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ALLAHABAD SERIES

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(2021)08ILR A1
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.08.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

Second Appeal No. 53 of 2015

Mohd. Farooq Siddiqui ...Appellant
Versus
Smt. Saeeda Bano ...Respondent

Counsel for the Appellant:
M.A. Siddiqui, M.A. Siddiqui

Counsel for the Respondent:
Subhash Vidyarthi

A. Civil Law - Code of Civil Procedure, 1908 – Section 100 – Second Appeal – Substantial question of law – Oral hiba (Gift) under Mohammadan law – No delivery of possession in pursuance of hiba, rather donee is continuing the possession prior to execution of hiba as a tenant – Relevance thereof – No finding with regard to possession after the hiba recorded – No statement in the hibanama with regard to transfer of possession in favour of the donee – Rasheeda Khatoon's principle applied – Since the transfer of possession of the premises in question is an essential ingredient of hiba, the first appellate court has recorded that the transfer of possession in lieu of hiba was not proved – Held, judgment and order of the first appellate court reversing the findings of fact recorded by the trial court is based on the material evidence on record, no substantial question of law pertaining to the same arises in the second appeal. (Para 19, 21, 22, 24, 25 and 29)

B. Second Appeal – Specific Relief Act, 1963 – Section 34 – Civil Suit – Maintainability – Sale deed executed – Omission to challenge it – Effect – First appellate court has held that since the additional prayer required to be taken seeking cancellation of sale deed favouring the defendants has not been taken, the suit would therefore be barred in terms of proviso to Section 34 of the Act – Held, the question regarding maintainability of the suit in terms of Section 34 of the SR Act has to be seen with regard to pleadings made in the plaint and would therefore be a question of law which can be taken at any stage. (Para 18 and 26)

Appeal dismissed. (E-1)

Cases relied on :-

1. Uma Pandey & anr. Vs Munna Pandey & ors. reported in (2018) 5 SCC 376

2. Rasheeda Khatoon Vs Ashiq Ali reported in (2014) 10 SCC 459

3. Firm Baldeo Prasad-Balgovind Vs Shubratan & ors. reported in (1936) AWR 506

4. Kshitish Chandra Purkait Vs Santosh Kumar Purkait & ors. reported in (1997) 5 SCC 438

(Delivered by Hon'ble Manish Mathur, J.)

1. The substitution of sole appellant as allowed earlier is permitted to incorporate during the course of the day.

2. Heard Mr. Aftab Ahmad learned counsel for plaintiff-appellant and Mr. Subhash Vidyarthi learned counsel for defendant respondent.

3. Second appeal under Section 100 of the Code of Civil Procedure 1908 has been filed against judgment and decree dated 16th February, 2015 relating to suit No. 32 of 1982, Mohd. Farooq Siddiqui versus Smt. Saeeda Bano.

4. A preliminary objection regarding maintainability of the second appeal has

been raised by learned counsel for respondent on the ground that no substantial question of law is involved in the present second appeal. The said question therefore is also being adjudicated upon.

5. The plaintiff-appellant had filed a suit for declaration with regard to the suit premises which was decreed by means of the judgment and decree dated 31st March, 2003 but the first appeal was allowed by means of the judgment and decree dated 16th February, 2015 leading to the filing of the present second appeal.

6. Learned counsel for appellant has submitted that the suit premises had earlier belonged to Smt. Abida Bano who was the owner in possession of the house bearing Municipal No. 337/1991 having purchased the same by means of a registered sale deed from one Altaf Husain. It is submitted that the plaintiff-appellant entered into the suit premises as a tenant of Smt. Abida bano who was widow but issueless. Learned counsel submits that due to the care being taken by the plaintiff- appellant, Smt. Abida Bano being pleased with his services gifted the suit premises to the plaintiff-appellant by means of an oral gift deed i.e. a hiba. It is submitted that merely to recognize the oral gift deed, a written deed of hibanama was also executed on 10th April, 1972 while delivering formal possession of the suit premises on the same date. It is submitted that subsequently the defendant-respondent filed SCC suit No. 715 of 1980 claiming herself to be the owner of the entire suit premises due to which the plaintiff-appellant was compelled to file the present suit No.32 of 1982 seeking the relief of declaration. It is submitted that since the plaintiff-appellant was already in possession over the suit premises, no further relief of possession was sought nor was required to be taken in the plaint.

7. Learned counsel submits that the trial court framed four issues with the first issue pertaining to the ownership and possession of the plaintiff and issue No.3 being framed with regard to the ownership of the suit premises by the defendant. He has submitted that after examination of evidence, the suit has been decreed in favour of the plaintiff-appellant by means of the judgment and decree dated 31st Mach, 2003 which was appealed against by the defendant-respondent.

8. Learned counsel for appellant has further indicated that the first appellate court had framed three points of determination with the first point adverting to the question regarding validity of the oral hiba and the ownership of the plaintiff on that basis. The second issue framed by the first appellate court was with regard to the suit being barred in terms of the proviso to Section 34 of the Specific Relief Act, 1963.

9. Learned counsel for the plaintiff-appellant has submitted that the first appellate court has erred substantially in law in reversing the judgment and decree of the trial court primarily on the ground that the reversal has been done with regard to findings of fact recorded by trial court without scrutinizing the said findings and pointing out any errors therein. It is also submitted that finding recorded by the first appellate court regarding invalidity of the hibanama is also against the oral evidence on record. It has also been submitted that the first appellate court has misinterpreted the proviso to Section 34 of the Specific Relief Act in holding against the plaintiff-appellant and has also erred substantially in

law with regard to the finding pertaining to ownership of the defendant-appellant in view of the fact that the sale deed alleged to have been executed in favour of the defendant-appellant was never proved during trial.

10. Learned counsel for the appellant has relied upon the judgment in the case of **Uma Pandey and another versus Munna Pandey and others reported in (2018) 5 SCC 376** to submit that the question pertaining to interpretation of any document including its contents or admissibility in evidence or its effect on the rights of the parties to the lis constitutes a substantial question of law and that the question since arising in the present appeal, deserves to be admitted on the said substantial question of law.

11. Learned counsel for the respondents however has refuted the submissions advanced by learned counsel for plaintiff-appellant with the submission that judgment and order of the first appellate court is based on cogent findings appreciating evidence recorded by the trial court and as such the present second appeal does not involve any substantial question of law requiring it to be admitted on the said question. It is submitted by learned counsel for defendant-appellant that in terms of Section 100 of the Code of Civil Procedure, it is incumbent that the second appeal should deserve admission on a substantial question of law and since no substantial question of law arises for determination in the present second appeal the same is required to be dismissed at admission stage itself.

12. Learned counsel for the respondent has also submitted that with regard to issue No.1 framed by the trial court pertaining to ownership and possession of the plaintiff-appellant, the trial court has clearly erred on that issue since even from a perusal of judgment and decree of the trial court, it is apparent that the conditions required to prove a hibanama were not satisfied even if the evidence considered by the trial court is taken into account. It is submitted that the first appellate court has reversed the said finding of fact taking into account the statements of plaintiff witnesses themselves to hold that three essential ingredients required for proving a hibanama were not satisfied. It is submitted that the first appellate court has reversed the finding of trial court upon consideration of evidence which was already on record.

13. Since a dispute has been raised with regard to admissibility of the second appeal in terms of Section 100 of the Code of Civil Procedure, it would be appropriate to deal with the said submission as a preliminary issue.

14. Considering the material on record and submissions advanced by learned counsel for parties, it is undisputed that the suit premises belonged to Smt. Abida Bano as the owner in possession. While the plaintiff-appellant claims ownership and possession over the suit premises on the basis of the oral gift and hibanama dated 10th April, 1972, the defendant-respondent has claimed ownership and possession over suit premises on the basis of a registered sale deed dated 16th July, 1980 executed by successor of Smt. Abida Bano.

15. In judgment and decree of the trial court, it has been indicated that as per averments made in the plaint, it is the case of the plaintiff-appellant that Smt. Abida

Bano had first donated the suit premises by means of oral hiba in his favour on 10th April, 1972 and merely to record the said fact, a written hibanama was also executed though not registered. The trial court as indicated herein above had framed four issues with the first issue pertaining to ownership and possession of the plaintiff. It is apparent from the judgment and decree of the trial court that the aforesaid hibanama was found to be valid on the basis of conditions for execution of hibanama being satisfied. The trial court judgment has indicated evidence of plaintiff's witnesses, Anwar Husain and Mushir Ahmad to establish that the hibanama in favour of plaintiff-appellant stood proved in terms of Section 149 of Muslim Law. At the same time, the trial court has disbelieved the story of sale deed said to have been executed in favour of defendant-respondent. The trial court has discarded the plea of defendant that plaintiff-appellant was not in possession over the property in question since no mutation in his favour was effected in the Palikia records. The said plea has been discarded on the ground that mutation in Palika records does not confer any ownership on the person concerned and is therefore an irrelevant factor. The trial court has then gone ahead to indicate that the hibanama which was on record as paper No. Ga-10 is not a registered instrument and therefore can not be seen in evidence but at the same time can be looked into for the purposes of proving an oral hiba. The trial court has thereafter on that basis and on the basis of evidence of P.W.-2 and 3 held the hibanama to be proved in favour of the plaintiff-appellant.

16. The first appellate court as indicated herein above had framed three points for determination with the first point pertaining to the ownership and possession of the plaintiff-appellant on the basis of the oral hiba and second point for determination being framed with regard to suit being not maintainable in terms of proviso to Section 34 of the Specific Relief Act, 1963.

17. A perusal of the judgment and order passed by the first appellate court indicates that the entire hibanamama has been reproduced in the body of the judgment. Upon consideration of the hibanama and evidence of plaintiff's witnesses themselves the first appellate court has recorded a conclusion that hibanama was never proved by the plaintiff's witnesses since in their statements, the plaintiff's witnesses 2 and 3 have clearly indicated that Smt. Abida Bano was a pardanashin lady whom they did not recognize. The first appellate court has also on the basis of the statements of plaintiff's witnesses 2 and 3 reached a conclusion that the said plaintiff witnesses had merely sought to prove the hibanama and no evidence whatsoever has been produced to prove the oral hiba which is said to have preceded the hibanama. The first appellate court after adverting to judgments passed by this Court regarding conditions for proviing oral hiba by a pardanashin lady has held that neither the oral hiba nor the hibanama stood proved.

18. With regard to second point of determination, the first appellate court has clearly recorded a finding that the suit itself was barred in terms of proviso to Section 34 of the Specific Relief Act, 1963. To reach that conclusion, the first appellate court has recorded a finding that even as per submissions of the plaintiff, he was aware with regard to the execution of a sale deed in favour of the defendant but had

specifically omitted to challenge the said sale deed. On that score, the first appellate court has held that since the additional prayer required to be taken seeking cancellation of sale deed favouring the defendants has not been taken, the suit would therefore be barred in terms of proviso to Section 34 of the Specific Relief Act.

19. It is undisputed that even as per pleadings of the plaintiff-appellant, the alleged written hibanama was preceded by oral hiba said to have been made by Smt. Abida Bano in favour of the plaintiff. Conditions regarding proving of a hibanama have been laid down by Hon'ble the Supreme Court in the case of **Rasheeda Khatoon versus Ashiq Ali reported in (2014) 10 SCC 459** in which it has been held that a gift under the muhammdan law can either be oral or by means of written instrument but for a gift to constitute a valid gift under the muhammdan law, three essential features are required namely (i) declaration of the gift by donor (ii) acceptance of the gift by donee expressly or impliedly and (iii) delivery of possession either actually or constructively to the donee. It has further been held that only because the writing is contemporaneous of the making of gift deed it does not warrant a registration under Section 17 of the Registration Act. The relevant paragraphs of the judgment are as follows:

" 16. From the aforesaid discussion of the propositions of law it is discernible that a gift under the Muhammadan Law can be an oral gift and need not be registered; that a written instrument does not, under all circumstances require registration; that to be a valid gift under the Muhammadan Law three essential features namely, (i) declaration of the gift by the donor, (ii) acceptance of the gift by the donee expressly or impliedly, and (iii) delivery of possession either actually or constructively to the donee, are to be satisfied; that solely because the writing is contemporaneous of the making of the gift deed, it does not warrant registration under Section 17 of the Registration Act.

17. At this juncture, it is pertinent to refer to a three-Judge Bench decision in Valia Peedikkandi Katheesa Umma and others v. Pathakkalan Naravanath Kunhamu (deceased) and after him his legal representatives and others, AIR 1964 SC 275 where the question arose whether a gift by a husband to his minor wife and accepted on her behalf by her mother is valid. Dealing with the concept of gift under Muhammadan Law the Court observed that:-

"... Muhammadan Law of gifts attaches great importance to possession or seisin of the property gifted (Kabz-ul-Kami) especially of immovable property. The Hedaya says that seisin in the case of gifts is expressly ordained and Baillie (Dig P.508) quoting from the Inayah refers to a Hadis of the Prophet-"a gift is not valid unless possessed." In the Hedaya it is stated ? "Gifts are rendered valid by tender, acceptance and seisin" (p.482) and in the Vikayah "gifts are perfected by complete seisin" Macnaghten (202)."

After so stating the Court proceeded to lay down that it is only actual or constructive possession that completes the gift and registration does not cure the defect nor is a bare declaration in the deed that possession was given to a minor of any avail without the intervention of the guardian of the property unless the minor has reached the years of discretion. It has been further opined therein that if the property is with the donor he must divest

from it and the donee must enter upon possession. However, to that rule there are certain exceptions which the Court took note of, stating thus:-

"Exceptions to these strict rules which are well recognized are gifts by the wife to the husband and by the father to his minor child (Macnaghten, page 51 principles 8 to 9). Later it was held that where the donor and donee reside together an overt act only is necessary and this rule applies between husband and wife. In Mahomed Sadiq Ali Khan v. Fakhr Jahan Begum, 59 Ind App 2 : (AIR 1932 PC 13) it was held that even mutation of names is not necessary if the deed declares that possession is delivered and the deed is handed to the wife." We have referred to this decision only to highlight the principle that either there has to be actual delivery of possession from the donor or the donee must be in constructive possession to make a gift valid under the Muhammadan Law.

22. We have already stated, actual physical possession may not be always necessary if there is constructive possession of the donee. In this context we may reproduce Section 152, sub-Section(3) of Mulla's Muhammadan Law:-

"No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. ***In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divert himself of all control over the subject of the gift." "***

20. Upon applicability of the aforesaid judgment, it is to be seen that learned counsel for the plaintiff-appellant has asserted that since the plaintiff was continuing in possession since prior to the hibanama as a tenant in the suit premises, he continued to be in possession as such which can be said to be a constructive possession over the suit premises. As such it is submitted that nothing further was required to be done by the plaintiff-appellant since he continued to be in constructive possession over the suit premises.

21. Upon applicability of the aforesaid judgment in the case of Rasheeda Khatoon (supra) to the facts of the present appeal, the first appellate court has noticed that the plaintiff-appellant was continuing in possession over suit premises since prior to the hibanama. However it is a material fact that the said possession of the plaintiff-appellant was as a tenant over the suit premises and not in the capacity of owner. In the case of Rasheeda Khatoon (supra), Hon'ble the Supreme Court has held that possession can be shown not only by exclusive enjoyment of the land or premises in question but also by asserting who has actual control over the property. It was held that some one may be in apparent occupation of the premises but the other would have control and actual possession.

22. With regard to applicability of the aforesaid law, it is seen from judgment of trial court that no such finding with regard to possession of the plaintiff has been recorded after the hiba. The trial court after noticing that the plaintiff's witnesses proved the hibanama has assumed possession of the plaintiff over suit premises. However the first appellate court after reproducing the hibanama has recorded a specific finding that the plaintiff's witnesses had not proved possession of plaintiff over the suit premises. It has also been recorded by the first appellate court that although even as

per pleadings of the plaintiff that the hibanama was preceded by oral hiba, the oral hiba has not been proved by any witness. It is specifically recorded that the plaintiff's witnesses had merely proved the written hibanama but since the case of plaintiff is based on the oral hiba, the same was required to be proved in accordance with the judgments on that score. The first appellate court has thereafter disbelieved plaintiff's submissions on that very score. The aspect with regard to proving of habanama has also been disbelieved by the first appellate court after adverting to the statements of plaintiff's witnesses which clearly established that plaintiff's witnesses who were also witnesses to the alleged hibanama never recognized Smt. Abida Bano who was a pardanashin lady and as such has held that there is no evidence with regard to proof of oral hiba since the alleged witness to hibbanama have specifically stated that they did not recognize the donor i.e. Smt. Abida Bano; the written hibanama as such does not stand proved.

23. Learned counsel for appellant has relied upon the judgment rendered by this Court in the case of **Firm Baldeo Prasad-Balgovind versus Shubratan and others reported in (1936) AWR 506** to submit that non mutation of the name of donee in municipal records does not have any bearing with regard to the plaintiff being in possession and therefore the first appellate court has clearly erred in placing too much reliance on that aspect. However in paragraph 3 of the aforesaid judgment, it is apparent that what has been held is that with regard to proof of hibanama, all that is required is that the donor should clearly divest himself of his ownership in the subject matter of the gift and should deliver such possession as the subject matter of gift admits of. The relevant paragraph is quoted as follows:-

"3. The rule of Muhammadan Law as regards delivery of possession in cases of gift is well settled. All that is required is that the donor should clearly divest himself of his ownership in the subject-matter of the gift and should deliver such possession as the subject-matter of the gift admits of. Where a house is in actual occupation of the donor and the donee, who are related as father-in-law and daughter-in-law, and the donor declares, in unequivocal language, that he has divested himself of ownership of half of it, retaining the other half and authorised the donee to take possession, the character of the donee's possession, which already existed, is altered, and for all formal purposes the gift must be considered to have been perfected by such delivery of possession as was feasible in the circumstances. It is significant that in this case the donor did not exercise any act of ownership after executing the deed of gift. The donor, who retained ownership of half the house, remained in joint possession with the donee. The latter was in possession precisely in the same manner as the donor in respect of her half of the house. The mere fact that the donor did not have mutation of names effected in the Municipal registers does not affect the case. For these reasons, the view of the learned Subordinate Judge is right. The appeal has no force, and is dismissed with costs."

24. Upon applicability of the aforesaid judgment, it is apparent as indicated in the narration of first appellate court that at the time of execution of hibanama, it is specifically stated that the donor was still continuing in possession over the suit premises. There is no

statement in the hibanama with regard to transfer of possession in favour of the donee i.e. the plaintiff. Since the transfer of possession of the premises in question is an essential ingredient of hiba, the first appellate court has recorded that the transfer of possession in lieu of hiba was not proved.

25. In the considered opinion of this Court, no exception can be taken by the said finding recorded by the first appellate court particularly since the trial court has not adverted to that issue at all. It is thus clear that the judgment rendered by the first appellate court with regard to issue No.1 is on the basis of pleadings and evidence on record and findings of the trial court have been reversed after scrutinizing the said findings and pointing out errors. In view of aforesaid, with regard to finding recorded regarding hiba, no exception can be taken to the finding of the first appellate court and no substantial question of law pertaining to the same arises in the second appeal.

26. With regard to the second point of determination by first appellate court pertaining to the suit being barred in terms of proviso to Section 34 of the Specific Relief Act, 1963, it is apparent that although the learned counsel for appellant has taken a plea that such an issue could not have been framed at the stage of first appeal without such ground having been taken before the trial court, but it is seen that no such ground has been taken in the memorandum of appeal before this court nor any such substantial question of law has been proposed. Even otherwise, the question regarding maintainability of the suit in terms of Section 34 of the Specific Relief Act has to be seen with regard to pleadings made in the plaint and would therefore be a question of law which is already settled can be taken at any stage.

27. With regard to the aforesaid finding, it is seen from the judgment of first appellate court that the plaintiff from the very outset was aware with regard to the registered sale deed having been executed in favour of the defendant on which basis she was claiming. The first appellate court has recorded a finding to that effect that even in the plaint, the plaintiff has clearly indicated that the present suit was filed after filing of a suit for ejectment by the defendants which was registered as SCC Suit No. 715 of 1980 which was on the basis of the registered sale deed. As such no exception can be found to the finding recorded by the first appellate court regarding the said issue since admittedly no prayer has been sought by the plaintiff regarding cancellation of registered sale deed favouring the defendant-respondent.

28. The admissibility of second appeal in terms of Section 100 of the Code of Civil Procedure is to be on the basis of a substantial question of law being involved as distinct from a mere question of law. As such the involvement of a substantial question of law for a second appeal to be entertained is a sine qua non. The same has been held by Hon'ble Supreme Court in the case of **Kshitish Chandra Purkait versus Santosh Kumar Purkait and others reported in (1997) 5 SCC 438.** The relevant paragraph is quoted as follows:-

" 12. In the light of the legal position stated above, we are of the view that the High Court acted illegally and in excess of its jurisdiction in entertaining the new plea, as it did, and consequently in allowing the second appeal. Even according to the High Court, the point

urged on behalf of the appellant was only a "legal plea" though no specific plea was taken or no precise issues were framed in that behalf. The High Court failed to bear in mind that it is not every question of law that could be permitted to be raised in second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in sub-section (5) of Section 100 CPC. Under the proviso, the Court should be "satisfied" that the case involves a "substantial question of law" and not a mere "question of law". The reason for permitting the substantial question of law to be raised, should be "recorded" by the Court. It is implicit therefrom, that on compliance of the above, the opposite party should be afforded a fair or proper opportunity to meet the same."

29. Upon consideration of the aforesaid factors, it is apparent that the judgment and order of the first appellate court reversing the findings of fact recorded by the trial court is based on the material evidence on record and after discussing the findings recorded by the trial court. As such in the considered opinion of this Court, there is no substantial question of law involved which may require admission of the second appeal.

30. Consequently the second appeal being devoid of merits is dismissed upholding the judgment & decree dated 16th February, 2015 passed in First Appeal No. 136 of 2003. Parties shall bear their own costs.

(2021)08ILR A9
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2021

BEFORE

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

First Appeal No. 119 of 2021

Liaqat Hussain ...Appellant
Versus
Smt. Jainab Parveen ...Respondent

Counsel for the Appellant:
Sri Arun K. Singh Deshwal, Sri Anil Kumar Dubey

Counsel for the Respondent:

A. Civil Law - Code of Civil Procedure, 1908 – Order XII Rule 6 – Family dispute – Restitution of Conjugal Right – Wife's admission of her willingness to cohabit with plaintiff-husband – Effect of admission – Held, finding of trial court is perverse and against the evidence on record – Suit should have been decreed on the basis of admission of the defendant-respondent. (Para 10 and 12)

Appeal allowed. (E-1)

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

1. Heard Sri Arun K. Singh Deshwal, learned counsel for appellant.

2. Despite service of notice on respondent no.2 none has put in appearance on her behalf.

3. On the basis of submissions of learned counsel for appellant and the admission of defendant-respondent in her written statement filed before the court below, we proceed to decide this appeal at the admission stage even in absence of counsel for respondent.

4. The instant appeal has been filed against the judgment and order dated 23.10.2020 passed by Principal Judge, Family Court, District Amroha in Original Suit No. 623 of 2017 (Liaqat Hussain Vs. Smt. Jainab Parveen), whereby the suit of the plaintiff-appellant for restitution of conjugal rights has been dismissed.

5. The plaintiff-appellant Liaqat Hussain had filed a suit for restitution of conjugal rights against the defendant-respondent Smt. Jainab Parveen with the allegations that she had been residing separately without any reasonable cause and had been depriving of his conjugal relations.

6. The defendant-respondent Smt. Jainab Parveen filed her written statement with the defence that she was subjected to physical and mental cruelty and had fear of life.

7. The learned trial Judge after having framed three issues dismissed the suit of the plaintiff.

8. Learned counsel for appellant has contended that there is sufficient evidence on record and admission of respondent herself that she was willing cohabit with plaintiff and despite the admission of the respondent the learned trial Judge had dismissed the suit of plaintiff.

9. Learned counsel for plaintiff also relied upon the statement of D.w.1 Jainab Parveen. The defendant-respondent although in her examination-in-chief has stated that she was subjected to physical and mental cruelty at the matrimonial house yet in her cross-examination she has categorically stated that after "NIKAH" up to 2016 she had been residing with plaintiff-appellant and she is willing to pass her remaining matrimonial life with appellant-Liaqat.

10. The learned trial Judge has dismissed the suit despite the admission of the defendant-respondent, which is based on perverse finding and against the evidence on record.

11. There is specific provision in Civil Procedure Code wherein Order XII Rule 6 is relevant, which is extracted below:

"6. Judgment on Admissions :- *(1)Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.*

(2) whenever a judgment is pronounced under sub-rule (1) a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

12. As such the suit of plaintiff should have been decreed on the basis of admission of the defendant-respondent. Consequently, the impugned judgment of the trial court needs interference by this Court.

13. Accordingly, the appeal is allowed. The judgment and order dated 23.10.2020 passed by Principal Judge, Family Court, District Amroha in Original Suit No. 623 of 2017 (Liaqat Hussain Vs. Smt. Jainab Parveen) is set aside and

quashed. The Original Suit No. 623 of 2017 (Liaqat Hussain Vs. Smt. Jainab Parveen) is decreed.

(2021)08ILR A11
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2021

BEFORE

THE HON'BLE VIVEK VARMA, J.

Second Appeal No. 211 of 2021

Prahlad & Ors. ...Appellants
Versus
Smt. Hameedan & Anr. ...Respondents

Counsel for the Appellants:
Sri Kshitij Shailendra

Counsel for the Respondents:
Sri Anay Kumar Srivastava

A. Civil Law - Code of Civil Procedure, 1908 – Section 100 – Order XLI R. 31 – Second Appeal – Substantial question of law – Point of Determination – Failure of first appellate court to frame it – Effect – Held, first appellate court being final court of fact must not record mere general expression of concurrence with the trial court judgment, rather it must give reasons for its decision on each point independently to that of the trial Court – Entire evidence must be considered and discussed in total. Such exercise should be done after formulating the points for determination in terms of the provisions contained under Order 41 Rule 31 C.P.C. and the Court must proceed in adherence to the requirements of the statutory provisions – High Court found the substantial question of law involved in the appeal – Matter remitted to the First Appellate Court for fresh consideration. (Para 11, 16 and 17)

Appeal allowed. (E-1)

Cases relied on :-

1. Laliteshwar Prasad Singh & ors. Vs S.P. Srivastava (Dead) through L.Rs., (2017) 2 SCC 415

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

1. Heard Sri Kshitij Shailendra, learned counsel for the appellants, and Sri Anay Kumar Srivastava, learned counsel for the caveator- respondent. With the consent of learned counsel appearing for the parties, the present appeal is being decided at this stage itself in terms of the Rules of the Court.

2. The present second appeal has been filed challenging the judgment, order and decree dated 21.11.2020 passed by the Additional District & Sessions Judge/ Special Judge (SC/ST Act), Baghpat in Civil Appeal No. 6 of 2019 (Prahlad and others v. Smt. Hameedan and others), and the judgment, order and decree dated 03.12.2018 passed by the Civil Judge, Junior Division-Ist, Baghpat in Original Suit No. 143 of 2005 (Smt. Hameedan and another v. Prahlad and others).

3. The plaintiff-respondent no. 1 instituted a civil suit for permanent prohibitory injunction against the defendants-appellants. The case of the plaintiff-respondent was that the land in dispute had been allotted to her by Gaon Sabha on 12.06.1969, over which she had constructed a Gher and that, the defendants, having no concern with the property, were causing interference in her possession.

4. The trial Court vide judgment and order dated 03.12.2018 decreed the suit against which the defendants filed a civil appeal, being Civil Appeal No. 6 of 2019, which was dismissed by the lower appellate

Court vide judgment and order dated 01.01.2020.

5. The record reflects that the appellants filed a second appeal, being Second Appeal No. 248 of 2020 (Prahlad and others v. Smt. Hameedan and another), which has been allowed by this Court vide order dated 06.07.2020 and the judgment and order dated 01.01.2020 passed by the lower appellate Court was set aside and the matter was remanded back to pass a fresh judgment as there was non-compliance of the provisions of Order 41 Rule 31 C.P.C.

6. Pursuant to the said order of this Court, the lower appellate Court has passed the impugned judgment and order dated 21.11.2020.

7. Sri Kshitij Shailendra, learned counsel for the appellants, submits that on the matter being remanded back, the lower appellate Court has again decided the appeal without framing points of determination and thus, there is non-compliance of the provisions of Order 41 Rule 31 C.P.C.

8. With the consent of learned counsel for the parties, the following substantial question of law is being framed for determination:

"Whether the judgment of the first appellate Court was consistent with the provisions of Order 41 Rule 31 C.P.C., and if not, the consequences thereof?"

9. The judgment of the first appellate Court dated 21.11.2020 records the issues framed by the trial Court for determination. Then it frames three points for determination. However, a bare perusal of the said points would indicate that they do not at all fall within the valid category for determination and they are too vague and general in nature. The appellate Court notices the fact that the trial Court found Issue Nos. 2, 3, 4, 5, 6 and 7 against the appellants. Thereon, after merely referencing the results of the findings of the trial court on Issue Nos. 2, 3, 4, 5, 6 and 7 the appellate court records its agreement with the judgment of the trial Court.

10. The judgment of the first appellate Court fails to advert to the grounds taken in the memo of appeal. The judgment of the appellate Court is cryptic and has not identified the points which arise for determination and has not returned any independent finding on any issue.

11. It is settled law that the first appellate court being final court of fact must not record mere general expression of concurrence with the trial court judgment, rather it must give reasons for its decision on each point independently to that of the trial Court. Thus, the entire evidence must be considered and discussed in total. Such exercise should be done after formulating the points for determination in terms of the provisions contained under Order 41 Rule 31 C.P.C. and the Court must proceed in adherence to the requirements of the statutory provisions.

12. The Supreme Court in the case of **Laliteshwar Prasad Singh and others v. S.P. Srivastava (Dead) through L.Rs., (2017) 2 SCC 415,** in paragraphs-13, 14 and 15, has held as under:

"13. An appellate court is the final court of facts. The judgment of the appellate court must, therefore, reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of the first appellate court, in *Vinod Kumar v. Gangadhar, [(2015) 1 SCC 391 : (2015) 1 SCC (Civ) 521],* it was held as under: (SCC pp. 394-96, paras 12-15)

"12. In *Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179, t*his Court held as under: (SCC pp. 188-89, para 15)

'15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.'

The above view has been followed by a three-Judge Bench decision of this Court in *Madhukar v. Sangram, (2001) 4 SCC 756,* wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

13. In *H.K.N. Swami v. Irshad Basith, (2005) 10 SCC 243*, this Court stated as under: (SCC p. 244, para 3)

'3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title.'

14. *Again in Jagannath v. Arulappa,* (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court observed as follows: (SCC p. 303, para 2)

'2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion.'

15. Again in *B.V. Nagesh v. H.V. Sreenivasa Murthy, (2010) 13 SCC 530 : (2010) 4 SCC (Civ) 808,* this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)

'3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide *Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179, SCC p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756, SCC p. 758, para 5.)*

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law.' "

14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasonings of the trial court are erroneous.

15. In the light of the above, when we consider the present case, we find that in terms of Order 41 Rule 31 CPC, the High Court neither has framed the points for determination nor discussed the evidence adduced by the defendants. The High Court seemed to have only considered two aspects: (i) genealogical table produced by the first respondent-plaintiff; (ii) documentary evidence adduced by the first respondent-plaintiff, that is, Ext 13 series-entry in survey record of rights and rent receipts (Exts. 1/J and 1/K to 1/M) filed by the first respondent-plaintiff. The documentary evidence adduced by the first respondent-plaintiff has been refuted by the second respondent-defendant. To support his defence plea, second respondent-defendant has adduced oral evidence by examining number of witnesses. That apart, the second respondent-defendant mainly relied upon the following evidence of first respondent-plaintiff (PW-3):

"Tarawati Devi had purchased total two acres and fifteen decimals of land. I cannot tell the number of sale deeds. I don't have the knowledge about the registration of her name on the said land. Till the time of her death, the land purchased by her remained with Tarawati Devi. The land in dispute is two acre and fifteen decimals in area. The land in dispute in the present suit is the land purchased by Tarawati Devi."

The High Court does not seem to have examined the above admission of the first respondent-plaintiff nor considered the oral evidence adduced by the second respondent-defendant. Being the first appellate court, the final court on facts, the High Court should have considered the evidence adduced by the first respondent-plaintiff as well as the evidence adduced by the second respondent-defendant. But the High Court seems to have considered only the evidence adduced by the first respondent-plaintiff and not the evidence adduced by the second respondent-defendant and the alleged inherent contradictions in the statement of first respondent-plaintiff."

13. Sri Anay Kumar Srivastava, learned counsel for the caveator-respondent, does not dispute the stand taken by the learned counsel for the appellants.

14. In all fairness, learned counsel for the caveator has submitted that the matter may be remitted to the first appellate court for fresh consideration.

15. From an independent perusal of the judgment of the first appellate court I am of the considered opinion that the order of the first appellate court dated 21.11.2020 cannot stand, being contrary to the law.

16. The answer to the substantial question of law is as follows:

"The judgment of the first appellate Court is not only inconsistent with the provisions of Order 41 Rule 31 C.P.C. but has led to fatal miscarriage of justice and is unsustainable in the law."

17. Accordingly, the impugned judgment, order and decree dated 21.11.2020 passed by the Additional District & Sessions Judge/ Special Judge (SC/ST Act), Baghpat is set aside. The matter is remitted to the first appellate Court for a fresh decision in accordance with law. The first appellate court shall decide the appeal expeditiously, fixing short dates, without granting unnecessary adjournments.

18. The appeal is allowed in the above terms.

(2021)08ILR A15
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2021

BEFORE

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

Second Appeal No. 1280 of 2018

Smt. Ramlata Singh ...Appellant
Versus
Arun Kumar Dubey & Anr. ...Respondents

Counsel for the Appellant:
Sri Jitendra Kumar, Sri Ashu Verma

Counsel for the Respondents:
Sri Ashish Bajpayee, Sri Adya Prasad Tewari, Sri Sheo Shankar Tripathi

A. Civil Law - Code of Civil Procedure, 1908 – Section 100 – UP Land

Development and Mortgage Act, 1963 – Section 20 – Suit – Specific performance of contract – Refusal or grant thereof – Exercise of power by the Court – Assigning of the reason, requirement thereof – Held, the discretion to grant or refuse specific performance cannot be exercised arbitrarily – *A fortiori*, howsoever reasonable a premise on which the thought process of a Court is found to reach a particular conclusion, a laconic or cryptic conclusion, bereft of reasons, is inherently arbitrary – Requirement of assigning reasons is more onerous in the case of judicial verdicts, rendered by Courts properly so called, or Tribunals, that have trappings of Courts – Despite the plaintiff succeeding to prove his case of a breach of contract, specific performance may be refused, but the discretion has not to be exercised arbitrarily, it has to be exercised in accordance with Section 20 of the Act of 1963. (Para 16 and 20)

Appeal allowed in part. (E-1)

Cases relied on :-

1. Tigvijay Singh Vs Ram Autar & anr., 2012 (6) AWC 5649

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

1. The moot question involved in this second appeal is : Can specific performance of contract relating to immovable property be arbitrarily refused by the Court?

2. The late Balji Dubey, father of the defendant-respondents, executed a registered agreement to sell, covenanting to transfer by sale land comprising *Arazi* No. 204 (M), admeasuring 14 *biswa* and 15 *dhur*, out of the total area of the plot admeasuring 3 bigha 5 *biswa* 15 *dhur*, situate at *Mauza* Gothaura, *Pargana* Bhuili, *Tehsil* Chunar, District Mirzapur, in favour of the plaintiff for a total sale consideration of Rs.30,000/-. An earnest of Rs.15,000/- was paid at the time of contract. The land contracted to be sold as aforesaid, shall hereinafter be referred to as "the suit property". The contract was executed and registered on 29.06.1994. It was covenanted in the suit agreement that the plaintiff would be entitled to call upon the vendor, whenever she wanted the sale deed to be executed in her favour, in terms of the agreement. The plaintiff appears to have called upon Balji a number of times over to execute the sale deed, but he did not discharge his obligations. Pending the unfulfilled promise under the suit agreement, Balji Dubey passed away, leaving behind him, his widow and his sons, Arun Kumar Dubey and Sanjay Kumar Dubey. The plaintiff got a notice served upon the heirs of the late Balji Dubey on 31.12.1996, calling them to come forward and execute a sale deed in terms of the suit agreement. Since that was not done, she instituted Original Suit no.10 of 1997 before the Court of the Civil Judge (Sr. Div.), Mirzapur, praying that a decree for specific performance in terms of the suit agreement be passed in her favour and against the defendant-respondents. In the alternate, relief of refund of the earnest of Rs.15,000/- together with interest at the rate of 2% per month was claimed.

3. The defendant-respondents entered appearance and filed a joint written statement, traversing the plaint allegation. They took the defence that Balji had never executed the suit agreement. The agreement did not bear the signatures or thumb marks of the defendants. The plaintiff had set up an imposter to execute the agreement. Their predecessor-in-title, Balji had not received a penny towards the earnest, mentioned in the suit agreement. The plaintiff was neither ready nor willing to get a sale deed

executed in terms of the agreement. The suit is barred by Section 16 of the Specific Relief Act, 1963 (for short "the Act of 1963") as well as the provisions of the U.P. Land Development and Mortgage Act. The plaintiff never served upon the defendants any notice, and, therefore, all allegations regarding service of the notice are baseless. The defendants asked the suit to be dismissed with costs.

4. The Trial Court, upon the pleadings of parties, struck the following issues (translated into English from Hindi vernacular):

(i) Whether the defendants' father, Balji Dubey, had executed the registered agreement to sell dated 29.06.1994 in favour of the plaintiff, covenanting to sell the property in dispute for a sum of Rs.30,000/- and received an earnest of Rs.15,000/- before the Registrar?

(ii) Whether the plaintiff was ever ready and willing to get a sale deed executed and is still ready and willing?

(iii) Whether the suit is barred by Section 20 of the U.P. Land Development and Mortgage Act?

(iv) Relief?

5. The parties went to trial, leading both documentary and oral evidence. The learned Civil Judge (Senior Division), who tried the suit, held that the suit agreement was forged and did not bear Balji Dubey's signatures. It was also held that the suit agreement, being not proved, the question of readiness and willingness was also to be answered against the plaintiff. Issue no.3 was answered in the affirmative in favour of the defendant, holding the suit to be barred by Section 20 of the U.P. Land Development and Mortgage Act. In consequence of the findings recorded on the various issues, the Trial Court dismissed the plaintiff's suit with costs by its judgment and decree dated 20.09.2003. The plaintiff-appellant appealed the decree to the District Judge, Mirzapur *vide* Civil Appeal no.13 of 2013.

6. The appeal aforesaid was assigned to the Additional District Judge/ Fast Track Court, Mirzapur, before whom, it came up for determination on 04.09.2018. The lower Appellate Court framed two points of determination in accordance with the provisions of Order XLI Rule 31 CPC. These points are (translated into English from Hindi vernacular):

(i) Whether the signatures of Balji Dubey are forged and whether the agreement was not executed by him in favour of the plaintiff?

(ii) Whether failure of the plaintiff, Ramlata Singh to appear in Court, leads to the conclusion that the agreement is not proved and whether an adverse inference on that account is to be raised against the plaintiff?

7. The lower Appellate Court, after a meticulous examination of evidence on record, held that the suit agreement was fully proved by the evidence on record. It was also held that the notice of demand to execute a sale deed was duly served and it was proved that the plaintiff had been ready and willing throughout to get the sale deed executed in her favour in terms of the suit agreement. It was further held that the suit was not at all barred under Section 20 of the U.P. Land Development and Mortgage Act.

8. After returning all findings in favour of the plaintiff-appellant, the lower Appellate Court made a short shrift of the

matter to say that though the plaintiff had always been ready and willing to get the sale deed executed, but since she had asked for the alternative relief of refund of earnest, she was entitled to that relief alone. The appeal was, therefore, allowed in the terms that the decree of the Trial Court was set aside, but reversing it, a decree of specific performance was not passed; instead a decree for refund of the earnest in the sum of Rs.15,000/- together with 6% interest was passed.

9. Aggrieved, the present appeal has been instituted.

10. This appeal was admitted to hearing on 17.12.2018 on the following substantial questions of law:

1. Whether, the Court can refuse the main relief of specific performance of contract in suit in spite of finding that the plaintiff had succeeded to prove his/her case?

2. Whether, the Court can refuse or avoid the main relief in the suit for specific performance of contract without assigning any reason?

3. Whether, the Court can grant alternative relief to refund the advance money along with interest in the suit for specific performance of contract without assigning any reason?

11. Heard Mr. Jitendra Kumar, learned Counsel for the plaintiff-appellant and Mr. A.P. Tewari, learned Counsel appearing on behalf of the defendant-respondents.

12. All the three substantial questions of law are interrelated and almost identical in content. These are, therefore, being dealt with and answered together.

13. Mr. Jitendra Kumar, learned Counsel for the appellant points out that the Lower Appellate Court had found, for a fact, that execution of the suit agreement was duly proved. The readiness of the plaintiff-appellant was throughout established, which entitled the appellant, in the opinion of the Lower Appellate Court, to succeed in her suit. In the submission of the learned Counsel, the Lower Appellate Court could not arbitrarily and without assigning any reason, refuse specific performance, by granting the alternate relief of refund of earnest with interest.

14. Mr. Tewari, on the other hand, submits that under Section 20 of the Act 1963, it is open to the Lower Appellate Court, which is the last Court of fact, to exercise its discretion in granting specific performance. He submits that the Lower Appellate Court was well within its jurisdiction to exercise that discretion against the grant of specific performance and instead, order refund of earnest with interest. He emphasizes that the plaintiff-appellant had sought the alternate relief of refund of interest, which empowered the Appellate Court to accept the alternate relief, instead of the principal relief of specific performance.

15. This Court has keenly considered the submissions of the learned Counsel and perused the record.

16. It is true that the Court has discretion to grant specific performance, where it finds for the plaintiff on all the facts in issue and those relevant in a suit for specific performance of contract. But, the discretion to grant or refuse specific performance, cannot be arbitrarily exercised. The foremost index of non-arbitrariness about the order of any Court,

or for that matter, even an Authority, is the assignment of reasons for the conclusions reached. A *fortiori*, howsoever reasonable a premise on which the thought process of a Court is found to reach a particular conclusion, a laconic or cryptic conclusion, bereft of reasons, is inherently arbitrary. Unless the reader of the judgment can know the reasons that weighed with the author to reach his conclusion, arbitrariness would vitiate that order. The requirement of assigning reasons is more onerous in the case of judicial verdicts, rendered by Courts properly so called, or Tribunals, that have trappings of Courts. The power under Section 20 of the Act of 1963 to exercise discretion to grant or refuse specific performance has a number reputed parameters, on which it is exercised, one way or the other. This principle, that the discretion to decree specific performance cannot be arbitrarily exercised, is enumerated in the provisions of Section 20 of the Act of 1963 (as it stood before its amendment by Act no.18 of 2018). It reads:

"20. Discretion as to decreeing specific performance.--(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance--

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff; or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation I.--Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation II.--The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff, subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

17. There could still be a number of other factors, on the basis of which, the decision to grant or refuse specific performance, could turn one way or the other. This could be the conduct of the party

asking for specific performance or the one resisting it. Specific performance, being an equitable relief, could also be refused on the ground that the plaintiff had not come to Court with clean hands and had suppressed material facts. Likewise, the defendant too could suffer specific performance, because breach of contract being fully proved against him, his conduct prior to commencement of action and during the course of trial disentitle him to the discretion of the Court, granting the alternate relief of refund, instead of specific performance. There could be cases, which are there in ample measure, where phenomenal rise in the price of immovable property have weighed with the Courts in substituting the relief of specific performance by a decree for payment in lump sum of a much higher compensation to the successful plaintiff or requiring the plaintiff to enforce specific performance on payment of a higher sale consideration, rationalized to the contemporary price index. Again, this kind of an adjustment of compensation to the plaintiff or enhanced price to the vendee is not to be ordered, keeping aside relevant factors. These relevant factors could be, whether the delay is attributable to the plaintiff or the defendant; or still more, to none of them, but the judicial process. Sadly, the Lower Appellate Court, while exercising the discretion to refuse specific performance and instead granting the alternate relief of refund with interest, has not done the slightest of this meticulous consideration. At least, not a word has been said in the judgment, that may lead to the interference about a valid exercise of this discretion. It would be imperative here, to extract the short finding recorded by the Lower Appellate Court on the issue in hand. It reads (in Hindi vernacular):

"उपरोक्त विवेचन से स्पष्ट है कि अपीलार्थिनी प्रश्नगत दस्तावेज 32क जो कि वाद का आधार है को सिद्ध करने में सफल रही है। वह प्रश्नगत भूमि पर बैनामा कराने के लिए हमेशा तैयार व रजामन्द रही है, परन्तु प्रतिवादी/ रेस्पान्डेन्ट्स के द्वारा प्रश्नगत भूमि का न तो बैनामा किया गया न ही अपीलार्थिनी द्वारा दी गयी धनराशि को ही अदा किया गया। जब कि वादिनी/ अपीलार्थिनी की अपील स्वीकार किये जाने योग्य है एवं आलोच्य आदेश दिनांकित-20.09.2003, निरस्त किये जाने योग्य है।"

18. In this connection, reference may be made to the decision of a Division Bench of this Court in **Tigvijay Singh vs. Ram Autar and another, 2012 (6) AWC 5649. In Tigvijay Singh,** it has been held:

"It is an acknowledged legal proposition that a plaintiff can claim more than one relief on the same cause of action. He must claim all; he will otherwise entitle to bring a new suit for omitted relief, unless the omission is for the first time was with leave of the Court. The claim of alternative relief of refund of earnest money along with interest etc. is a usual relief claimed in such suits. The defendant cannot compel a plaintiff to be satisfied by the alternative relief, relief for specific performance of contract to sell instead. It will be travesty of justice if relief for contract to sell is denied on this ground. It is true that discretion has been given to the Court under Section 20 of the Specific Relief Act but the specific performance relief should not be refused arbitrarily. The discretion should be exercised on sound principles of law capable of correction by an appellate court, as laid down by the Apex Court in the case of Lourdu Mari David (supra). It is settled law that the party who seeks to avail of the equitable jurisdiction of a Court and specific performance being equitable relief, must come to the Court with clean hands.

Here is a case where it was neither found by the trial court nor any material was placed before us by the defendant to show that the plaintiffs has not come to the court with clean hands or they have based their claim on some falsehood. As a matter of fact, the position is otherwise. The defendant has not come to the court with clean hands and has come forward with untrue facts. Refusal of decree for specific performance of contract to sell in such situation would not promote honesty in society."

19. The case in hand and what appears from the finding recorded by the Lower Appellate Court, shows utter breach in observance of the statutory obligation cast upon the Court under Section 20 of the Act of 1963, as it stood prior to its amendment.

20. In view of what has been said hereinabove, **substantial no. 1 is answered in the affirmative**, in terms that despite the plaintiff succeeding to prove his case of a breach of contract, specific performance may be refused, but the discretion has not to be exercised arbitrarily; it has to be exercised in accordance with Section 20 of the Act of 1963 and other relevant factors reputed under the law. **Substantial question of law no.2 is answered in the negative**, holding that the Court cannot refuse the relief of specific performance of contract without assigning good and cogent reasons there for. **Substantial question no. 3 is also answered in the negative** in terms that the alternate relief of refund of earnest, along with interest in a suit for specific performance, cannot be opted by the Court without assigning good and cogent reasons.

21. In the circumstances, there is no alternative but to allow the appeal in part and set aside the impugned judgment and decree passed by the Lower Appellate Court to the extent that it refuses specific performance. The relevant namesake of a finding would also be treated to be nullified. The other findings recorded by the Lower Appellate Court regarding establishment of the plaintiff's case about the validity of the suit agreement, the readiness and willingness and the suit not being barred under Section 20 of the U.P. Land Development and Mortgage Act, are all affirmed. These shall not be reopened. It must also be remarked that there is no cross-appeal preferred by the defendants, questioning the decree for refund with interest or the findings on which it is based. There is, therefore, no occasion for this Court to upset those findings. It is clarified that this Court has not expressed opinion, either way, about the way the Lower Appellate Court, after considering evidence and hearing parties, may exercise its discretion to grant specific performance or opt for the alternative relief. The Lower Appellate Court shall be free to exercise that discretion in accordance with law and after considering the evidence on record.

22. In the result, this appeal succeeds and is **allowed in part.** The impugned decree passed by the Lower Appellate Court shall stand set aside to the extent alone that it directs refund with interest, instead of specific performance. The appeal shall stand restored to the file of the Lower Appellate Court for determination of the question about the grant of relief of specific performance afresh, after hearing parties and bearing in mind the guidance in this judgment. Costs easy.

23. Let the lower courts records be sent down to the lower Appellate Court at once. Both parties shall appear before the

lower Appellate Court on 6th September, 2021.

24. Let this order be communicated to the District Judge, Kaushambi by the Registrar (Compliance).

(2021)08ILR A22
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.08.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

F.A.F.O. No. 903 of 2012

Smt. Ritu Jutshi & Ors. ...Appellants
Versus
Smt. Rukmini Kaul ...Respondent

Counsel for the Appellants:
Rajeiu Kumar Tripathi

Counsel for the Respondent:
Aftab Ahmad, Akhil Kumar, Malay Shukla, Mohammad Aslam Khan, Mohd. Aslam Khan, Mohd. Shafiq, Mohiuddin Khan, Shaquiel Ahmad

(A) Civil Law - Code of Civil Procedure ,1908 - Section 104 read with Order 43, Rule 1 (k) read with Section 141 - The Limitation Act,1963 - Section 14 *ejusdem generis* - no appeal is provided against an Order under Order XXII Rule 3 and 5 of the Code either under Section 104 or Order 43 Rule 1 of the Code - once the suit has abated or is dismissed, any person such as the appellants claiming to be a legal representative of the deceased would be required to apply for setting aside the abatement or dismissal of the suit under Order XXII Rule 9 (2) of the Code - if such an application is dismissed, the order dismissing such an application would be open to challenge in an appeal under Order 43, Rule 1(k) of the Code. (Para - 16,17)

Application for substitution filed under Order XXII Rule 3 - without any application being filed under Order XXII Rule 9 for setting aside abatement - rejected - ground - it was unaccompanied by any application for condonation of delay and application for setting aside abatement - present appeal under Order 43, Rule 1 (k) - preliminary objection - maintainability of the appeal.(Para -2,4,6,8)

HELD:- It is clear that once the suit has abated or it is dismissed or in the present case the appeal, it was open to the person claiming to be legal representative of the deceased to apply for setting aside of abatement or dismissal of the suit in terms of Order XXII Rule 9(2) of the Code.There was no application either for setting aside of abatement or dismissal of the suit as required to be filed under Order XXII Rule 9(2) of the Code. Respondent has rightly objected to the maintainability of the appeal since it is not maintainable from an order rejecting an application under Order XXII Rule 3 of the Code.(Para - 18,19)

Appeal dismissed. (E-6)

List of Cases cited:-

1. Mangluram Dewangan Vs Surendra Singh & ors. , (2011) 12 SCC 773

2. Mst. Fakhrun & ors. Vs Hafizulla alias Kalloo & ors. , 1999 (17) LCD 906

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard Mr. Rajeiu Kumar Tripathi, learned counsel for appellants and Mr. Shaquiel Ahmad, learned counsel for respondent.

2. First Appeal from Order under Section 104 read with Order 43, Rule 1 (k) read with Section 141 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code) has been filed against order dated 31.07.2012 passed in Regular Civil Appeal No.53 of 1995. By means of the impugned order, the application for substitution filed

under Order XXII Rule 3 has been rejected primarily on the ground that it was unaccompanied by any application for condonation of delay and application for setting aside abatement.

3. Learned counsel appearing on behalf of the respondent has raised a preliminary objection regarding maintainability of the appeal in view of the fact that an appeal under Order 43, Rule 1 (k) can be filed only against an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit. It has been submitted that since in the present case, the order under challenge has merely rejected the application filed under Order XXII Rule 3 of the Code, therefore, there is no refusal to set aside abatement in terms of Rule 9 of Order XXII and the present appeal, therefore, is not maintainable. Learned counsel for respondent has relied upon the decision of Hon'ble the Supreme Court in **Mangluram Dewangan v. Surendra Singh and others** reported in (2011) 12 SCC 773.

4. With regard to the preliminary objection raised by learned counsel for respondent, learned counsel for appellants has drawn attention to the record of appeal with the submission that the application for substitution filed under Order XXII Rule 3 was duly accompanied by an application seeking condonation of delay and was in fact on record as Paper No.C-62. It is submitted that aforesaid application was duly supported by an affidavit and, therefore, the lower appellate court has recorded a wrong finding that the application for substitution was unaccompanied by any application seeking condonation of delay. It has been further submitted that the rejection of application filed under Order XXII Rule 3 of the Code would in fact have the consequence of abating the proceedings and would as such amount to dismissal of appeal due to which the present appeal would be maintainable in terms of Order 43 Rule 1 (k). It has also been submitted that an application for condonation of delay and seeking substitution would have inherent relief of setting aside abatement without any specific application being made particularly in terms of Articles 120 and 121 of the Limitation Act. Learned counsel has relied upon a decision of Hon'ble Single Judge in **Mst. Fakhrun and others** v. **Hafizulla alias Kalloo and others** reported in 1999 (17) LCD 906 to substantiate his submissions.

5. Learned counsel has also submitted that the lower appellate court has also committed an error in dismissing the appeal as a whole without considering the fact that an application for substitution of appellant no.1 on record as Paper No. A-55/1 was already pending consideration although the same is not under challenge.

6. Upon consideration of material on record and submissions advanced by learned counsel for the parties, it is apparent that Application A-59 was filed by applicant Shyam Sunder Jutshi for his substitution in place of appellant no.3. The application was filed by the said applicant claiming himself to be the legal heir of deceased appellant no.3. Objections were filed against the application which were taken on record as Paper No.C-65. The impugned order dated 31.07.2012 has indicated that no formal prayer for condonation of delay has been filed nor any formal prayer for setting aside of abatement has been made which has natural consequence as to non-bringing of legal heirs of the deceased party on record in

time. In pursuance of aforesaid, the application A-59 was rejected as having not been filed within time and not containing a prayer for setting aside abatement due to which the appeal as a whole was abated, leading to filing of the present appeal.

7. A perusal of the provisions under Order 43, Rule 1 (k) indicates that an appeal under the said provision can be filed against an order under rule 9 of order XXII refusing to set aside the abatement or dismissal of a suit.

8. In the present case, it is apparent and has been admitted that the application for substitution was filed under Order XXII Rule 3 without any application being filed under Order XXII Rule 9 for setting aside abatement although it is also apparent from the record that an application for condonation of delay in filing the substitution application was on record and was apparently not seen while passing the impugned order. Nonetheless, it is admitted that there was no separate application filed for setting aside abatement.

9. Section 104 read with Order 43 Rule 1 of the Code in fact does not provide for any appeal being filed against rejection of an application under Order XXII Rule 3. Learned counsel for appellants has placed reliance on the judgment passed by this Court in **Mst. Fakhrun** (supra) with the submission that the application for substitution can be treated as an application for setting aside abatement.

10. As is evident from the aforesaid decision in **Mst. Fakhrun** (supra), a learned Single Judge of this Court has held that an application for substitution of heirs of deceased appellant or respondent is also to be treated as an application for setting aside abatement and an order rejecting the said application amounts to an order refusing to set aside abatement.

11. However, from a perusal of paragraph 11 of said judgment, it is apparent that the same was held in terms of the question of limitation required with regard to filing of applications for substitution, condonation of delay and setting aside abatement. After examining the provisions of Articles 120 and 121 of the Limitation Act, it was held that an application for substitution with a prayer to set aside abatement may be made within a period of 150 days from the date of death of the plaintiff, defendant, appellant or the respondent as the case may be.

12. From aforesaid paragraph of the said judgment, it is apparent that the learned Single Judge has held that such a single application for substitution of legal heirs of the deceased can be treated to be an application if it is made within a period of 150 days from the date of death and the judgment itself indicates that even then in the application for substitution, a composite prayer to set aside abatement is also required. It is, thus, clear that prayer for setting aside abatement is required to be made whether by means of a separate application or even in the application filed for substitution. In the present case, from a perusal of the application filed by appellants, it is evident that no prayer whatsoever has been made for setting aside of abatement. As such, the aforesaid judgment does not help the case of appellants.

13. Learned counsel for appellants has also submitted that even under Order 43 Rule 1(k), it has been stated that the appeal would be maintainable from an order under

rule 9 of order XXII refusing to set aside the abatement **or dismissal of a suit.** It has, thus, been submitted that the effect of the impugned order rejecting the substitution application is that the suit/appeal itself has been dismissed as indicated in the impugned order itself and, therefore, it is submitted that the appeal would be maintainable.

14. With regard to the said submission, it is apparent that the words 'or dismissal of a suit' cannot be seen in isolation and have to be *ejusdem generis* to the provisions indicated prior thereto. Any other interpretation of the said wordings would amount to doing violence to the provisions of the Code. It is clear from a reading of Order 43, Rule 1 (k) that the wordings 'or dismissal of a suit' have to be read in conjunction with the first part of the provisions which provides for appeal to be maintainable against an order made under rule 9 of order XXII refusing to set aside the abatement. Accepting the submission of learned counsel for appellants would have strange consequences in case the wordings 'or dismissal of a suit' are to be treated as a separate portion without any relation to the preceding wordings. If such a submission is accepted, it would amount to an appeal being maintainable under Order 43, Rule 1 (k) even in case a suit is dismissed on merits. In that case, therefore, the provisions of Section 96 of the Code or even Section 100 of the Code would be redundant. Such an interpretation cannot be provided in the present case.

15. In the present case, it is also apparent that without any specific prayer for setting aside abatement either in the substitution application or even by means of a separate application, such a relief cannot be read into the application. As such, it is clear that the application would remain an application under Order XXII Rule 3 of the Code and would not take on the garb of an application for setting aside abatement under Order XXII Rule 9 of the Code. Keeping this perspective in mind, it would thus be apparent that in the present case, only an application for substitution under Order XXII Rule 3 has been rejected and the scope of such an application cannot be expanded to consider it as an application under Order XXII Rule 9.

16. Hon'ble the Supreme Court in **Mangluram Dewangan**(supra) has clearly held that no appeal is provided against an Order under Order XXII Rule 3 and 5 of the Code either under Section 104 or Order 43 Rule 1 of the Code. In paragraph 10 (f) & (g) of the report, it has been held as follows:-

"10.A combined reading of the several provisions of Order 22 of the Code makes the following position clear:

(a) …..

(b) …..

(c) …..

(d) …..

(e) …..

(f) Where a suit abates or where the suit is dismissed, any person claiming to be the legal representative of the deceased plaintiff may apply for setting aside the abatement or dismissal of the suit under Order 22 Rule 9(2) of the Code. If sufficient cause is shown, the court will set aside the abatement or dismissal. If however such application is dismissed, the order dismissing such an application is open to challenge in an appeal under Order 43 Rule 1(k) of the Code.

(g) A person claiming to be the legal representative cannot make an application under Rule 9(2) of Order 22 for

setting aside the abatement or dismissal, if he had already applied under Order 22 Rule 3 for being brought on record within time and his application had been dismissed after an enquiry under Rule 5 of Order 22, on the ground that he is not the legal representative."

17. Upon applicability of the aforesaid judgment in the present facts and circumstances, it is clear that once the suit has abated or is dismissed, any person such as the appellants claiming to be a legal representative of the deceased would be required to apply for setting aside the abatement or dismissal of the suit under Order XXII Rule 9 (2) of the Code. However, if such an application is dismissed, the order dismissing such an application would be open to challenge in an appeal under Order 43, Rule 1(k) of the Code.

18. From aforesaid, it is clear that once the suit has abated or it is dismissed or in the present case the appeal, it was open to the person claiming to be legal representative of the deceased to apply for setting aside of abatement or dismissal of the suit in terms of Order XXII Rule 9(2) of the Code. However, in the present case, there was no application either for setting aside of abatement or dismissal of the suit as required to be filed under Order XXII Rule 9(2) of the Code. In such circumstances, it is evident that since there was no application for setting aside abatement or dismissal of the suit as contemplated in paragraph 10(f) of the aforesaid judgment, the connotation and purport of the application A-59 remain as an application for substitution under Order XXII Rule 3 of the Code and by no stretch of imagination can it be held to be an application for setting aside of abatement.

19. In view of aforesaid, it is evident that the respondent has rightly objected to the maintainability of the appeal since it is not maintainable from an order rejecting an application under Order XXII Rule 3 of the Code.

20. Consequently, the appeal fails and is **dismissed**. The parties to bear their own costs.

21. At this juncture, learned counsel for appellants submits that the appeal is pending consideration since year 2012 and even if now an application for setting aside of abatement is filed before the lower appellate court, it would have great difficulty with regard to condonation of delay. Regarding the same, it is apparent from the record that an application for condonation of delay in filing the substitution application is already on record which has been overlooked while passing the impugned order. As such, the same can be considered and orders be passed thereupon due to which pendency of the present appeal should not come into the way although orders pertaining to same would be required to be passed by the court concerned who may also take into account the provisions of Section 14 of the Limitation Act. However, no such specific direction can be issued in the present appeal since it has been dismissed on the issue of non-maintainability.

(2021)08ILR A26
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.08.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

F.A.F.O. No. 989 of 2012

M/S Kamalsons ...Appellant
Versus
Mrs. Sajma & Ors. ...Respondents

Counsel for the Appellant:
Brijendra Chaudhary, Raghunath Singh, Vijai Kumar Srivastava

Counsel for the Respondents:
Prabhakar Trivedi

(A) Civil Law - The Motor Vehicles Act, 1988 - Section 2(15) - gross vehicle weight , Section 66 - Necessity for permits , Section 66(1) , 66(3)(i) , 150(2)(a)(i)(C) , Section 173 - Appeal - principles of purposive construction - In construing the wordings of legislation, interpretation which restricts the operation of the statute should be avoided and a purposive construction should be adopted which would not defeat the very purpose of the Act . (Para -16)

Offending vehicle was a goods vehicle - in terms of Section 66(3)(i) - provision of Section 66(1) of the Motor Vehicles Act not applicable to any goods vehicle, the gross vehicle weight of which does not exceed 3000 kg - laden weight of the offending vehicle - registration certificate - being 2750 Kg was well within the limits specified under Section 66(3)(i) of Motor Vehicles Act - offending vehicle did not require any specific permit - findings of tribunal against the appellant - not in accordance with the provisions of Section 66(3)(i) of the Motor Vehicles Act.(Para - 6)

HELD:- Offending vehicle being covered by provisions of Section 66 (3)(i) of the Motor Vehicles Act was not required to have a special permit since its gross vehicle weight in terms of Section 2(15) was below 3000 kg. The liability fastened by the Tribunal upon appellant as such was incorrect and against the provisions of law. Judgment and award passed by Motor Accident Claims Tribunal, set aside, so far as it relates to issue pertaining to liability of appellant to satisfy the award. Respondent No.5 i.e. the National Insurance Company Ltd. is required to satisfy the award. (Para - 21)

Appeal allowed. (E- 6)

List of Cases cited:-

1. Hindustan Lever Ltd. Vs Ashok Vishnu Kate, [(1995) 6 SCC 326 : 1995 SCC (L&S) 1385]

(Delivered by Hon'ble Manish Mathur, J.)

(C.M. Application No.31633 of 2018 for Restoration of the Appeal)

1. Application has been filed seeking restoration of the appeal to its original number by recalling of order dated 14.03.2018 whereby the appeal had been dismissed in default of appearance. Learned counsel appearing on behalf of answering respondent does not have any objection in case the appeal is restored to its original number. In view thereof the application is allowed and the appeal is restored to its original number recalling the order dated 24.03.2018.

(Order On Memo of First Appeal From Order)

1. Heard learned counsel for appellant and learned counsel appearing on behalf of respondent no.5.

2. The appeal is being heard and decided today itself by the consent of learned counsel for parties.

3. It is admitted between the parties that the respondents no.1 to 4 are merely proforma respondents and their being unrepresented at the final hearing is of no consequence.

4. First appeal from order has been filed under Section 173 of the Motor Vehicles Act,1988 against the judgment and award dated 28.05.2012 passed by Motor Accident Claims Tribunal/ District Judge, Barabanki in Claim Petition No.231 of 2009 whereby the claim petition was

allowed determining liability for payment of compensation upon the owner of the offending vehicle who is appellant herein.

5. The short question of law involved in the present appeal pertains to interpretation of Section 66 and Section 2(15) of the Motor Vehicles Act, 1988.

6. Learned counsel for appellant has submitted that the offending vehicle was a goods vehicle with unladen weight capacity of 1625 kg and laden weight of 2750 Kg as indicated in the registration certificate. It is submitted that the issue with regard to determination of liability for compensation was formulated as issue no.6 by the tribunal and has been held against the appellant. Learned counsel has submitted that as per Section 66(1) of the Motor Vehicles Act,1988, the use of a vehicle as a transport vehicle in any public place whether actually carrying passenger or goods or not has to be in term of conditions of permit granted or countersigned by Regional State Transport Authority or any prescribed authority. It is submitted that in terms of Section 66(3)(i), the provision of Section 66(1) of the Motor Vehicles Act would not be applicable to any goods vehicle, the gross vehicle weight of which does not exceed 3000 kg. It is therefore submitted that the laden weight of the offending vehicle as per the registration certificate being 2750 Kg was well within the limits specified under Section 66(3)(i) of Motor Vehicles Act, due to which the offending vehicle did not require any specific permit. Therefore, the findings of the tribunal against the appellant is not in accordance with the provisions of Section 66(3)(i) of the Motor Vehicles Act.

7. Learned counsel appearing on behalf of respondent no.5 has refuted the submissions advanced by learned counsel for appellant with the submission that the provision of Section 66(3)(i) of the Motor Vehicles Act have to be seen in the context of the definition of gross vehicle weight as given in Section 2(15) of the Motor Vehicles Act, 1988 whereby the gross vehicle weight in respect of any vehicle means the total weight of the vehicle and load certified and registered by the registering authority as permissible for that vehicle. In view of aforesaid submission, learned counsel submits that for the said purpose, the total weight of the vehicle has to be taken as an addition of unladen weight plus the laden weight. Considering the aforesaid, it is submitted that the total unladen weight of the offending vehicle being 1625 Kg was required to be added to the laden weight of the vehicle being 2750 kg i.e. a total weight of 4375 Kg. It is submitted that the condition would indicate gross vehicle weight of the offending vehicle exceeding 3000 Kg as indicated in Section 66(3)(i) of the Motor Vehicles Act, due to which the offending vehicle was required to have a permit for plying. Since the offending vehicle did not have any permit to ply the goods, the same constituted a breach of the Insurance Policy due to which the answering respondent was not liable for compensation in terms of Section 150(2)(a)(i)(C) of the Motor Vehicles Act as the purpose of the vehicle was not allowed by the permit under which the vehicle was used.

8. In view of the aforesaid submissions, the following point arises for determination, which is as follows:-

"Whether the offending vehicle was required to ply only with a permit in accordance with Section 66(1) and the consequences on plying without such

permit under 150(2) (a) (i) (C) of the Motor Vehicles Act,1988."

9. With regard to the aforesaid point of determination, it is clear that the respondent no.5, being Insurance Company was liable to be excluded for payment of compensation in terms of Section 150(2) (a) (i) (C) of the Motor Vehicles Act,1988 in case the offending vehicle was being plied for a purpose which was not allowed by the permit under which the vehicle was used. The said question has to be seen in the context of Section 66 of the Motor Vehicles Act, 1988. The aforesaid section is as follows:

"66. ***Necessity for permits.-****(1) No owner of a Motor Vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorizing him the use of the vehicle in that place in the manner in which the vehicle is being used:*

Provided that a stage carriage permit shall, subject to any conditions that may be specified in the permit, authorize the use of the vehicle as a contract carriage:

Provided further that a stage carriage permit may, subject to any conditions that may be specified in the permit, authorize the use of the vehicle as a goods carriage either when carrying passengers or not:

Provided also that a goods carriage permit shall, subject to any conditions that may be specified in the permit, authorize the holder to use the vehicle for the carriage of goods for or in connection with a trade or business carried on by him.

(2) The holder of a goods carriage permit may use the vehicle, for the drawing of any trailer or semi-trailer not owned by him, subject to such conditions as may be prescribed:

1[Provided that the holder of a permit of any articulated vehicle may use the prime-mover of that articulated vehicle for any other semi-trailer]

(3) The provisions of sub-section(1) shall not apply-

(a) to any transport vehicle owned by the Central Government or a State Government and used for Government purposes unconnected with any commercial enterprise;

(b) to any transport vehicle owned by a local authority or by a person acting under contract with a local authority and used solely for road cleansing road watering or conservancy purposes;

(c) to any transport vehicle used solely for police, fire brigade or ambulance purposes;

(d) to any transport vehicle used solely for the conveyance of corpses and the mourners accompanying the copies;

(e) to any transport vehicle used for towing a disabled vehicle or for removing goods from a disabled vehicle to a place of safety;

(f) to any transport vehicle used for any other public purpose as may be prescribed by the State Government in this behalf;

(g) to any transport vehicle used by a person who manufactures or deals in motor vehicles or builds bodies for attachment to chassis, solely for such purposes and in accordance with such conditions as the Central Government may, by notification in the Official Gazette, specify in this behalf;

(i) to any goods vehicle, the gross vehicle weight of which does not exceed 3,000 Kilograms;

(j) subject to such conditions as the Central Government may, by notification in the Official Gazette, specify, to any transport vehicle purchased in one State and proceeding to a place, situated in that State or in any other State, without carrying any passenger or goods;

(k) to any transport vehicle which has been temporarily registered under Section 43 while proceeding empty to any place for the purpose of registration of the vehicle;

(m) to any transport vehicle which, owing to flood, earthquake or any other natural calamity, obstruction on road, or unforeseen circumstances, is required to be diverted through any other route, whether within or outside the State with a view to enabling it to reach its destination;

(n) to any transport vehicle used for such purposes as the Central or State Government may, be order, specify;

(o) to any transport vehicle which is subject to a hire-purpose, lease or hypothecation agreement and which owing to the default of the owner has been taken possession of by or on behalf of the person with whom the owner has entered into such agreement, to enable such motor vehicle to reach its destination; or

(p) to any transport vehicle while proceeding empty to any place for purpose of repair.

(4) Subject to the provisions of sub-section (3), sub-section (1) shall, if the State Government by rule made under Section 96 so prescribes, apply to any motor vehicle adapted to carry more than nine persons excluding the driver."

10. From a reading of Section 66 of the Motor Vehicles Act, it is discernible that use of Motor Vehicle as a transport vehicle in any public place whether carrying any passengers or goods or not is prohibited unless and until, it is in accordance with the condition of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorizing the use of the vehicle in that place in the manner in which the vehicle is being used.

11. The exception to Section 66(1) of the Motor Vehicles Act is indicated in Sub-section (2) with the relevant portion being Sub-section 3(i) which indicates that the provisions of Sub-section (1) would not apply to any goods vehicle, the gross vehicle weight of which does not exceed 3,000 Kg.

12. The definition of the word 'gross vehicle weight' has been defined in Section 2(15) of the Motor Vehicles Act which is as follows:

"(15) "gross vehicle weight" means in respect of any vehicle the total weight of the vehicle and load certified and registered by the registering authority as permissible for that vehicle;"

13. The definition of the word 'gross vehicle weight' indicated in Section 2(15) of the Motor Vehicles Act clearly means the total weight of the vehicle and the load certified and registered by the registering authority. The terms of the aforesaid section would clearly imply that the gross vehicle weight of any vehicle would mean the base unladen weight of vehicle plus the load certified by registering authority as being permissible for that vehicle.

14. In the present case, a perusal of the registration certificate indicates that the offending vehicle has an unladen weight of 1625 Kg with laden weight being 2750 kg. The basic explanation of the gross vehicle weight as indicated in Section 2(15) of the Motor Vehicles Act, 1988 would mean the base unladen weight of the vehicle plus the weight of load permitted. In the registration certificate the laden weight of the vehicle in question is clearly indicated as 2750 kg. The meaning thereof clearly is that the base unladen weight of the vehicle is 1625 Kg with permissible load of 1125 kg. which in its entirety would constitute laden weight of the vehicle.

15. The submission of learned counsel for answering respondent that the gross vehicle weight of the offending vehicle as defined in Section 2(15) of the Motor Vehicles Act would mean the addition of unladen weight of 1625 kg with laden weight of 2750 kg does not hold good since the same would do violence to the definition of the word gross vehicle weight as defined under Section 2(15) of the Motor Vehicles Act,1988. From a bare understanding of Section 2(15) of the Motor Vehicles Act,1988, such an explanation to the definition cannot be sustained.

16. With regard to interpretation of statute, it is now well settled that the same is to be read in its entirety and the purport and object underlying the statute is required to be given effect to by applying the principles of purposive construction. It is well settled that in construing the wordings of legislation, interpretation which restricts the operation of the statute should be avoided and a purposive construction should be adopted which would not defeat the very purpose of the Act.

17. Hon'ble the Supreme Court in the case of ***Hindustan Lever Ltd. vs. Ashok Vishnu Kate*** has observed as under:-

13.In Hindustan Lever Ltd.v.Ashok Vishnu Kate[(1995) 6 SCC 326 : 1995 SCC (L&S) 1385] this Court observed : (SCC pp. 347-48, paras 41-42)

"41. In this connection, we may usefully turn to the decision of this Court in Workmenv. American Express International Banking Corpn. [(1985) 4 SCC 71 : 1985 SCC (L&S) 940] wherein Chinnappa Reddy, J. in para 4 of the Report has made the following observations : (SCC p. 76)

'4. The principles of statutory construction are well settled. Words occurring in statutes of liberal import such as social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Lilliputian dimensions. In construing these legislations the imposture of literal construction must be avoided and the prodigality of its misapplication must be recognised and reduced. Judges ought to be more concerned with the "colour", the "content" and the "context" of such statutes(we have borrowed the words from Lord Wilberforce's opinion in Prenn v.Simmonds [(1971) 1 WLR 1381 : (1971) 3 All ER 237 (HL)]). In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not to be interpreted purely on internal linguistic considerations. In one of the cases cited before us, that is, Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court [(1980) 4 SCC 443 : 1981 SCC (L&S) 16] we had occasion to say : (SCC p. 447, para 6)

"6. ? Semantic luxuries are misplaced in the interpretation of 'bread and butter' statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the court is not to make inroads by making etymological excursions." '

42. Francis Bennion in his Statutory Interpretation, 2nd Edn., has dealt with the Functional Construction Rule in Part XV of his book. The nature of purposive construction is dealt with in Part XX at p. 659 thus:

'A purposive construction of an enactment is one which gives effect to the legislative purpose by?

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose (in this Code called a purposive-and-literal construction), or

(b) applying a strained meaning where the literal meaning is not in accordance with the legislative purpose (in the Code called a purposive-and-strained construction).'

At p. 661 of the same book, the author has considered the topic of 'Purposive Construction' in contrast with literal construction. The learned author has observed as under:

'Contrast with literal construction.?Although the term "purposive construction" is not new, its entry into fashion betokens a swing by the appellate courts away from literal construction. Lord Diplock said in 1975:"If one looks back to the actual decisions of the [House of Lords] on questions of statutory construction over the last 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions." The matter was summed up by Lord Diplock in this way?

...I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it.' "

18. Once the entire laden weight of the offending vehicle as per registration certificate is indicated as 2750 kg, obviously no permit for the offending vehicle was required in terms of Section 66(3)(i) of the Motor Vehicles Act.

19. From a perusal of the impugned judgment and award, it is apparent that although such a plea had been taken by the appellant but the same has been rejected while deciding issue no.6. However, the reasoning of the tribunal with regard to such submission of the appellant is not quite understandable since the aforesaid submission has been rejected only on the ground that provisions of Section 66 of the Motor Vehicles Act would be applicable only in case they are notified in the official gazette and since no such notification has been issued in the official gazette, the appellant would not derive any benefit from Section 66 of the Motor Vehicles Act.

20. The impugned judgment and award does not indicate as to why the provision of Section 66 were required to be separately notified in the gazette once the Act itself in its entirety has been notified and published in the gazette of India Extract, part II dated 22.05.1989 and had come into force on 01.07.1989. Section 66 of the Motor Vehicles Act does not indicate that it would have to be notified separately

in the gazette. The said provision being a part and parcel of the Motor Vehicles Act, 1988 therefore stood notified alongwith notification of the Act itself in May, 1989. The said ground by the Tribunal is clearly against the provisions of statute.

21. Considering the aforesaid, it is held that the offending vehicle being covered by provisions of Section 66 (3)(i) of the Motor Vehicles Act was not required to have a special permit since its gross vehicle weight in terms of Section 2(15) was below 3000 kg. The liability fastened by the Tribunal upon appellant as such was incorrect and against the provisions of law. In view of aforesaid, the appeal succeeds and is **allowed** setting aside the judgment and award dated 28.05.2012 passed by Motor Accident Claims Tribunal/ District Judge, Barabanki in Claim Petition No.231 of 2009, so far as it relates to issue no.6 pertaining to liability of appellant to satisfy the award. As a consequence, it is held that the Respondent No.5 i.e. the National Insurance Company Ltd. is required to satisfy the award. Parties shall bear their own costs.

(2021)08ILR A33
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.08.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

F.A.F.O. No. 1037 of 2008

Oriental Insurance Co. Ltd. ...Appellant
Versus
Vashishtha Mauray ...Respondent

Counsel for the Appellant:
B.C. Pandey

Counsel for the Respondent:
Akhilesh Kumar Srivastava, Prabhakar Tiwari, R.K. Singh, Rajendra Pratap Singh

(A) Civil Law - The Motor Vehicles Act, 1988 - Section 170 - Impleading insurer in certain cases , Section 173 - Appeals - Indian Evidence Act, 1872 - Section 103 - Burden of proof as to certain fact - contributory negligence - once the defendants had failed to raise the necessary pleadings and no issue was framed and no evidence was produced on the said question, then it was not open for the defendants to make out a new case.(Para -16)

Present appeal pertains to the factum of contributory negligence on the part of the claimant due to which he has suffered injuries.Para - 6)

HELD:- There is no pleading on behalf of the defendant-appellant (Insurance Company) with regard to contributory negligence on the part of the claimant and therefore rightly no issue with regard to the said fact has been framed by the Tribunal. Evidence on record has been clearly considered by the Tribunal in a cogent and reasonable manner and, therefore, also the submissions of the defendant-appellant regarding contributory negligence of the claimant does not hold any good ground.Claimant-respondent is granted liberty to move appropriate application for withdrawal of the outstanding awarded amount which shall be paid upon such an application being made with up to date interest.(Para - 17,21,23)

Appeal dismissed. (E-6)

List of Cases cited:-

1. Bachhaj Nahar Vs Nilima M&al & anr. , Civil Appeal No.5798-5799 of 2008

2. Ram Swarup Gupta (Dead) by LRs Vs Bishun Narain Inter College & ors. , (1987) 2 SCC 555

3. Gopal Krishnaji Ketkar Vs Mohamed Haji Latif & ors., AIR 1968 SC 1413

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard learned counsel for appellant, learned counsel for respondent claimant and Mr. Akhilesh Kumar Srivastava, learned counsel for respondents 2 and 3. No-one has appeared on behalf of respondent no.4.

2. First Appeal from Order has been filed under Section 173 of the Motor Vehicles Act, 1988(hereinafter referred to as the Act) against the judgment and award dated 31.05.2008 passed in Claim Petition No.138 of 2006 (Vasishtha Maurya v. Chairman, U.P.S.R.T.C. and others) whereby the claim petition of the injured claimant has been allowed awarding a compensation of Rs.2,72,800/- along with 8% interest per annum with the appellant insurance company liable to satisfy the award.

3. Learned counsel for appellant submits that the incident had occurred in the night of 19/20th January, 2005. In the Claim Petition, the claimant has averred that he was travelling as a passenger on the Roadways bus No. U.P. 42/T-2068. When the bus was standing due to a traffic jam near Ram Sanehi Ghat bridge, the claimant had deboarded the bus in order to relieve himself but had slipped and fallen on endeavouring to board the bus thereafter due to the fact that the bus had started moving again. Learned counsel for appellant has submitted that the present appeal is being pressed only with regard to the factum of contributory negligence on the part of the claimant and while other grounds have also been taken particularly with regard to challenge to the quantum of compensation, the same are not being pressed in the present appeal.

4. It is submitted by learned counsel for appellant that when the offending bus was in the midst of its journey and had stopped owing to a traffic jam, there was no occasion for the claimant to have deboarded the bus without informing either the driver or the conductor of the bus who being unaware about the claimant deboarding the bus were perfectly within their right to restart the journey once the traffic jam had cleared. It is thus submitted that it is the claimant himself who is to blame for the incident that had taken place due to which he had suffered injuries and as as such the Roadways is not at all liable to make good the compensation. Since the offending bus was insured with the appellant, the appellant as such is also not liable to satisfy the award. Learned counsel has further submitted that the Tribunal should have recorded a finding with regard to contributory negligence of the claimant regarding the incident that had occurred.

5. Learned counsel for the claimant respondent no.1 has refuted the submissions advanced by learned counsel for appellant with the submission that the ground pertaining to contributory negligence has not been taken before the Tribunal concerned and, therefore, the appellant is prohibited from taking such a ground for the first time in appeal. Learned counsel has further submitted that the evidence on record clearly indicated that the claimant had deboarded the bus after informing the driver and the conductor who were well-aware of the said fact and even after the claimant had fallen from the bus on trying to re-board it, co-passengers of the claimant had drawn attention of the bus driver to the said fact who ignored the same and drove the bus in a rash and negligent fashion resulting in the incident in question in which the claimant had suffered injuries

to the tune of 70%. Learned counsel has submitted that the judgment and award under challenge has been passed after considering the material evidence on record and does not require to be interfered with.

6. Considering the material on record and submissions advanced by learned counsel for the parties, it is evident that the sole question involved in the present appeal pertains to contributory negligence on the part of the claimant due to which he has suffered injuries. The point of determination therefore in the present appeal is as follows:-

7. Whether the judgment and award impugned has occasioned an error of law since the aspect of contributory negligence of the claimant has not been considered?

8. The trial court in the impugned judgment and award has framed five issues with issues no. 1 and 2 pertaining to the claimant being a passenger on the offending bus at the time and place indicated in the claim petition with issue no 2 pertaining to whether the claimant had suffered injuries on account of rash and negligent driving of the offending bus.

9. The Tribunal has decided the issue no.1 in favour of the claimant on the basis of statement by the claimant as P.W. 1 and a co-passenger, Birbal as P.W. 2. The Tribunal has also recorded the fact that the driver of the bus Prahlad Singh was examined as O.P.W. 1 who did not deny the incident as having taken place.

10. Regarding issue no.2, the Tribunal has also decided in favour of the claimant on the basis of statements recorded by the plaintiff-witnesses indicated herein above. A specific finding has been recorded by the Tribunal on the basis of statement of P.W. 2 corroborating the evidence of P.W. 1 that the claimant had de-boarded the bus after informing the driver and conductor of the bus. The Tribunal has thereafter held the driver of the bus guilty of rash and negligent driving on the basis of evidence and the charge-sheet that was filed in pursuance to the first information report that had been filed.

11. Since the quantum of compensation is not being pressed by the appellant, there is no occasion for this Court to record any finding thereupon.

12. So far as the question of contributory negligence on the part of the claimant is concerned, it is evident from the record and particularly the written statement filed by the insurance company that the plea of contributory negligence on the part of the claimant has not been taken either in the written statement or even in the application filed under Section 170 of the Act. Naturally, since no such pleading was on record on behalf of the insurance company pertaining to contributory negligence on the part of the claimant, no such issue was framed by the Tribunal.

13. Regarding the said question, Hon'ble the Supreme Court in **Bachhaj Nahar** v. **Nilima Mandal and another** rendered in Civil Appeal No.5798-5799 of 2008 has held as follows:-

"8. The High Court, in this case, in its obvious zeal to cut delay and hardship that may ensue by relegating the plaintiffs to one more round of litigation, has rendered a judgment which violates several fundamental rules of civil procedure. The rules breached are:

(i) No amount of evidence can be looked into, upon a plea which was never

put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.

(ii) A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

(iii) A factual issue cannot be raised or considered for the first time in a second appeal.

Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied to civil litigation. The provisions are so elaborate that many a time, fulfillment of the procedural requirements of the Code may itself contribute to delay. But any anxiety to cut the delay or further litigation, should not be a ground to float the settled fundamental rules of civil procedure. Be that as it may. We will briefly set out the reasons for the aforesaid conclusions."

14. In Para 11 of the said judgment, it has been held as under:-

"11. The High Court has ignored the aforesaid principles relating to the object and necessity of pleadings. Even though right of easement was not pleaded or claimed by the plaintiffs, and even though parties were at issue only in regard to title and possession, it made out for the first time in second appeal, a case of easement and granted relief based on an easementary right. For this purpose, it relied upon the following observations of this Court inNedunuri Kameswaramma v. Sampati Subba Rao [1963]2SCR208 :

No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion.

But the said observations were made in the context of absence of an issue, and not absence of pleadings. The relevant principle relating to circumstances in which the deficiency in, or absence of, pleadings could be ignored, was stated by a Constitution Bench of this Court inBhagwati Prasad v. Shri Chandramaul:[1966]2SCR286 :

If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial,then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit was touched, tough indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is:did the parties know that the matter in question was involved in the trial, and did they lead evidence about it?If it

appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter.To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

The principle was reiterated by this Court inRam Sarup Gupta (dead) by LRs. v. Bishun Narain Inter College [1987]2SCR805"

15. Upon applicability of the aforesaid judgment, it is apparent that the trial court did not err in not framing an issue with regard to contributory negligence of the claimant in absence of any such pleading.

16. Learned counsel for the claimant-respondent has also relied upon the judgment rendered in **Ram Swarup Gupta (Dead) by LRs v. Bishun Narain Inter College & others** reported in (1987) 2 SCC 555 in which Hon'ble the Supreme Court has held that once the defendants had failed to raise the necessary pleadings and no issue was framed and no evidence was produced on the said question, then it was not open for the defendants to make out a new case. The relevant portion of the judgment is as follows:-

"5.Shri S.N. Kacker, learned counsel for the appellant contended that the trial court as well as the High Court both erred in holding that the licence was irrevocable under Section 60(b) of the Indian Easements Act. He urged that the defendants had failed to raise necessary pleadings on the question, no issue was framed and no evidence was produced by them. In the absence of requisite pleadings and issues it was not open to the trial court and the High Court to make out a new case for the defendants, holding the licence irrevocable. He urged that the defendants had failed to produce any evidence to prove the terms and conditions of the licence. In order to hold the licence irrevocable, it was necessary to plead and further to prove that the defendants had made construction, "acting upon the terms of the licence". Shri Kacker further urged that Raja Ram Kumar Bhargava being karta of joint family, could not alienate the property permanently to the detriment of the minor co-sharers. Shri U.R. Lalit, appearing on behalf of the defendant-respondents supported the findings recorded by the trial court and the High Court and urged that both the courts have recorded findings of facts on appreciation of evidence on record that the licence granted by Raja Ram Kumar Bhargava was irrevocable and that acting upon the licence the school had made construction for the purposes of running the school and the licence was irrevocable. He took us through the record to show that necessary pleadings had been raised by the defendants and there was sufficient evidence in support of the pleadings.

6.The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the licence was irrevocable as contemplated by Section 60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should

be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Some times, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence in that event it would not be open to a party to raise the question of absence of pleadings in appeal.....
....."

17. In the present appeal, it is apparent from a reading of the written statement that there is no pleading on behalf of the defendant-appellant with regard to contributory negligence on the part of the claimant and therefore rightly no issue with regard to the said fact has been framed by the Tribunal.

18. In view of the judgment rendered by Hon'ble the Supreme Court in the case of **Ram Swarup Gupta**(Supra) such a fresh assertion cannot be entertained.

19. Although the present appeal can be decided on the said issue but it is also a relevant fact that submissions on behalf of the appellant pertaining to same are also not borne out from the record. The Tribunal has clearly noticed the fact that the claimant in his examination in chief and cross-examination has made a specific statement that he de-boarded the bus after informing the driver and the conductor. The statement of the bus driver Prahlad Singh is on record where he has stated that he was unaware of any passenger deboarding the bus. He is also unaware as to whether the bus conductor had thereafter made a head-count of the passengers prior to restarting of the bus. Once the claimant had made a specific assertion in his deposition, the same having been denied by the defendant-appellant, the burden of disproving the claimant's narration lay upon the defendant-appellant in terms of Section 103 of Indian Evidence Act. As such, it was the duty of the defendant-appellant to have required the presence of the bus conductor to disprove the story set up by the claimant-respondent. That having not been done, an adverse inference is required to be drawn against the defendant-appellant as has been held by Hon'ble the Supreme Court in **Gopal Krishnaji Ketkar v. Mohamed Haji Latif and others,** reported in AIR 1968 SC 1413. The relevant portion of the said decision is as follows:-

"5.....We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his

possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof....."

20. It is also a material fact that the statements of the claimant were corroborated by the co-passenger Birbal who appeared as P.W. 2. The deposition of P.W. 2 is on record in which it has been clearly stated that the bus driver had been made aware by the deponent as well as other co-passengers regarding the falling of claimant off the bus, yet he ignored the same and drove rashly and negligently resulting in the incident and injuries.

21. The evidence on record has been clearly considered by the Tribunal in a cogent and reasonable manner and, therefore, also the submissions of the defendant-appellant regarding contributory negligence of the claimant does not hold any good ground.

22. In view of aforesaid, the appeal fails and is dismissed. The parties to bear their own costs.

23. The claimant-respondent is granted liberty to move appropriate application for withdrawal of the outstanding awarded amount which shall be paid upon such an application being made with up to date interest.

24. The lower court record shall be remitted to the Tribunal.

(2021)08ILR A39

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2021

BEFORE

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

F.A.F.O. No. 2356 of 2004

Krishna Pyare Gupta & Ors. ...Appellants
Versus
U.P. State Bridge Corporation Ltd. & Anr. ...Respondents

Counsel for the Appellants:
Sri Deepak Jaiswal, Akansha Gaur, Sri Ashok Kumar Gaur

Counsel for the Respondents:
Sri Mukesh Kumar Kushwaha, Sri K.S. Chaudhry, Sri Krishna Shanker Chaudhary, Sri V.A. Ansari

(A) Civil Law - The Motor Vehicles Act, 1988 - Section 110A,110B - Fatal Accidents Act, 1855 - The Income Tax Act, 1961 - Section194A (3) (ix) - multiplier - principle of contributory negligence - person who either contributes or author of the accident would be liable for his contribution to the accident having taken place - principle of "res ipsa loquitur" - "the things speak for itself" - composite/contributory negligence - The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care .(Para - 8,11)

Appeal, at the behest of the claimants - challenges judgment and award passed by Motor Accident Claims Tribunal - awarding a sum of Rs.8,88,608/- - interest at the rate of 6% as compensation - Tribunal deducted 30% of the award - which is bad - deceased not the author or the co-author of the accident having

taken place - not plying the vehicle which met with accident rather he was sitting in the same - income was Rs.12,500/- Tribunal erred in assessing the income of the deceased to be Rs.9,615 - Tribunal not granted any amount towards future loss of income of the deceased. (Para - 2,3,4)

HELD:- Deceased was not the author or the co-author of the accident, was not plying the vehicle. Hence, the deduction of 30% from the compensation awarded is bad and is set aside. Judgment and award passed by the Tribunal shall stand modified . Respondent-Insurance Company shall deposit the amount with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. 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.(Para -11,16)

Appeal partly allowed. (E-6)

List of Cases cited:-

1. National Insurance Company Limited Vs Pranay Sethi & ors., 2017 0 Supreme (SC) 1050

2. Bajaj Allianz General Insurance Co.Ltd. Vs Smt. Renu Singh & ors., First Appeal From Order No. 1818 of 2012

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

4. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

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

6. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Comp. Ltd., 2007(2) GLH 291

7. Smt. Sudesna & ors. Vs Hari Singh & anr., First Appeal From Order No.23 of 2001

8. Tej Kumari Sharma Vs Chola M&lam M.S. General Insurance Co. Ltd., First Appeal From Order No.2871 of 2016

(Delivered by Hon'ble Subhash Chand, J.)

1. Heard learned counsel for the appellant and learned counsel for the respondent-Insurance Company.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 7.5.2004 passed by Motor Accident Claims Tribunal/Additional District & Sessions Judge, Room No.14, Kanpur Nagar (hereinafter referred to as 'Tribunal') in M.A.C.P. No.642 of 2001 awarding a sum of Rs.8,88,608/- with interest at the rate of 6% as compensation.

3. The accident is not in dispute. The respondent has not challenged the liability imposed on them. It is submitted by learned counsel for the appellants that the Tribunal has deducted 30% of the award which is bad as the deceased was not the author or the co-author of the accident having taken place as he was not plying the vehicle which met with accident rather he was sitting in the same.

4. It is submitted by learned counsel for the appellant that the deceased was 31 years of age at the time of accident and was Engineer in Railways. His income according to the counsel for the claimants was Rs.12,500/- and the Tribunal has erred in assessing the income of the deceased to be Rs.9,615. It is further submitted that the Tribunal has not granted any amount towards future loss of income of the deceased which should be granted in view of the decision in **National Insurance Company Limited Vs. Pranay Sethi and Others, 2017 0 Supreme (SC) 1050.** It is

further submitted that the amount granted under non-pecuniary damages are on the lower side and it should be as per the decision in **Pranay Sethi (Supra).** It is further submitted that the deduction towards personal expenses of the deceased should be 1/4th as he was survived by her widow, a minor son and parents. It is also submitted that interest should be 12%.

5. As against this, learned counsel for the respondent has submitted that the Tribunal cannot be said to have committed any error in considering the income of Rs.9165/- as the basic income of the deceased who was Engineer in Railways was Rs.6500/-. It is further submitted that the Tribunal has committed an error apparent on record in granting multiplier of 17 which should be 16 as the deceased was 31 years of age at the time of his death. It is further submitted that the interest awarded by the Tribunal is just and proper and does not call for any interference.

6. Having heard the learned counsel for the parties, let us consider the negligence from the perspective of the law laid down.

7. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "res ipsa loquitur" meaning thereby "the things speak for itself" would apply.

8. The principle of contributory negligence has been discussed time and again. A person who either contributes or author of the accident would be liable for his contribution to the accident having taken place.

9. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It

is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330.*** *From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

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

22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side." *emphasis added*

10. The Apex Court in **Khenyei Vs. New India Assurance Company Limited**

& Others, 2015 LawSuit (SC) 469 has held as under:

"4. It is a case of composite negligence where injuries have been caused to the claimants by combined wrongful act of joint tort feasors. In a case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim of the plaintiff/claimant and need not be determined by the by the court. However, in case all the joint tort feasors are before the court, it may determine the extent of their liability for the purpose of adjusting inter-se equities between them at appropriate stage. The liability of each and every joint tort feasor vis a vis to plaintiff/claimant cannot be bifurcated as it is joint and several liability. In the case of composite negligence, apportionment of compensation between tort feasors for making payment to the plaintiff is not permissible as the plaintiff/claimant has the right to recover the entire amount from the easiest targets/solvent defendant.

14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence;whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination of negligence of two or more other persons. This Court in ***T.O. Anthony v. Karvarnan & Ors. [2008 (3) SCC 748]*** *has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder :*

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

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

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

18. This Court in ***Challa Bharathamma &Nanjappan (supra)*** *has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tort feasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle - trailor-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailor-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tort feasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.*

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tort feasors and to recover the entire compensation as liability of joint tort feasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tort feasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tort feasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tort feasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tort feasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of

impleadment of other joint tort feasors. In such a case, impleaded joint tort feasor should be left, in case he so desires, to sue the other joint tort feasor in independent proceedings after passing of the decree or award." *emphasis added*

11. The latest decision of the Apex Court in **Khenyei (Supra)** has laid down one further aspect about considering the negligence more particularly composite/contributory negligence. The deceased or the person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimised if he had taken care. In this case the deceased was not the author or the co-author of the accident. On facts, the deceased was not plying the vehicle. Hence, the deduction of 30% from the compensation awarded is bad and is set aside. The Insurance Company who will deposit the entire amount can have their right to recover the amount from owner and the Insurance Company of the other vehicle. As far as deceased is concerned, it is a case of composite negligence, hence, the amount cannot be deducted from the compensation awarded to the claimants who are the heirs of a non tort-feasor.

12. Having heard the counsels for the parties and considered the factual data, this Court finds that the accident occurred on 5.12.2000 causing death of Manoj Kumar Gupta who was 31 years of age at the time of accident. The Tribunal has assessed his income to be Rs.9165/- per year which according to this Court, would be at least Rs.11,500/- as Rs.1,000/- can be deducted towards income tax as even in the year 2000, the slab would have above Rs.1,00,000/-. Further, as the deceased was below 40 years of age and was a salaried person, 50% of the income will have to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra).** The amount under non-pecuniary heads should be at least Rs.70,000 + addition 10% per year which would bring to figure under this head approx Rs.1,00,000/- is granted in view of the decision in **Pranay Sethi (Supra).** As far as multiplier is concerned, it would be 16 in view of the decision of the Apex Court in **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121** as the deceased was in the age bracket of 31-35. As far as deduction is concerned, it would be 1/4th as the deceased was survived by his widow, a minor son and parents.

13. Hence, the total compensation payable to the appellants is computed herein below:

i. Income Rs.11,500/-

ii.Percentage towards future prospects : 50% namely Rs.5,750/-

iii. Total income : Rs. 11,500 + 5750 = Rs.17,250/-

iv. Income after deduction of 1/4th : Rs.12,938/- (rounded up)

v. Annual income : Rs.12,938 x 12 = Rs.1,55,256/-

vi. Multiplier applicable : 16

vii. Loss of dependency: Rs.1,55,256 x 16 = Rs.24,84,096/-

viii. Amount under non-pecuniary head : 1,00,000/-

ix. Total compensation : 25,84,100/- (rounded up)

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

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

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

16. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the 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. The amount already deposited be deducted from the amount to be deposited.

17. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagori P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291 and this High Court in** , 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) and in First Appeal From Order No.2871 of 2016 **(Tej Kumari Sharma v. Chola Mandlam M.S. General Insurance Co. Ltd.)** decided on 19.3.2021 while disbursing the amount.

18. This Court is thankful to both the learned Advocates for getting this matter disposed of during this pandemic.

(2021)08ILR A46
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 434 of 2021

M/s RM Dairy Products LLP, Sultanganj, Agra ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Nishant Mishra, Ms. Yashonidhi Shukla

Counsel for the Respondents:
C.S.C., A.S.G.I., Sri Manu Ghildyal, Sri Ashok Singh

A. Tax - The State/Central Goods and Service Tax Rules, 2017 - Rule 86A - The Rule does not contemplate any recovery of tax due from an assessee. It only provides, in certain situations and upon certain conditions

being fulfilled, specified amount may be held back and be not allowed to be utilized by the assessee towards discharge of its liabilities on the outward tax or towards refund. It creates a lien without actual recovery being made or attempted. For a valid exercise of power the authorized officer must have reason to believe that any credit of input tax available had been fraudulently availed or the assessee was not eligible to avail the same. The Rule only enables the authorized officer to not allow debit of an amount equivalent to 'such credit'. (Para 12-16, 22)

In the present case, the competent authority has 'reason to believe' based on material indicating non-existence of the selling dealer. It is thus alleged that the petitioner was not eligible to avail input tax credit as the seller M/s Darsh Dairy Food Products, Agra was a non-existent dealer.(Para 17)

Writ Petition Rejected.(E-8)

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Mr. Nishant Mishra along with Ms. Yashonidhi Shukla, learned counsel for the petitioner, Mr. Manu Ghildyal, learned counsel representing respondent nos. 1 to 3 and Mr. Ashok Singh, learned counsel for respondent no.4.

2. The present writ petition has been filed against the order dated 25.06.2021 passed by respondent no.3 under Rule 86A(1)(a)(i) of the State/Central Goods and Services Tax Rules, 2017 (hereinafter referred as the *"Rules").*

3. Four fold submissions have been advanced by learned counsel for the petitioner. First, relying on Rule 86A (1) of the Rules, it has been submitted that the respondents had no jurisdiction or authority to block any input tax credit over and above any amount that may have been actually available on the date of the order (in this case 25.6.2021).

4. Second, it has been submitted that Rule 86A of the Rules obliges the respondents to record a positive 'reason to believe' that credit of input tax had been fraudulently availed by the petitioner or the petitioner was wholly ineligible to avail the same. Inasmuch as the petitioner had not committed any fraud and it was otherwise eligible to avail the input tax credit, the action taken by the respondents is wholly without jurisdiction.

5. Third, it has been submitted that the input tax credit in dispute arose on account of the purchases made by the petitioner from M/s Darsh Dairy & Food Products, Agra with respect to which, adjudication proceedings are underway against the petitioner in accordance with Section 74 of the UP GST Act, 2017 (hereinafter referred to as the Act). Till those proceedings are concluded, no amount would become recoverable from the petitioner and, therefore, the impugned order passed by respondent no.3 under Rule 86A is wholly premature. In that context, it has also been submitted that Section 78 of the Act provides the manner and mode of recovery. An amount may be recovered only after lapse of three months time from the date of service of the adjudication order. Since the adjudication proceedings are still pending, it has been submitted, the impugned order is wholly premature and without basis.

6. Last, it has been submitted the Act clearly provides for the manner in which an amount may be determined to be due and recoverable from the petitioner. No other procedure may be adopted, as it would

violate the settled principle of law, if the legislature requires an act to be done in a particular manner, it must be done in that manner or not at all.

7. The writ petition has been vehemently opposed by learned counsel for the revenue.

8. Having heard the learned counsel for the parties and having perused the record, plainly, there can be no dispute that the Act prescribes the manner for determination of any tax not paid or short paid. Section 74 of the Act provides for determination of input tax credit wrongly availed or utilized by reason of fraudetc through the process of adjudication. Section 78 of the Act further mandates that any amount that may be determined under Section 74 of the Act may not be recovered for a period of three months from the date of service of the adjudication order.

9. Here, it may be seen that the recovery provision are contained in Section 79 and the enabling Rules. The recovery Rules fall under Chapter XVIII of the State GST Rules 2017 being Rules 142 to 161. On the other hand, Rule 86-A falls under the Chapter heading IX of the Rules regarding payment of tax.

10. Besides the Chapter heading being different, we may record that it is not that difference that prevails in our mind. It is the ambit and purpose of the Rule 86A that appears to be inherently different and independent of the recovery provisions. For that reason we are not inclined to accept the contentions advanced by the learned counsel for the petitioner.

11. Rule 86-A of the Rules reads as below:

"86A. *(1) The Commissioner or an officer authorised by him in this behalf, not below the rank of an Assistant Commissioner, having reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible in as much as-*

a) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36-

(i) issued by a registered person who has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

(ii) without receipt of goods or services or both; or

b) the credit of input tax has been availed on the strength of tax invoices or debit notes or any other document prescribed under rule 36 in respect of any supply, the tax charged in respect of which has not been paid to the Government; or

c) the registered person availing the credit of input tax has been found non-existent or not to be conducting any business from any place for which registration has been obtained; or

d) the registered person availing any credit of input tax is not in possession of a tax invoice or debit note or any other document prescribed under rule 36,

may, for reasons to be recorded in writing, not allow debit of an amount equivalent to such credit in electronic credit ledger for discharge of any liability under section 49 or for claim of any refund of any unutilised amount.

(2) The Commissioner, or the officer authorised by him under sub-rule (1) may, upon being satisfied that conditions for disallowing debit of electronic credit ledger as above, no longer exist, allow such debit.

(3) Such restriction shall cease to have effect after the expiry of a period of

one year from the date of imposing such restriction."

12. Plainly, the Rule does not contemplate any recovery of tax due from an assessee. It only provides, in certain situations and upon certain conditions being fulfilled, specified amount may be held back and be not allowed to be utilized by the assessee towards discharge of its liabilities on the outward tax or towards refund. It creates a lien without actual recovery being made or attempted.

13. The words 'input tax available' used in the first part of sub-rule (1) of Rule 86-A cannot be read as actual input tax available on the date of the order passed under that Rule.Those words are relevant for the purpose of laying down the first condition for the exercise of power by the Commissioner or the authorized officer. Thus, for a valid exercise of power, the authorized officer must have 'reasons to believe' that any credit of 'input tax available' (i.e. that was available in the electronic credit ledger of an assessee) had either been fraudulently availed or the assessee was not eligible to avail the same.

14. The words 'input tax available' have to be read only in the context of the infringement being alleged by the revenue. i.e. fraudulent availment or availment dehors eligibility to the same. Consequently, if an assessee is found to have either fraudulently availed or to have availed such 'input tax credit' that he was ineligible to avail, he may expose himself to action under the Rule, in future, when such an event may come to the knowledge of the authorized officer, subject of course to the rule of limitation.

15. Thus the word 'available' used in the first part of sub-Rules of Rule 86-A would always relate back in time when the assessee allegedly availed input tax credit either fraudulently or which he was not eligible to avail. It does not refer to and, therefore, it does not relate to the input tax credit available on the date of Rule 86-A being invoked. The word "has been" used in Rule 86-A (1) leave no manner of doubt in that regard.

16. *Prima facie,* in the facts of the present case, the revenue alleges fraudulent utilization of input tax credit.Even otherwise, what may fall within the ambit of the word 'ineligible' has been clarified by means of Rule 86-A (1)(a)(i) to include a transaction performed with a registered dealer who may be found to be non-existent or to have not conducted any business etc. Plain reading of the impugned order reveals that it is the revenue's allegation that M/s Darsh Dairy & Food Products, Agra products was found to be non-existent at the disclosed place of business.

17. The recital of that 'reason to believe', is contained in the impugned order. The correctness or otherwise or the sufficiency of the 'reason to believe' is not subject matter of dispute in the instant proceedings. It is the relevancy of that reason to believe with which we are in agreement with Mr. Ghildiyal. Thus, at present, the 'reason to believe' is based on material with the competent authority indicating non-existence of the selling dealer. It is thus alleged the petitioner was not eligible to avail input tax credit as the seller M/s Darsh Dairy & Food Products, Agra was a non-existent dealer.

18. In such facts, purely on a *prima facie* basis and leaving it open to the adjudicating authority to draw its own final conclusion in that regard, for the purpose of

the present writ petition, it cannot be denied that, at present, their exist 'reason to believe' with the revenue authorities that the assessee had fraudulently availed or was ineligible to avail 'input tax credit' with respect to which the impugned order has been passed.

19. As to the third submission advanced by learned counsel for the petitioner, the provision of Rule 86-A is not a recovery provision. In fact, it does not allow the revenue to reverse or appropriate any part of the credit existing in the electronic credit ledger of an assessee or to adjust that credit againstany outstanding demand or likely demand. It is at most a provision to secure the interest of revenue, to be exercised in the presence of the relevant 'reasons to believe', as recorded.

20. The Rule only enables the authorized officer to not allow debit of an amount equivalent to 'such credit'. The submission of Shri Mishra that the words 'such credit' refers only to any existing amount of positive credit in the electronic credit ledger or that it must be credit arising from the same seller, cannot be accepted as that intent is clearly non-existing in the Rule.

21. The operative portion of sub-rule (1) of Rule 86-A limits the exercise of power (by the authorized officer), to the amount that would be sufficient to cover the input tax that, according to the revenue, had either been fraudulently availed or to which the assessee was not eligible. It is an amount equal to that amount which has to be kept unutilised.

22. To that effect, the legislature has chosen the words 'not allow debit'. To not allow debit and to appropriate the same are two different things in the context of the Statute. They lead to different consequences. While the first only creates a lien in favour of the revenue by blocking utilization of that amount, appropriation of an amount would necessarily involve transfer of title over the money with the revenue. Plainly, the Rule does not contemplate or speak of such a consequence.

23. Thus, if the petitioner was to earn any further input tax credit in its electronic credit ledger upto the tune of Rs.7,06,66,700.00/-, the same would be retained by way of a lien in favour of the revenue, so however, that the revenue may not appropriate it under that Rule. Adjustment or appropriation may arise only upon an adjudication order attaining finality or after lapse of three months from the date of it being passed if there is no stay granted in appeal etc. that too as a consequence of the recovery provisions but not under Rule 86-A of the Rules.

24. Since, according to us, the provision of Rule 86-A is not a recovery provision but only a provision to secure the interest of revenue and not a recovery provision, to be exercised upon the fulfillment of the conditions, as we have discussed above, we are not inclined to accept the further submission advanced by the learned counsel for the petitioner that there is any violation of the principle when a legislative enactment requires an act to be performed in a particular way it may be done in that manner or not at all.

25. It also stands to reason, if there is no positive credit standing in the electronic credit ledger on the date of the order, passed under Rule 86-A, that order would be read to create a lien upto limit specified

in the order passed as per Rule 86-A of the Rules. As and when the credit entries arise, the lien would attach to those credit entries upto the limit set by the order passed under Rule 86-A of the Rules. The debit entry recorded in the electronic credit ledger would be read accordingly.

26. Therefore should the assessee earn further credit of 'input tax' the revenue would be entitled to a lien upto the limit of Rs.7,06,66,700.00/-. However, the same shall not be adjusted in favour of the revenue except in accordance with law, as discussed above. Any further credit that may arise over and above that amount would be allowed to be utilized without objection by the revenue.

27. Writ petition is **dismissed**. No order as to costs.

(2021)08ILR A51
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ Tax No. 832 of 2020

M/s Jay Shree Industries ...Petitioner
Versus
Union of India & Anr. ...Respondents

Counsel for the Petitioner:
Sri Vijay Kumar, Awadhesh Kumar Mishra

Counsel for the Respondents:
A.S.G.I., Sri Ramesh Chandra Shukla

A. Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 - Sections 125, 129 & 133 - Words & Phrases - "redemption fine" - In absence of any contrary statutory definition of the word 'penalty' or other specific exclusion of 'redemption fine' from the consequences of issuance of a Discharge Certificate, undoubtedly, the word 'penalty' appearing in section 129 of the Scheme includes, within its ambit, both, a penalty in *personam* and a penalty in *rem*. (Para 31)

Upon the petitioner being eligible under section 125 of the Scheme and upon payment of the entire amount due under section 124 of the Scheme and, in absence of any other objection being raised by the revenue, entitles the petitioner to receive Discharge Certificate. The authorities requiring the petitioner to deposit the 'redemption fine' as a pre-condition to issue the Discharge Certificate is found to be wholly contrary to the law. (Para 37 & 38)

Writ Petition Allowed. (E-8)

List of Cases cited:-

1. Workmen of Cochin Port Trust Vs Board of Trustees of the Cochin Port Trust & anr. (1978) 3 SCC 119

2. Kunhayammed & ors. Vs St.of Kerala & Anr. (2000) 6 SCC 359

3. Srish Chandra Sen & ors. Vs Commissioner of Income Tax, West Bengal AIR 1961 SC 487

4. Sewpujanrai Indrasanarai Ltd. Vs Collector of Customs & ors. AIR 1958 SC 845

5. Collector of Customs, Madras & ors. Vs D. Bhoormaall (1974) 2 SCC 544

6. UOI & Anr. Vs Mustafa & Najbai Trading Co. & ors. (1998) 6 SCC 79

7. R.E.M.S. Abdul Hameed Vs Govindaraju & ors. (1999) 4 SCC 663

8. Commissioner of Income Tax (Central) Vs B.N. Bhattacharjee & Anr. (1979) 4 SCC 121

(Delivered by Hon'ble Naheed Ara Moonis, J. &
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Shri Vijay Kumar along with Shri Awadhesh Kumar Mishra, learned counsel for the petitioner and Shri Ramesh Chandra Shukla, learned counsel for the revenue.

2. Present petition has been filed to quash the order dated 17.11.2020 issued by the Designated Committee, SVLDR Scheme, 2019/Commissioner Central Tax, Central Goods & Services Commissionerate, Ghaziabad. By that order, the said authority has refused to issue the Discharge Certificate in electronic form, in terms of the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (hereinafter referred to as the 'Scheme') for reason of outstanding demand of Rs. 30 lakh against the petitioner, towards redemption fine, for the same transaction and tax period for which the Discharge Certificate has been sought, upon payment of fee computed in terms of section 124 of the Scheme.

3. Briefly, the petitioner is a partnership concern against which an Order-in Original No. 2/A/Ayukt/M-/97 dated 14.08.1997 had been passed creating duty demand of Rs. 1,05,99,382/- together with penalty Rs. 60 lac under the Central Excise Act, 1944. Also, by that order, redemption fine Rs. 30 lac had been determined against the petitioner, in lieu of confiscation of goods under that Act.

4. Upon introduction of the Scheme through the Finance (No.2) Act, 2019, the petitioner applied for issue of the Discharge Certificate under section 127 of the Scheme, with respect to the aforesaid Order-in-Original dated 14.08.1997. It was required to deposit Rs. 63,59,629.20. Undisputedly, the petitioner deposited that amount on 30.06.2020. It did not discharge the liability of redemption fine Rs. 30 lac imposed vide the aforesaid Order-in-Original dated 14.08.1997. The Designated Committee did not issue the Discharge Certificate in absence of deposit of redemption fine Rs. 30 lacs. At that stage, the petitioner filed Writ Tax No. 483 of 2020 wherein, vide order dated 21.10.2020, the petitioner was granted liberty to file a representation relying on the order dated 27.02.2020 passed by the Gujarat High Court in R/Special Civil Application No. 21744 of 2019. The petitioner made compliance of that order. Subsequently, that writ petition came to be dismissed vide order dated 19.11.2020, in view of the order dated 17.11.2020 passed by the Designated Authority. Hence, this writ petition.

5. Learned counsel for the petitioner has submitted: "redemption fine' is a "penalty' and, therefore, by virtue of the clear language of section 129 of the Scheme, no amount of "redemption fine' may be demanded. The petitioner is eligible to the benefit of the Scheme and in view of the further fact that the petitioner has made the requisite deposit in terms of section 124 of the Scheme, it is entitled to its issue. In addition, he has placed heavy reliance on the final decision of the Gujarat High Court dated 27.02.2020 in R/Special Civil Application No. 21744 of 2019. He has further submitted that the Special Leave Petition filed against the aforesaid decision of the Gujarat High Court being Special Leave to Appeal (C) No. 449 of 2021 has been dismissed by the Supreme Court vide order dated 03.03.2021 on the following terms:

"1. We are not inclined to entertain the Special Leave Petition under Article 136 of the Constitution.

2. The Special Leave Petition is accordingly dismissed."

Relying on that order, it has been submitted, the decision of the Gujarat High Court has become binding on the revenue. Next, reliance has been placed on the communication dated 03.06.2013 issued by the Chairperson, Central Board of Excise and Customs (CBEC) to contend, "redemption fine' is "penalty'. Last, learned counsel for the petitioner has placed heavy reliance on the circulars and other communications issued by the departmental authorities (described as flyers and press notes in the decision of the Gujarat High Court), to submit that the departmental authorities have consistently read the provisions of the Scheme to include redemption fine as a penalty and therefore, the separate demand of "redemption fine' does not survive upon payment of the entire amount computed under section 124 of the Scheme.

6. Opposing the writ petition, learned counsel for the revenue submits that the Scheme is part of a fiscal statute. He has therefore invoked the rule of strict interpretation and submitted, the Scheme does not, in any way, include "redemption fine' within the ambit of consequences of the Discharge Certificate under section 129 of the Scheme. Therefore, unless the petitioner were to pay the entire amount of "redemption fine' - Rs. 30 lacs, the Discharge Certificate cannot be issued. Referring to the communication dated 20.12.2019, he would submit that the position in this regard has been clarified by the Central Board of Indirect Taxes and Customs (CBIC in short), to exclude "redemption fine' from "penalty' and therefore, from the scope of the Scheme. He has further submitted that the petitioner had given an undertaking before the Designated Committee to pay the redemption fine once the Discharge Certificate is issued to it. Therefore, invoking estoppel against the petitioner, it has been submitted, the petitioner cannot go against its own undertaking and that the challenge now raised, is merely an afterthought.

7. Having heard learned counsel for the parties and having perused the record, first, we find that the object of the Scheme is only one, being to end legacy disputes. For that object and purpose, the "amount in arrears" has been defined under section 121 (c) of the Scheme. It includes duty amount that is recoverable as arrears under an indirect tax enactment, on account of - either no appeal having been filed or on account of an order in appeal having attained finality or on account of a declarant having filed his return under the indirect tax enactment on or before the cut-off date, 30.06.2019, wherein he may have admitted the duty liability but not discharged the same. The phrase 'amount of duty' has been defined under section 121 (d) of the Scheme to mean the amount of central excise duty, the service tax and the cess payable under the indirect tax enactment.

8. Section 121 (u) of the Scheme provides that words and expressions used in this Scheme, but not defined, would carry the same meaning as may be assigned to them in the indirect tax enactment. In case of conflict between two or more such meanings in any indirect tax enactment, the meaning that is more congruent with the provisions of the Scheme shall be adopted. For ready reference, the provision of section 121 (u) of the Scheme is quoted below:

"(u) all other words and expressions used in this Scheme, but not defined, shall have the same meaning as assigned to them in the indirect tax enactment and in case of any conflict between two or more such meanings in any indirect tax enactment, the meaning which is more congruent with the provisions of this Scheme shall be adopted".

The words "penalty' and "redemption fine' have not been defined, either under the Central Excise Act, 1944 or the Scheme or the Rules framed thereunder.

9. Computation of the relief granted under the Scheme is provided under section 124 of the Scheme. It reads as under:

"124. *(1) Subject to the conditions specified in sub-section (2), the relief available to a declarant under this Scheme shall be calculated as follows:--*

(a) where the tax dues are relatable to a show cause notice or one or more appeals arising out of such notice which is pending as on the 30th day of June, 2019, and if the amount of duty is,--

(i) rupees fifty lakhs or less, then, seventy per cent, of the tax dues;

(ii) more than rupees fifty lakhs, then, fifty per cent, of the tax dues;

(b) where the tax dues are relatable to a show cause notice for late fee or penalty only, and the amount of duty in the said notice has been paid or is nil, then, the entire amount of late fee or penalty;

(c) where the tax dues are relatable to an amount in arrears and,--

(i) the amount of duty is, rupees fifty lakhs or less, then, sixty per cent, of the tax dues;

(ii) the amount of duty is more than rupees fifty lakhs, then, forty per cent of the tax dues;

(iii) in a return under the indirect tax enactment, wherein the declarant has indicated an amount of duty as payable but not paid it and the duty amount indicated is,--

(A) rupees fifty lakhs or less, then, sixty per cent, of the tax dues;

(B) amount indicated is more than rupees fifty lakhs, then, forty per cent, of the tax dues;

(d) where the tax dues are linked to an enquiry, investigation or audit against the declarant and the amount quantified on or before the 30th day of June, 2019 is--

(i) rupees fifty lakhs or less, then, seventy per cent, of the tax dues;

(ii) more than rupees fifty lakhs, then, fifty per cent, of the tax dues;

(e) where the tax dues are payable on account of a voluntary disclosure by the declarant, then, no relief shall be available with respect to tax dues.

(2) The relief calculated under sub-section (1) shall be subject to the condition that any amount paid as predeposit at any stage of appellate proceedings under the indirect tax enactment or as deposit during enquiry, investigation or audit, shall be deducted when issuing the statement indicating the amount payable by the declarant:

Provided that if the amount of predeposit or deposit already paid by the declarant exceeds the amount payable by the declarant, as indicated in the statement issued by the Designated Committee, the declarant shall not be entitled to any refund."

Undisputedly, the entire amount determined in terms of section 124 of the Scheme, Rs. 63,59,629.20 has been paid by the petitioner, within time.

10. The petitioner's eligibility to apply under the Scheme as provided under

section 125 of the Scheme is also undisputed by the revenue. That provision of law includes within the ambit of the Scheme, all persons, excluding those falling under clauses (a) to (h) of sub-section (1) of that section. Persons who have been held ineligible are, amongst others, those who may have been convicted of any offence punishable under any indirect tax enactment or; who may have been subjected to inquiry or investigation or audit though the amount of duty involved in such inquiry, investigation or audit may not have been quantified or; a person who may have made a voluntary disclosure or; a person who may have made a declaration under the Scheme with respect to excisable goods set forth in the Fourth Schedule of the Central Excise Act. Admittedly, the petitioner before us, is not such a person.

11. The consequences of the Discharge Certificate being issued are provided under section 129 of the Scheme. For ready reference, the provisions of section 129 are quoted herein below:

*"**129.** (1) Every Discharge Certificate issued under section 126 with respect to the amount payable under this Scheme shall be conclusive as to the matter and time period stated therein, and--*

(a) the declarant shall not be liable to pay any further duty, interest, or penalty with respect to the matter and time period covered in the declaration;

(b) the declarant shall not be liable to be prosecuted under the indirect tax enactment with respect to the matter and time period covered in the declaration;

(c) no matter and time period covered by such declaration shall be reopened in any other proceeding under the indirect tax enactment.

(2) Notwithstanding anything contained in sub-section (1),--

(a) no person being a party in appeal, application, revision or reference shall contend that the central excise officer has acquiesced in the decision on the disputed issue by issuing the Discharge Certificate under this scheme;

(b) the issue of the Discharge Certificate with respect to a matter for a time period shall not preclude the issue of a show cause notice,--

(i) for the same matter for a subsequent time period; or

(ii) for a different matter for the same time period;

(c) in a case of voluntary disclosure where any material particular furnished in the declaration is subsequently found to be false, within a period of one year of issue of the Discharge Certificate, it shall be presumed as if the declaration was never made and proceedings under the applicable indirect tax enactment shall be instituted."

12. Thus, upon the Discharge Certificate being issued under section 129 of the Scheme, the same would be conclusive as to the matter (resolution of the dispute) and the time period stated in that Certificate. Further, by virtue of clauses (a) (b) and (c) of sub-section (1) of section 129 of the Scheme, such a declarant would not be liable to pay any further amount, either towards duty or interest or penalty with respect to the subject matter in question and the time period covered under the declaration. Second, such a person shall not be prosecuted under the indirect tax enactment with respect to the subject matter and the time period covered under his declaration made. Third, no proceeding would be reopened, and no other proceeding would be initiated against such

a person for that subject matter and tax period. We are called upon to decide whether "redemption fine' is covered under the word "penalty; used in section 129 (1) (a) of the Act.

13. Sub-section (2) of section 129 provides exception to sub-section (1) of the Scheme. Thus, it has been provided: the person in whose favour a Discharge Certificate may have been issued, may not successfully contend that, by virtue of that certificate having been issued, the central excise authority had acquiesced (to the defence of the declarant). Thus, a Discharge Certificate cannot be read as evidence against the revenue in another proceeding. Second, the issue of Discharge Certificate may not prevent the authorities from issuing another notice on the same matter for another time period and it may also not prevent such authority from issuing a notice on another matter for the same time period. Further, by virtue of clause (c) of sub-section (2), it has been provided that the effect of a Discharge Certificate obtained on false declaration may stand wiped out if falsity in the declaration is discovered within a period of one year. Clearly, none of those statutory exclusions are attracted to the facts of the case and none has been pressed into service by the revenue.

14. Under section 133 of the Scheme, the Central Board of Indirect Taxes and Customs (CBIC) has been authorised to issue orders, instructions and directions to the other authorities, for the proper administration of the Scheme. The directions so issued have been made mandatory to be observed and followed by the authorities under the Scheme. For ready reference, the provisions of section 133 are quoted below:

"133. (1) The Central Board of Indirect Taxes and Customs may, from time to time, issue such orders, instructions and directions to the authorities, as it may deem fit, for the proper administration of this Scheme, and such authorities, and all other persons employed in the execution of this Scheme shall observe and follow such orders, instructions and directions:

Provided that no such orders, instructions or directions shall be issued so as to require any designated authority to dispose of a particular case in a particular manner.

(2) Without prejudice to the generality of the foregoing power, the Central Board of Indirect Taxes and Customs may, if it considers necessary or expedient so to do, for the purpose of proper and efficient administration of the Scheme and collection of revenue, issue, from time to time, general or special orders in respect of any class of cases, setting forth directions or instructions as to the guidelines, principles or procedures to be followed by the authorities in the work relating to administration of the Scheme and collection of revenue and any such order may, if the said Board is of opinion that it is necessary in the public interest so to do, be published in the prescribed manner."

Considering the submissions advanced by learned counsel for the petitioner, we have also to examine, whether the communications relied upon by him have binding force on the revenue authorities.

15. The Gujarat High Court, upon a detailed consideration of the Scheme, reached a conclusion that "redemption fine' was included in the term "penalty' appearing under section 129 (1) (a) of the Scheme. To reach that conclusion, that

Court has looked at the intent and object of the Scheme and reasoned that a person against whom "redemption fine' may have been imposed is not excluded from making a declaration under section 125(1) of the Scheme. Then, relying on the Frequently Asked Questions (FAQs), press notes and flyers issued for the smooth implementation of the Scheme, it has been further reasoned, for the purpose of section 129 of the Scheme, there is no other fine contemplated, other than the "redemption fine'. Third, it has been reasoned that the Board's communication dated 20.12.2019 is contrary to the intent and object of the Scheme. Here, it may be relevant to quote the text of the communication dated 20.12.2019:

"F.No.267/78/2019/CS-8
Government of India
Ministry of Finance
Department of Revenue
Central Board of Indirect Taxes and Customs
Dated, the 20th December, 2019
To,
The Principal Commissioner,
CGST Ahmedabad (South) Commissionerate

Subject: SabkaVishwas (Legacy Dispute Resolution) Scheme, 2019-reg

Sir,

I am directed to refer to your letter F.No.CGSt-Ahd(S)/ Legal/SCA-29/19-20 dated 19.12.2019 on the above mentioned subject.

2. The matter has been examined. 'Find' and 'Redemption Fine' denote different things. Section 9 of the Central Excise Act, 1944 provides for the offences and penalties under the Act. The penalties for the offences under the Act may extend to seven years of imprisonment and fine. Needless to say that once the person is granted immunity from prosecution, he also gets waiver from such 'fine'. However, redemption fine is levied in lieu of confiscation Section 34 of the Act, whereby the party can 'redeem' the confiscated goods. Under the scheme, no immunity (Section 129) or relief (Section 124) has been granted for redemption fine.

3. A 'case' under the scheme means 'a show cause notice, or one or more appeals arising out of such notice which is pending as on 30.06.2019' [explanation to rule 3, SVLDRS Rules, 2019]. In the instant case, the SCNs also involve imposition of redemption fine. There are two scenarios that can emerge:

(a) The SCN involving redemption fine has been adjudicated. In this case, redemption fine has been imposed and quantified.

(b) The SCN involving redemption fine is yet to be adjudicated. In other words, the redemption fine has not been imposed or quantified.

The Discharge Certificate [Section 129] which is issued at the end of the proceeding under the Scheme is a full and final closure of the matter and time period stated therein. Therefore, the Discharge Certificate in such cases can only be issued after settlement of redemption fine. In scenario (a) above, it would be mean payment of redemption fine. In scenario (b) above, it would mean adjudication of show cause notice for imposition of redemption fine and payment thereof.

4. The Hon'ble High Court may be apprised of the above position along with the relevant facts of the case.

Yours sincerely,

Sd/-

(Navraj Goyal) OSD(CX)"

16. Then, it has been reasoned that the goods in question (in that case) being not available for confiscation, the "redemption fine' imposed could only be a "penalty'. Last, the rule of interpretation - *contemporanea expositio* was invoked to conclude that the revenue authorities themselves read section 129 of the Scheme to include "redemption fine' within the ambit of "penalty'.

17. While we are obliged to consider the persuasive value of the decision of the Gujarat High Court, we are equally dismissive of the further submission advanced by learned counsel for the petitioner that the same has become the law declared by the Supreme Court, by virtue of dismissal of Special Leave to Appeal filed against that decision of the Gujarat High Court. In ***Workmen of Cochin Port Trust v. Board of Trustees of the Cochin Port Trust & Anr., (1978) 3 SCC 119,*** in the context of an order dismissing a Special Leave Petition in limine, it was clearly explained:

"10. In the instant case the award of the Tribunal, no doubt, was challenged in the special leave petition filed in this Court, on almost all grounds which were in the subsequent writ proceeding agitated in the High Court. There is no question, therefore, of applying the principles of constructive res judicata in this case. What is, however, to be seen is whether from the order dismissing the special leave petition in limine it can be inferred that all the matters agitated in the said petition were either explicitly or implicitly decided against the respondent. Indisputably nothing was expressly decided. The effect of a non-speaking order of dismissal without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to have decided that it was not a fit case where special leave should be granted. It may be due to several reasons. It may be one or more. It may also be that the merits of the award were taken into consideration and this Court felt that it did not require any interference. But since the order is not a speaking order, one finds it difficult to accept the argument put forward on behalf of the appellants that it must be deemed to have necessarily decided implicitly all the questions in relation to the merits of the award. A writ proceeding is a different proceeding..."

Again, in ***Kunhayammed & Ors. v. State of Kerala & Anr., (2000) 6 SCC 359***, it was conclusively laid down by the Supreme Court:

"40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the court, (iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are -- "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the merit worthiness of the petitioner's prayer seeking leave to

file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger".

18. Thus, the order dated 03.03.2021 dismissing the Special Leave to Appeal neither laid down the law of the land nor did the order of the Gujarat High Court merge in that order of the Supreme Court. Therefore, the Gujarat High Court decision has only persuasive value. That we are bound to consider.

19. With all respect, we face our own difficulty and reservations in accepting (in toto), the reasoning contained in the decision of the Gujarat High Court. Merely because the petitioner was eligible to apply for Discharge Certificate under the Scheme, it would not therefore make it entitled to issue of a Discharge Certificate. That eligibility arises under section 125 of the Scheme whereas the consequences of issue of the Discharge Certificate arise under section 129 of the Scheme. Therefore, a person who may be eligible and who may apply under and comply with the terms of the Scheme, may be issued the Discharge Certificate, yet, the benefit of the same may remain confined to the extent provided under section 129 of the Scheme only. In short, in our view, in scope and ambit sections 125 and 129 of the Scheme are different and largely independent of

each other. Merely because the person may be entitled to apply for issue of a Discharge Certificate it would not determine the consequences of its issue. He may continue to remain liable to pay "redemption fine' if that liability is not found to have been expressly dissolved under the Scheme.

20. Insofar as it has been reasoned by the Gujarat High Court that other than "redemption fine', no other fine is contemplated, we would like to look at the controversy in a little different complexion- whether the "redemption fine' would *per se* fall within the meaning of the word 'penalty' used in section 129 of the Scheme. The ambit of that question is limited to that extent as there is no dispute and, perhaps there can be no argument that "redemption fine' is either a 'duty' or 'interest' (which are the other consequences contemplated under section 129 (1) of the Scheme). This aspect, we propose to examine a little later.

21. The reasoning of the Gujarat High Court that "redemption fine' would remain a "penalty' because the goods had already been disposed of (in that case), has not been pressed in the present case. Neither, the facts on that aspect are clear nor we are required to examine that matter in detail since we propose to examine the very nature of "redemption fine'.

22. As to applicability of the rule of *Contemporanea Expositio*, again, with all respect, we find ourselves unable to persuade ourselves to the view taken by the Gujarat High Court. First, other than the communication dated 20.12.2019, none of the communications has been issued by the Central Board of Indirect Taxes and Customs, but by other/subordinate authorities. By virtue of section 133 of the Scheme (quoted above), the Central Board of Indirect Taxes alone is competent to issue mandatory orders, instructions, and directions to the authorities under the Scheme for the purpose of proper administration of its Scheme. Therefore, we are not inclined to look at the other communications (flyers and press notes) relied upon by learned counsel for the petitioner. Second, those communications do not contain expression of any opinion that "redemption fine' is "penalty' under section 129 (1) of the Scheme. Third, the communication dated 20.12.2019 clearly does not support the submission advanced by learned counsel for the petitioner. It speaks of "redemption fine' being different from "penalty'. Therefore, we are unable to accept the submission advanced by learned counsel for the petitioner on that count.

23. The rule of *Contemporanea Expositio* may apply only to cases where, in the first place, the revenue authorities have looked at the law in a particular way and that view taken in favour of the assessee has sustained over a period. Here, neither condition is satisfied. The view taken by the Central Board of Indirect Taxes and Customs is not in favour of the petitioner and, in any case, the Scheme is a recent enactment over which there is no consistent view taken by the departmental authorities.

24. Coming to the main issue, whether "redemption fine' falls within the meaning of the word 'penalty' used in section 129 of the Scheme, we find neither word has been defined under the Scheme or the Rules framed thereunder or the principal Act, namely the Central Excise Act, 1944. Indisputably, the "redemption fine' imposed on the petitioner was payable in lieu of "confiscation'. As to "confiscation', historically, under the

Roman Law, it was an act or desire of taking into hands of the Emperor and, to transfer it to the imperial treasury, the goods or the commodity forfeited. That principle appears to be existing in favour of the State, under the Central Excise Act, 1944 read with the Customs Act, 1962. Here, it may be noted that the powers of "confiscation', though existing under the Customs Act, 1962, have been made applicable to the Central Excise Act, 1944 by virtue of notifications issued under section 12 of the Central Excise Act. Section 9 of that Act provides for penalties punishable with imprisonment, for specified offences. Section 11 AC of that Act provides for monetary penalties for short levy or non-levy of Central Excise duty, in certain cases. Again, section 15 B of that Act provides for levy of monetary penalty for failure to furnish information on return (under section 15A). These penalties are imposable on the "person' offending the law. On the other hand, by virtue of section 110 and other provisions of the Customs Act, 1962 read with notification no. 68/63 dated 04.05.1963 (as amended), goods found to have been cleared in contravention of the Central Excise Act, 1944 may be confiscated.

25. We find that a three-judge bench of the Supreme Court in ***Srish Chandra Sen & Ors. Vs. Commissioner of Income-tax, West Bengal, AIR 1961 SC 487,*** had the occasion to consider the meaning of the word 'redemption' in the context of the Income Tax Act, 1922. In that background, it was observed as under:

"18. We next consider the effect of redemption. Learned counsel for the appellant contends that redemption in this connection means that by a single payment, the liability for periodical payments is saved but the assessment on the land remains uncancelled. He has cited Wharton's Law Lexicon to show the meaning of the word "redemption", which is "commutation or the substitution of one lump payment for a succession of annual ones: e.g. See the Land Tax and the Title Redemption Acts and many other statutes". Redemption is the act of redeeming which in its ordinary meaning is equal to bringing off a charge or obligation by payment. To what extent this redemption freed the land or its holder from the obligation depends not so much upon what the obligation was before redemption as what remained of that obligation after it. Here, the payment itself was meant to be "an immediate payment of one sum equal in value to the revenue redeemed" (vide the Resolution of Government dated October 17, 1861). By the down payment, the entire land revenue to be recovered from that land was redeemed. The payment was equal to the capitalised value of the land revenue. When such a payment took place, it cannot be said that the assessment for land revenue remained. The land was freed from that assessment as completely as if there was no assessment. Thenceforward, the land would be classed as revenue-free, in fact and in law. In The Land-Law of Bengal (Tagore Law Lectures, 1895) p. 81 S.C. Mitra described these revenue-free lands as follows:

"There is another class of revenue-free lands which comes within these rules laid down in the Registration and Tenancy Acts, namely, lands of which Government has, in consideration of the payment of a capitalised sum, granted proprietary title free in perpetuity from any demand of land-revenue.""

26. Section 34 of the Central Excise Act, 1944 creates a fine in lieu of "confiscation'. It reads:

"34. Option to pay fine in lieu of confiscation.*-Wherever confiscation is*

adjudged under this Act or the rules made thereunder, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks".

The above provision is similar in scope and ambit to section 125 of the Customs Act, 1962 which reads:

"125. Option to pay fine in lieu of confiscation.--(1) *Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:*

.....

.....

.....

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods".

Plainly, same, or similar concept of "confiscation' exists both under the Customs Act, 1962 and the Central Excise Act, 1944. It allows the revenue authorities to seize and confiscate any goods found offending those legislations. Under both enactments, such confiscation is in addition to the other penalties prescribed against the person offending the laws in the transaction that may give rise to an act of "confiscation'. Again, under both legislations, there is a right given to the offender to reclaim the title in the confiscated goods, subject to payment of an amount in addition to the other penalties that may have been imposed. That amount is known as the "redemption fine', under both laws.

27. Thus, upon "confiscation', the title in the goods vests in the State. Yet, by virtue of section 34 of the Central Excise Act, 1944, an opportunity is given to the offender to reclaim that title in those goods through payment of "redemption fine', in addition to all other dues of tax/duty, interests and liabilities of other penalties.

28. Considering the nature of "confiscation' under the Foreign Exchange Act, a five judge Constitution Bench of the Supreme Court in ***Sewpujanrai Indrasanarai Ltd. v. Collector of Customs & Ors., AIR 1958 SC 845,*** at that early stage, had made a distinction between the penalty imposed on a citizen for violating the law and, a penalty imposed on the offending goods, both penalties arising from one transaction. The first was categorized as a penalty in *personam*, visiting the offender/person whereas confiscation was held to be a penalty in rem, visiting the goods. That penalty being imposed on the offending goods may be imposed even if the ownership in the goods remains undetermined or in doubt or in dispute and even if a penalty in *personam* may remain from being imposed. In paragraph 15 of that decision, it was held as below:

"(15) We do not so decide, but let us assume that the construction put forward on behalf of the appellant is the one that should be accepted in this case. The question then is-does S. 23 of the Foreign Exchange Act apply o the facts of this case and could the appellant Company be proceeded against under that section? A

distinction must at once be drawn between an action in rem and a proceeding in personam. Section 23 of the Foreign Exchange Act is a proceeding against the offender, and is applicable to the person who contravenes any of the provisions of that Act, even though on a conviction for such contravention, the Court may, if it thinks fit and in addition to any sentence which it may impose for such contravention, direct that the goods in respect of which the contravention has taken place be confiscated. In substance it is a proceeding against a person for the purpose of penalising him for a contravention of the provisions of the Foreign Exchange Act, and such a proceeding is available when the offender is known. Take, however, a case where the offender (the smuggler, for example) is not known, but the goods in respect of which the contravention has taken place are known and have been seized. Section 167(8) of the Sea Customs Act contemplates a case of this nature, when it describes the offence in Col. 1 in the following words:

"If any goods, the importation or exportation of which is ..... prohibited or restricted be imported into or exported from India contrary to such prohibition or restriction."

The penalty provided is that the goods shall be liable to confiscation. There is a further provision in the penalty column that any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods etc. The point to note is that so far as the confiscation of the goods is concerned, it is a proceeding in rem and the penalty is enforced against the goods whether the offender is known or not known; the order of confiscation under section 182 Sea Customs Act, operates directly upon the status of the property, and under S. 184 transfers an absolute title to Government. Therefore, in a case where the Customs authorities can proceed only against the goods, there can be no question of applying S. 23 of the Foreign Exchange Act and even on the construction put forward on behalf of the appellant Company as respects S. 8(3), the remedy under the Sea Customs Act against the smuggled goods cannot be barred; when on the facts of the case S. 23 can have no application, no question of prejudicing its provisions by the adoption of the procedure under the Sea Customs Act can at all arise."

29. The question again arose in another case before the Supreme Court in ***Collector of Customs, Madras & Ors. v. D. Bhoormall, (1974) 2 SCC 544,*** in the context of the Customs Act, 1878. The same principle was followed and applied. The imposition of penalty on the offender was treated to be a penalty in *personam* whereas the penalty of confiscation of the goods was treated to be penalty in *rem.* Relevant to our discussion in paragraphs 22 and 23 of the aforesaid decision, it was held:

"22. A reading of Section 167(8) and the related provisions indicates that proceedings for confiscation of contraband goods are proceedings in rem and the penalty of confiscation under the first part of the entry in column (3) of clause (8) of the Schedule, is enforced against the goods irrespective of whether the offender is known unknown. But, imposition of the other kind of penalty, under the second part of the entry in column (3), is one in personam ; such a penalty can be levied only on the "person concerned" in any offence described in column (I) of the clause.

23. Goods found to be smuggled can, therefore, be confiscated without proceeding against any person and without ascertaining who is their real owner or who was actually concerned in their illicit import."

30. Last, in ***Union of India & Anr. Vs. Mustafa & Najibai Trading Co. & Ors., (1998) 6 SCC 79***, the above noted principle of law was again reiterated in the context of the Customs Act, 1962. It was thus held as below:

"33. Similarly, in the case of D. Bhoormall, (1974) 2 SCC 544, this Court, while considering the provisions of Section 167(8) of the Sea Customs Act, 1878, has pointed out that proceedings for confiscation of contraband goods are proceedings in rem and the penalty of confiscation is enforced against the goods irrespective of whether offender is known or unknown and it is not necessary for the Customs authorities to prove that any particular person is concerned with their illicit importation or exportation and it is enough if the department furnishes prima facie proof of the goods being smuggled stocks. It was observed that the second kind of penalty which is enforced against the person concerned in the smuggling of the goods is one in personam and in the case of the said penalty the Department have to prove further that the person proceeded against was concerned in the smuggling. It was held that "goods found to be smuggled can, therefore, be confiscated without proceeding against any person and without ascertaining who is their real owner or who was actually concerned in their illicit import." [pp. 550, 551 and 554]

34. This distinction between the nature of the two penalties , viz., penalty in rem and penalty in personam, has been maintained in the Act. The provision regarding confiscation of goods contained in Sections 111 and 113 of the Act is a penalty in rem which is enforced against the goods, while the personal penalties imposed under Section 112 and other provisions of the Act are in the nature of penalty in personam which are enforced against the person concerned."

31. In view of that law laid down by the Supreme Court, "confiscation' is nothing but a penalty in *rem.* Redemption fine, by virtue of Section 34 of the Central Excise Act, is only a payment made in lieu of this penalty. Upon any "confiscation' made under the Act, the option to pay an equivalent fine is required to be provided. It is not possible to say that the nature of "confiscation' under the Act and a fine in lieu thereof is somehow different. "Redemption fine' must necessarily also be considered a 'penalty' against the offending goods. Further, in absence of any contrary statutory definition of the word 'penalty' or other specific exclusion of 'redemption fine' from the consequences of issuance of a Discharge Certificate (under section 129 of the Scheme), undoubtedly, the word 'penalty' appearing in section 129 of the Scheme includes, within its plain ambit, both, a penalty in *personam* and a penalty in *rem.* Here, both, personal penalty and the penalty in rem arose from a single transaction. Clearly, both penalties are part of the same dispute, for a common period. It is so because even according to the revenue both those penalties were imposed vide the Order-in-Original 2/A/Ayukt/M/97 dated 14.08.1997. Though that order has not been shown to us, yet it is not the case of the revenue that the "redemption fine' in question was imposed on the petitioner, independent of that order. The revenue only contends that by its very nature,

"redemption fine' is not a "penalty' at all. That submission is contrary to the law laid down by the Supreme Court. We have no hesitation to hold, "redemption fine' is a kind or type of "penalty' under the Central Excise Act, 1944.

32. Now, we choose to consider the intent and object of the Scheme. Though incorporated with reference to a fiscal statute, it does not create a charge or levy of tax. Rather, it represents and implements the Union Government's policy to reduce legacy litigation involving disputed levies of indirect taxes under twenty-eight (28) specified indirect tax enactments under section 122 (a) and (b) of the Scheme and, any other enactment that may have been notified for that purpose. To end such legacy litigation, the Scheme first lays down strict eligibility, under section 125 of the Scheme. Undisputedly, the present petitioner is eligible to apply for issue of the Discharge Certificate. The Scheme provides for (legacy dispute) resolution upon payment of thirty to sixty percent of the disputed demand of tax dues. By virtue of section 123 of the Scheme, "tax dues' are the total disputed amount of duty only.

33. Thus, the legislation seeks to reduce indirect tax legacy litigation, against positive payment of a part (according to the predetermined rates) of the disputed dues of tax. Remarkably, the Scheme requires the applicant/assessee to pay part of the disputed dues of tax even to obtain closure to any appeal filed by the revenue. Also, the legislation is not an amnesty scheme - to encourage voluntary disclosures of hitherto undisclosed, evaded taxes. Rather, by virtue of section 124 (1) (e) of the Scheme, it purposely denies any relief to persons who may have made a voluntary disclosure. Clearly, the Scheme is a reform legislation. It seeks to end old or pending indirect tax disputes, against payment of a substantial part of the disputed tax amount.

34. While interpreting another reformatory legislation involving land laws, in ***R.E.M.S. Abdul Hameed v. Govindaraju & Ors., (1999) 4 SCC 663,*** the Supreme Court considered whether a minor inam came within the purview of the Tamil Nadu Minor Inams (Abolition and Conversion into Ryotwari) Act, 1963 or it would fall under the Madras Inam Estates (Abolition and Conversion into Ryotwari) Act, 1963, (hereinafter referred to "Act 26 of 1963"), in the reformatory nature of the Act, the Supreme Court relied on the intention of the legislature to include all inams. It further opined that any exclusion claimed must arise on "unimpeachable evidence" and not ipse dixit. It was thus held:

"12. Returning to the present case, to be out of Act 26, the area of grant to the appellants should not constitute to be a "part-village estate" and for this the appellants have to prove that its grant was expressed "only in terms of acreage or cawnies etc.". Unless this is shown exclusion from the Act cannot be gained. Looking back to the history of legislation of inam estates, the intention of the legislature was to encompass all inam estates within its fold and if small exclusion is made, the exclusion has to be read keeping with the intention of legislation. The exclusion cannot be read by ipse dixit but only through clear and unimpeachable evidence. The legislature further makes it clear through sub-section (9) of Section 2 of Act 30 of 1963 that it is only such area of grant which is not included within the purview of Act 26 of 1963 as will constitute to be "minor inam" under Act 30 of 1963".

35. As noted above, the Scheme being a piece of reformative legislation, "redemption fine' that is a penalty in rem must clearly be shown to have been excluded from the meaning of the word "penalty' used in section 129 of the Scheme, before it may be inferred that a Discharge Certificate may be issued only upon payment of the "redemption fine'/penalty in *rem.* In absence of any provision to exclude "redemption fine'/ penalty in rem from the benefits of the Discharge Certificate contained in section 129 of the Scheme, no such inference may be drawn, against the plain language and intent of the Scheme. In absence of any express exclusion created by the Scheme, "redemption fine' would always remain a "penalty' covered under the meaning of that word used in section 129 (1) (a) read with section 121 (u) of the Scheme. Thus, we have reached the same conclusion on the point as the Gujarat High Court, but for reasons of our own.

36. That being the law, the further objection of the revenue based on the rule of estoppel is devoid of any merit. In ***Commissioner of Income Tax (Central) v. B.N. Bhattacharjee & Anr., (1979) 4 SCC 121,*** it was clearly opined that estoppel does not operate against a statute. The Supreme Court had laid down:

"58. The soul of estoppel is equity, not facility for inequity. Nor is estoppel against statute permissible because public policy animating a statutory provision may then become the casualty. Halsbury has noted this sensible nicety:

"Where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person charged with the performance of the duty cannot by estoppel be prevented from exercising his statutory powers. [Maritime Electric Co. Ltd. v. General Diaries Ltd., 1937 AC 610 and HALSBURY'S LAWS OF ENGLAND, para 1515]

A petitioner in a divorce suit cannot obtain relief simply because the respondent is estopped from denying the charges, as the court has a statutory duty to inquire into the truth of a petition. [Hudson v. Hudson, 1948 P. 292 and HALSBURY'S LAWS OF ENGLAND, para 1515] "

The luminous footnote cites rulings and states that:

"This rule probably also applies where the statute bestows a discretion rather than imposing a duty. [HALSBURY'S LAWS OF ENGLAND, 4th Edn., p. 1019]"

To sum up, where public duties cast by statute are involved, private parties cannot prevent performance by invoking estoppel. We do not discuss further since the facts here exclude estoppel".

We have no reason to apply a different yardstick to allow the respondent authorities to overlook the clear and binding statutory provision, in favour of the concession claimed to have been made by the petitioner. The concession, if any, made by the petitioner in the Discharge Certificate proceedings - to deposit the "redemption fine', would remain contrary to the express provision of law and therefore unenforceable and of no consequence.

37. In the result, upon the petitioner being eligible under section 125 of the Scheme and upon payment of the entire amount due under section 124 of the Scheme and, in absence of any other objection being raised by the revenue, clearly, the petitioner is entitled to issue of the Discharge Certificate.

38. Accordingly, the present petition is **allowed.** The communication dated

20.12.2019 issued by the CBIC providing for payment of "redemption fine' in addition to the settlement amount paid under section 124 of the Scheme and further providing that the Discharge Certificate under the Scheme may not be issued unless that fine has been paid, is clearly contrary to the Scheme. To that extent it is unenforceable against the petitioner. The order dated 17.11.2020 issued by the Designated Committee, SVLDR Scheme, 2019/Commissioner Central Tax, Central Goods & Services Commissionerate, Ghaziabad, requiring the petitioner to deposit the 'redemption fine' as a pre-condition to issue the Discharge Certificate is found to be wholly contrary to law for the same reason. The said order is accordingly set-aside, and a Mandamus is issued to the said respondent to issue the Discharge Certificate to the petitioner within a period of two weeks from the date of service of a copy of this order.

39. No order as to costs.

(2021)08ILR A67
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 1610 of 2021

Sarvesh Kumar Dixit ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Vijay Dixit

Counsel for the Respondents:
C.S.C.

A. Service Law – Dismissal – Departmental Enquiry - U.P. Government Servant (Discipline and Appeal) Rules, 1999 – The departmental enquiry should be conducted and concluded in accordance with law and for conducting oral enquiry the date, time and place must be fixed intimating the incumbent about such date, time and place and proper opportunity should be extended to an employee. If any departmental enquiry, which is initiated and contemplated for awarding major punishment is conducted without providing an ample opportunity to the employee for conducting oral enquiry, such departmental enquiry vitiates and does not sustain in the eyes of law. Consequently, if any, punishment order is passed following such enquiry report, such punishment shall also be vitiated and shall not be sustainable in the eyes of law. (Para 6)

Writ petition allowed. (E-3)

Precedent followed:

1. St.of U.P. & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772 (Para 6)

2. Roop Narain Pandey Vs U.P. Co-operative Institutional Service Board & ors., 2019 (3) ADJ 9 (Para 7)

3. Chairman L.I.C. Vs A. Masilamani, (2013) 6 SCC 530 (Para 8)

Present petition assails dismissal order dated 08.05.2020.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Sri Vijay Dixit, learned counsel for the petitioner has filed rejoinder affidavit to the counter affidavit filed on behalf of the opposite party no. 2, which is taken on record.

2. Heard Sri Sandeep Dixit, learned Senior Advocate assisted by Sri Vijay Dixit, learned counsel for the petitioner and

Sri Vivek Kumar Shukla, learned Standing Counsel for the State.

3. By means of this petition, the petitioner has assailed the dismissal order dated 8.5.2020 passed by opposite party no. 1 (Annexure-1 to the writ petition). The main ground to assail the impugned order of dismissal is that the dismissal order has been passed on the basis of enquiry wherein no date time and place was fixed and the petitioner was not afforded an opportunity of hearing as per law therefore, the enquiry proceeding vitiates and consequent thereto the punishment order of dismissal also vitiates.

4. So as to strengthen his legal submission, the learned Senior Advocate for the petitioner has referred paragraph no. 14 and paragraph nos. 37 to 43 of the writ petition and the reply of the aforesaid paragraphs has been given in the counter affidavit in paragraph nos. 20 and 37 whereby those contents of writ petition has not been denied with material.

5. Precisely, by means of paragraph no. 14 of the writ petition the specific averments have been made that no date, time and place has been fixed by the Enquiry Officer. In fact no enquiry has been conducted by the Enquiry Officer in terms of the provisions as contemplated in the provision of U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as the ' Rules, 1999'). The enquiry officer has submitted its report on 15.11.2018. In other paragraph nos. 37 to 43 of the petition, the same averments have been made by the petitioner. While replying the aforesaid contention of paragraph No. 14 of the writ petition, the opposite party in paragraph No. 20 has, however, denied the contents of paragraph no. 14 but it is nowhere explained as to how the date, time and place has been fixed for conducting the oral enquiry. Likewise while replying paragraph nos. 37 to 43 of the writ petition the opposite party in paragraph no. 37 of the counter affidavit has not denied the specific averments of those paragraphs and only this much has been indicated that the punishment order of dismissal has been passed strictly on the basis of Rules, 1999.

6. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that the departmental enquiry should be conducted and concluded in accordance with law and for conducting oral enquiry the date, time and place must be fixed intimating the incumbent about such date, time and place and proper opportunity should be extended to an employee. If any departmental enquiry, which is initiated and contemplated for awarding major punishment is conducted without providing an ample opportunity to the employee fixing date, time and place for conducting oral enquiry, such departmental enquiry vitiates and does not sustain in the eyes of law. Consequently, if any, punishment order is passed following such enquiry report, such punishment shall also be vitiated and shall not be sustainable in the eyes of law. The Hon'ble Apex Court in ***Re: State of Uttar Pradesh and others Vs. Saroj Kumar Sinha (2010) 2 Supreme Court Cases 772*** has held that if the departmental enquiry is contemplated without adopting the procedure of law and without affording ample opportunity of hearing to the petitioner and without fixing date, time and place, such departmental enquiry shall vitiate. The relevant paragraph no. 39 reads as under:-

"39.The proposition of law that a government employee facing a department

enquiry is entitled to all the relevant statement, documents and other materials to enable him to have a reasonable opportunity to defend himself in the department enquiry against the charges is too well established to need any further reiteration. Nevertheless given the facts of this case we may re-emphasise the law as stated by this Court in the case of State of Punjab Vs. Bhagat Ram: (SCC p. 156. paras 6-8):

"6. The State contended that the respondent was not entitled to get copies of statements. The reasoning of the State was that the respondent was given the opportunity to cross-examine the witnesses and during the cross-examination the respondent would have the opportunity of confronting the witnesses with the statements. It is contended that the synopsis was adequate to acquaint the respondent with the gist of the evidence.

7. The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the government servant is afforded a reasonable opportunity to defend himself against the charges on which inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the government servant. Unless the statements are given to the government servant he will not be able to have an effective and useful cross-examination.

8. It is unjust and unfair to deny the government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the government servant. A synopsis does not satisfy the requirements of giving the government servant a reasonable opportunity of showing cause against the action proposed to be taken."

7. This Court in ***Re:Roop Narain Pandey Vs. U.P. Co-operative Institutional Service Board and Ors. 2019 (3)ADJ 9*** has considered the similar controversy and the relevant paragraph nos. 13 to 25 read as under:-

*13. In the case of **Meenglas Tea Estate v. The workmen., AIR 1963 SC 1719,** the Hon'ble Supreme Court observed that it is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way to cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted.*

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

*15. In **Punjab National Bank v. A.I.P.N.B.E. Federation, AIR 1960 SC***

160, (vide para 66), *the Hon'ble Apex Court held that in such enquiries evidence must be recorded in the presence of the charge-sheeted employee and he must be given an opportunity to rebut the said evidence. The same view was taken in* ***A.C.C. Ltd. v. Their Workmen, (1963) II LLJ. 396,*** *and in* ***Tata Oil Mills Co. Ltd. v. Their Workmen, (1963) II LLJ. 78 (SC).***

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

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

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

18. In the ***State of Uttar Pradesh v. Saroj Kumar Sinha, reported in (2010) 2 SCC 772,*** *the Hon'ble Apex Court held that:-*

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

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

19. Similar view was taken by the ***Hon'ble Apex Court in Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570*** *as under:-*

"Indisputably, a departmental proceeding is a quasi-judicial proceeding.

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

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

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

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

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

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

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

23. The Division Bench of this Court in the case of ***Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570*** *has held as under:-*

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can

certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

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

25. Recently the entire law on the subject has been reviewed and reiterated in ***Chamoli District Co-operative Bank Ltd. Vs. Raghunath Singh Rana and others, AIR 2016 SC 2510*** *and the Hon'ble Apex Court has culled out certain principles as under:*

"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 and 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."

8. During the course of argument, learned Additional Chief Standing Counsel has, however, submitted that if this Court arrives on conclusion that this is the case of no enquiry and the order of dismissal is liable to be set aside, then in the light of decision of Hon'ble Apex Court in **Re: Chairman L.I.C. Vs. A. Masilamani (2013) 6 SCC 530** the matter should be remanded back to the authority concerned to pass order strictly in accordance with law, particularly from the stage of defect.

9. Accordingly, considering the aforesaid submissions and legal propositions, **the writ petition is allowed.**

10. A writ in nature of certiorari is issued and the impugned order dated 8.5.2020 passed by opposite party no. 1 (Annexure-1 to the writ petition) is, hereby, quashed

11. The consequences to follow.

12. It is needless to say that if the competent authority wants to pass appropriate order following due procedure of law and rules, such order may be passed with expedition preferably within a period of three months. It is also provided that in view of decision of Hon'ble Apex Court in ***Re: Chairman L.I.C. Vs. A. Masilamani (2013) 6 SCC 530,*** the fresh order may be passed rectifying the legal error from the stage of defect.

13. No order as to costs.

(2021)08ILR A73
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN

Service Single No. 4290 of 2014

Bhagwan Das ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shobha Nath Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – Regularization – Principles of Parity - U.P. Regularization of Daily Wages Appointment on Group-D Posts Rules, 2001 - If any employee has engaged as a daily wager prior to cut off date i.e. 29.6.1991 and is serving as daily wager on 21.12.2001, the date of commencement of the Rules, 2001, his services should have been regularized in terms of regularization Rules, 2001.

It has been not disputed that the judgment of this Court *in re: Janardan Yadav* (infra), laying down the abovementioned preposition, has not been quashed or modified by the Division Bench of this Court or by Hon'ble Apex Court, therefore, that judgment is still a good law governing the field. Further, the services of identically placed employees have been regularized following this decision, therefore, on the basis of principles of parity the services of the petitioner may be regularized in terms of the directions issued *in re: Janardan Yadav* (infra). (Para 9, 10)

Writ petition allowed. (E-3)

Precedent followed:

1. Janardan Yadav Vs St. of U.P., 2008 (1) ADJ 60 (Para 6)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Shobh Nath Pandey, learned counsel for the petitioner and Sri Vinod Kumar Shukla, learned Standing Counsel for the State-respondents.

2. By means of this writ petition, the petitioner has prayed for the following reliefs:-

"(i) to issue a writ, order or direction in the nature of certiorari, thereby quashing the impugned order dated 25.06.2014, passed by the opposite party No.3, as contained in Annexure No.1 to this writ petition.

(ii) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties to regularize the services of the petitioner in pursuance of U.P. Regularization of Daily Wages Appointments on Group-D Posts Rules, 2001.

(iii) to issue a writ, order or direction in the nature of mandamus thereby commanding the opposite parties to pay the minimum of pay-scale to the petitioner with immediate effect in the interest of justice."

3. Learned counsel for the petitioner has assailed the order dated 25.06.2014 passed by the Divisional Forest Officer, District-Faizabad rejecting the claim of the petitioner for regularization.

4. Learned counsel for the petitioner has drawn attention of this Court towards the impugned order dated 25.06.2014 wherein this is admission on the part of the opposite parties that the petitioner has discharged his duties from March 1991 to June 1991, September 1991 to June 1992, August 1992 to October 1992, December, 1992 to June 1994, August 1994 to April 1996 and December 2000 to March 2004.

5. As per the opposite parties, the petitioner has not discharged his continuous duties with effect from the cut off date i.e. 29.06.1991 till 21.12.2001, the date of commencement of Rules, so his claim has been rejected. The relevant Rules are known as U.P. Regularization of Daily Wages Appointment on Group-D Posts Rules, 2001 (here-in-after referred to as the "Rules, 2001").

6. Learned counsel for the petitioner has placed reliance of the decision of this Court rendered in re: ***Janardan Yadav vs. State of U.P.*** reported in ***[2008 (1) ADJ 60]*** referring para-8, whereby this Court has held that if any daily wager has been engaged prior to cut off date i.e. 29.06.1991 so indicated in the Rules, 2001 and was working on the date of commencement of Rules, 2001 i.e. 21.12.2001, the services of such employee should be regularized in terms of Rules, 2001. Therefore, as per learned counsel for the petitioner, the petitioner was admittedly discharging his duties in the month of March, 1991 and he was also discharging his duties on 21.12.2001, therefore, the candidature of the petitioner was worth to be regularized in terms of Rules, 2001.

7. However, Sri Vinod Kumar Shukla, learned Standing Counsel has submitted that so far as the judgment of this Court in re: ***Janardan Yadav (supra)*** is concerned, he has nothing to say but the petitioner has not discharged his duties since May, 1996 till November, 2000 i.e. more than four years period and that period may be considered as artificial break, however, for the remaining period of service rendered by the petitioner there are some artificial break.

8. Sri Shukla has further submitted that however such regularization rules has again been amended in the year 2016 wherein the cut off date has been fixed as 21.12.2001, therefore, the candidature of the petitioner may be considered under the amended Rules, 2016.

9. Be that as it may, para-8 of the judgment in re: ***Janardan Yadav (supra)*** is very clearly providing that if any employee has engaged as a daily wager prior to cut off date i.e. 29.06.1991 and is serving as daily wager on 21.12.2001, the date of commencement of the Rules, 2001, his services should have been regularized in terms of regularization Rules, 2001. For convenience, para-8 of the aforesaid judgment is being reproduced here-in-below:-

"8. The said stand is contrary to the Rules and it amounts to reading certain words in Rule 4(1) which is not provided

therein by the Rule framing authority. The rule framing authority has not framed the aforesaid Rules in manner as are being read by the respondents. Since the Rules are applicable only to daily wage employees, the Rules framing authority was aware that such employee could not have worked continuously throughout and, therefore, has clearly provided that the engagement must be before 29.6.1991 and he is continuing as such on the date of commencement of the Rules. If a daily wage engagement has been made before 29.6.2001 and was continuing on 21.12.2001, meaning thereby the daily wage engagement remained necessity of the department or the requirement thereof for more than 10 years, for such a person only, the benefit of regularization under 2001 Rules has been provided and it nowhere requires further that the incumbent must have worked continuously from the date of initial engagement till the commencement of these Rules and to read these words would amount to legislation, which is not permissible in law. While interpreting the statute, it is well settled that neither any word shall be added nor be subtracted but if a plain reading of the statute is clear and unambiguous, the same has to be followed as such. This Court does not find any ambiguity in Rule-4(1) providing as to which kind of persons would be entitled for regularization and it nowhere requires that the incumbent must have worked throughout from the date of initial engagement till the date of commencement of the Rules."

10. It has been not disputed at the bar that the judgment of this Court in re: ***Janardan Yadav (supra)*** has not been quashed or modified by the Division Bench of this Court or by Hon'ble Apex Court, therefore, that judgment is still a good law governing the field. Further, the services of identically placed employees have been regularized following the decision of this Court in re: ***Janardan Yadav (supra)***, therefore, on the basis of principles of parity the services of the petitioner may be regularized in terms of the directions being issued in re: ***Janardan Yadav (supra)***.

11. Accordingly, the writ petition is allowed. The impugned order dated 25.06.2014, passed by the opposite party No.3, which is contained as Annexure No.1 to the writ petition, is hereby quashed.

12. A writ in the nature of mandamus is issued commanding the opposite parties to regularize the services of the petitioner, strictly in accordance with law and provide him all consequential service benefits which are admissible for regular employees of the department.

13. No order as to costs.

(2021)08ILR A75
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.07.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 6747 of 2021

Durgesh Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Raj Kumar Upadhyaya(R.K.)

Counsel for the Respondents:
C.S.C., Kaushalendra Yadav

A. Service Law – Compassionate Appointment - Dying in Harness Rules, 1974 - The required condition for appropriate post should be fulfilled by the

candidate holding such post and there cannot be any compromise. This Court may not relax such condition, inasmuch as, this is a domain of concerning authority to fix mandatory condition for particular post. Impugned order dated 22.9.2021 cannot be interfered with as far as it provides that on account of non-obtaining the required condition the petitioner would not be eligible to hold the post of Junior Assistant. (Para 9)

B. The appointment on compassionate ground is not a temporary appointment but has to be treated as permanent appointment and any condition which makes such appointment conditional may not be permissible. The law stipulates that the appointment under Dying-in-Harness Rule is of permanent nature and as per letter and spirit of the particular rule, any suitable appointment on compassionate ground is provided to one eligible member of the family of deceased employee at the earliest so that sufferance and distress of the family could be met out. Therefore, it would not be proper, if such appointment is provided subject to any condition, which if not fulfilled may cause cancellation of appointment. (Para 10, 11, 13)

In the present case since the petitioner was not able to achieve the required typing speed at that point of time, therefore, if competent authority may deem fit and proper, may provide another opportunity to the petitioner taking his typing test but if the authority does not find it feasible, at least any **appropriate appointment as per his educational qualification may be provided to the petitioner** so that the family of deceased employee who died in-harness could survive properly. (Para 14)

Writ petition disposed off. (E-3)

Precedent followed:

1. Shakuntala Devi Vs St. of U.P. & ors., Writ-A No. 9255 of 2017, decided on 20.04.2017 (Para 11)

2. Ravi Karan Singh Vs St. of U.P. & ors., 1999 (2) A.W.C. 976 All. (Para 12)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri R.K. Upadhyaya, learned counsel for the petitioner and learned Standing Counsel for the State.

2. The question for consideration is that as to whether the compassionate appointment can be provided subject to the fulfillment of any condition to be completed in future failing which that appointment would be cancelled. To be more precise, as to whether the nature of compassionate appointment can be uncertain or temporary or it should have permanent character.

3. The brief facts of the case are that the father of the petitioner died in harness on 15.11.2017 while working on the post of Senior Assistant in the office of District Election Officer, Barabanki. After his death the petitioner was appointed on the post of Junior Assistant on compassionate basis on 02.05.2018 under the provisions of Dying-in-Harness Rule, 1974. He submitted his joining on such post on 17.09.2018.

4. In the aforesaid appointment order the petitioner was required to submit CCC certificate from DOEACC Society in Computer Operation within a year or any certificate from recognized, equivalent society along with 25 W.P.M. typing speed. The petitioner submitted CCC certificate on 12.02.2020 obtained from National Institute of Electronics and Information Technology (NIELIT).

5. Precisely, the grievance of the petitioner is that he was provided appointment on compassionate ground in the respondent department and said appointment was conditional to the effect

that in case the petitioner completes the course of CCC certificate and acquires typing speed of 25 W.P.M., his appointment shall continue. As per impugned order, the petitioner could not obtain the required typing speed i.e. 25 W.P.M., therefore, his services have been terminated.

6. The case set up by the learned counsel for the petitioner challenging the impugned order on the premise that the appointment under Dying-in-Harness Rule is of permanent nature, inasmuch as, such appointment is provided to an employee whose bread earner has died in-harness and during the distress and difficulties of the family one eligible person of the family member is given appointment under the Dying-in-Harness Rule so that family of the deceased employee could survive. Therefore, if any appointment is provided to any person which is dependent upon any technical condition and if such condition does not fulfill the said appointment is cancelled, then the very purpose of providing appointment under Dying-in-Harness Rule would frustrate. Learned counsel for the petitioner has further explained the reason as to why the petitioner could not achieve such required speed but that explanation cannot be looked into at this stage being factual aspect but it can be seen as to whether the appointment under Dying-in-Harness Rule has been provided in the letter and spirit of the particular rule. The petitioner has categorically stated in para 12 of the writ petition that after the death of the bread earner of the family the entire family is in distress and they are facing lot of problems. In this para the reason of not obtaining the speed has been indicated. Learned counsel for the petitioner has further submitted that if the petitioner was not capable of discharging the duties of Junior Assistant in the District Election Office, Fatehpur as had been provided to him under Dying-in-Harness Rule any other appropriate appointment could have been provided to the petitioner which is of permanent nature.

7. Learned Standing Counsel has referred to the contents of various paragraphs of counter affidavit by submitting that since the petitioner could not achieve the required speed of typing which was mandatory for the post of Junior Assistant, therefore, his appointment has rightly been cancelled. The entire counter affidavit is based on the very fact that whatever was the required and mandatory conditions for holding any particular post, that condition must be fulfilled by the employee.

8. Heard learned counsels for the respective parties and perused the material available on record.

9. At the outset, I am in agreement with the contentions of opposite party that the required condition for appropriate post should be fulfilled by the candidate holding such post and there cannot be any compromise. This Court may not relax such condition, inasmuch as, this is a domain of concerning authority to fix mandatory condition for particular post. Therefore, I do not interfere the impugned order dated 22.9.2021 (Annexure No.1) as far as it provides that on account of non-obtaining the required condition the petitioner would not be eligible to hold the post of Junior Assistant.

10. However, the another relevant issue in the present case is that the appointment was provided to the petitioner under Dying-in-Harness Rule as the bread earner of the family died in-harness and on

account of that demise the family of the deceased employee has suffered a lot, therefore, it had been rightly considered by the competent authority to provide any appropriate appointment to the petitioner under Dying-in-Harness Rule on the compassionate basis. The law stipulates that the appointment under Dying-in-Harness Rule is of permanent nature and as per letter and spirit of the particular rule any suitable appointment on compassionate ground is provided to one eligible member of the family of deceased employee at the earliest so that sufferance and distress of the family could be met out. Therefore, if any appointment is provided subject to any condition and non-fulfillment thereof may cause cancellation of appointment would not be proper in a case where appointment under Dying-in-Harness Rule has been provided.

11. One case law has been cited by the learned counsel for the petitioner, in re:- ***Writ A No. 9255 of 2017 (Shakuntala Devi vs. State of U.P. & Others)*** which was decided finally vide judgment and order dated 20.4.2017 wherein some cases have been cited decided by the Constitutional Court to the effect that **"the appointment on compassionate ground is not a temporary appointment but the same has to be treated as permanent appointment."**

12. This Court in re: Shakuntala Devi (supra) has cited one judgment of Division Bench of this Court in re: ***Ravi Karan Singh vs. State of U.P. and others, 1999 (2) A.W.C.-976 All.,*** wherein the Division Bench has held that the appointment under Dying-in-Harness has to be treated as permanent appointment. Later on a Full Bench in the case of Sr. General Manager, Ordnance Factory vs. Central Administrative Tribunal and others, MANU/UP0287/2016, has approved the judgment in re: Ravi Karan Singh (supra).

13. I am also in agreement with the judgment and order in re:- Shakuntala Devi (supra) and other similar judgments to the effect that the appointment under Dying-in-Harness Rule has to be treated as permanent and if on account of any condition which makes such appointment conditional may not be permissible.

14. In the present case since the petitioner was not able to achieve the required typing speed at that point of time, therefore, if competent authority may deem fit and proper may provide another opportunity to the petitioner taking his typing test but if the authority does not find it feasible, at least any appropriate appointment as per his educational qualification may be provided to the petitioner so that the family of deceased employee who died in-harness could survive properly.

15. So as to carry out this exercise, I direct the competent authority to reconsider the candidature of the petitioner for providing him any appropriate appointment under Dying-in-Harness Rule for that the petitioner may prefer a fresh representation taking all pleas and grounds which are available to him enclosing therewith copy of relevant documents which are necessary for disposal of the representation and any appropriate decision as directed above shall be taken by the competent authority i.e. opposite party no.2 (Chief Election Officer, U.P., 4th Floor, Vikas Bhawan, Janpath Market, Hazratganj, Lucknow) with promptness preferably within a period of two months from the date of receipt of representation and the decision thereof

shall be communicated to the petitioner forthwith.

16. It is also observed that while taking fresh decision the earlier impugned order dated 22.9.2020 which is subject matter of the present writ petition shall be ignored.

17. The present writ petition is, accordingly, ***disposed of*** in the aforesaid terms.

(2021)08ILR A79
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 7577 of 2021

Pradeep Kumar Gupta ...Petitioner
Versus
Engineer In Chief(Mechanical) Irrigation & Ors. ...Respondents

Counsel for the Petitioner:
Purnima Gupta, B.R. Singh, Subodh Kumar Gupta

Counsel for the Respondents:
C.S.C.

A. Service Law – Pension - If the Competent Authority has extended any benefit to an employee in compliance of the judgment and order passed by this Court or by any Constitutional Court, the said benefit may not be reviewed/recalled without getting appropriate order from the concerning Court by filing review application or challenging the said order before the Superior Court. (Para 11)

In the present case, there is no averment on the part of the State Government that for getting the benefit of pay-scale in the year 1996 onwards the petitioner has ever misrepresented before the Competent Authority, rather, said benefit has been provided to the petitioner in compliance of order of this Court. (Para 14)

B. If any mistake committed by the department in making pay fixation of an employee is rectified after the retirement of an employee withdrawing the benefit which have been paid to such employee much prior to the retirement of an employee, such mistake may not be rectified, consequently no amount in the name of excess amount shall be recovered from the employee nor the pension of such employee could be reduced. (Para 13)

The office memo dated 16.1.2020 (impugned order) has been quashed being illegal, arbitrary and violative of Article 14 and 16 of the Constitution of India, as vide this order the authority illogically and inappropriately recalled its own order of compliance passed way back on 8.9.2011., i.e. after more than eight years. (Para 15, 16)

Writ petition allowed. (E-3)

Precedent followed:

1. Sushil Kumar Singhal Vs Pramukh Sachiv Irrigation Department & ors., (2014) 16 SCC 444 (Para 10)

Present petition assails office memo dated 16.01.2020, issued by Executive Engineer concerned, reducing the final pay of the petitioner, thereby reducing the pension.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri B.R. Singh, learned counsel for the petitioner and the learned Standing Counsel for the State-respondents.

2. By means of this writ petition, the petitioner has prayed for the following reliefs:-

"(i) to issue a writ, order or direction in the nature of certiorari quashing the order, as contained in Annexure No.1, dated 16.01.2020 passed by the opposite party No.4 and the letters dated 28.05.2020 and 18.07.2019, as contained in Annexure Nos.2 and 3, passed by the opposite party No.2.

(ii) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties not to reduce the pension of the petitioner in pursuance of Annexure No.1.

(iii) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties to pay the arrears of pay fixation dated 09.01.2018 in tune of Rs.315145/- to the petitioner and other arrears."

3. Learned counsel for the petitioner has contented that the petitioner retired from service on 31.01.2018 and before his retirement his final salary has been determined vide office memo dated 09.01.2018 (Annexure No.13) to the tune of Rs.83300/- and on the basis of said salary the pension of the petitioner was fixed as Rs.41650/-, as indicated in Annexure No.15 to the writ petition. After about 2 years from his retirement, the impugned office memo dated 16.01.2020 has been issued by the Executive Engineer concerned reducing the final pay of the petitioner to Rs.80900/- thereby reducing the pension of the petitioner.

4. Per contra, learned Standing Counsel has submitted that since the pay fixation of the petitioner was wrongly made in the year 1996 and later on, therefore, the required exercise has been carried out pursuant to the letters dated 18.07.2019, 19.11.2019 and 02.12.2019.

5. Learned Standing Counsel has drawn attention of this Court towards the counter affidavit showing Annexure Nos.CA-1 to CA-3, which are letters dated 18.07.2019, 19.11.2019 and 02.12.2019, wherein it has been indicated that salary of the petitioner was wrongly fixed in the year 1996 and later on. Therefore, cautious decision was taken to revise the salary of the petitioner as per the Government Orders. Further attention has been drawn towards Annexure No.CA-4 of the counter affidavit, which is a letter dated 02.01.2019 as copy thereof has been provided to the petitioner, whereby it has been indicated that the salary of the petitioner shall be reduced in terms of the government order as it has not been fixed properly.

6. As per learned Standing Counsel, the petitioner has not submitted the reply to the aforesaid letter dated 02.01.2019, therefore, the impugned order dated 16.01.2020 has been passed reducing the pay scale of the petitioner and such order is well reasoned order which has been passed considering the relevant government orders.

7. Replying the aforesaid contention of learned Standing Counsel, Sri B.R. Singh, learned counsel for the petitioner has drawn attention of this Court towards paras-10 to 13 of the writ petition wherein he has categorically indicated that in the issue in question the Division Bench of this Court has passed the judgment and order dated 29.03.2011 in Writ Petition No.786 (S/B) of 2009 allowing the writ petition in part directing the opposite parties to provide the notional promotion and other consequential benefits to the petitioner with effect from 01.09.1996. Notably, this fact has not been denied by the State in the counter affidavit. The operative portion of

the judgment and order dated 29.03.2011 is being reproduced here-in-below:-

"Accordingly, the writ petition is allowed in part and impugned order dated 12th January 2009, passed by the Tribunal stands modified subject to the aforesaid directions. The claimant-respondents are entitled for notional promotion and with all consequential benefits w.e.f. 1st September, 1996."

8. Sri B.R. Singh, learned counsel for the petitioner has submitted that the aforesaid judgment and order dated 29.03.2011 has not been assailed by the State Government and vide subsequent office memo dated 08.09.2011 (Annexure No.8) made compliance of order dated 29.03.2011.

9. Sri B.R. Singh, learned counsel for the petitioner has therefore submitted that since the petitioner was paid appropriate pay scale strictly in accordance with law and also in compliance of order of this Court dated 29.03.2011, therefore, the petitioner did not reply to the letter dated 02.01.2019 which was issued by the Finance Controller of the department addressing to the Executive Engineer of the Department.

10. Sri B.R. Singh, learned counsel for the petitioner has drawn attention of this Court towards the decision of Hon'ble Apex Court in re: ***Sushil Kumar Singhal vs. Pramukh Sachiv Irrigation Department and others*** reported in ***(2014) 16 SCC 444*** referring para-7 thereof by submitting that the case of the petitioner is squarely covered with the decision of the Hon'ble Apex Court inasmuch as the petitioner retired from service in the month of January, 2018 and by means of impugned order dated 16.01.2020 the benefit, which was provided to the petitioner in the year 1996 onwards, has been reduced. Para-7 of the aforesaid judgment is being reproduced here-in-below:-

"7. Upon perusal of the aforestated G.O. and the submission made by the learned counsel appearing for the appellant, it is not in dispute that the appellant had retired on 31st December, 2003 and at the time of his retirement his salary was Rs.11,625/- and on the basis of the said salary his pension had been fixed as Rs.9000/-. Admittedly, if any mistake had been committed in pay fixation, the mistake had been committed in 1986, i.e. much prior to the retirement of the appellant and therefore, by virtue of the aforestated G.O. dated 16th January, 2007, neither any salary paid by mistake to the appellant could have been recovered nor pension of the appellant could have been reduced."

11. Having heard learned counsel for the parties and having perused the material available on records, I am of the considered opinion that if the Competent Authority has extended any benefit to an employee in compliance of the judgment and order passed by this Court or by any Constitutional Court, the said benefit may not be reviewed/ recalled without getting appropriate order from the concerning court by filing review application or challenging the said order before the Superior Court.

12. In the present case, admittedly, in compliance of the judgment and order dated 29.03.2011 passed by the Division Bench of this Court in Writ Petition No.786 (S/S) of 2009 and other connected matters the benefit has been given to the petitioner on 08.09.2011. Admittedly, no review has been sought by the State Government

seeking review of order dated 29.03.2011 and the said order has not been assailed before the Superior Court. As a matter of fact, the review of order dated 08.09.2011 (Annexure No.8) has been sought preferring notice to the petitioner on 02.01.2020 and later on the said order has been reviewed by means of order dated 16.01.2021 (Annexure No.1), which is not legally permissible. I wonder the manner in which the earlier compliance order dated 08.09.2011 has been reviewed by means of office memo dated 16.01.2020 which is not appreciated.

13. Besides, the Hon'ble Apex Court in re: ***Sushil Kumar Singhal (supra)*** has clearly held that if any mistake committed by the department in making pay fixation of an employee is rectified after the retirement of an employee withdrawing the benefit which have been paid to such employee much prior to the retirement of an employee, such mistake may not be rectified, consequently no amount in the name of excess amount shall be recovered from the employee nor the pension of such employee could be reduced.

14. In the present case, there is no averment on the part of the State Government that for getting the benefit of pay scale in the year 1996 onwards the petitioner has ever misrepresented before the Competent Authority, rather, the said benefit has been provided to the petitioner in compliance of order of this Court as observed above. The specific averments to this effect made in paras-10 to 13 of the writ petition has not been denied by the State in the counter affidavit.

15. I am restraint to observe that the authority concerned should refrain itself in passing inappropriate and illogical order recalling its own order passed way back inasmuch as in the present case the appropriate order of compliance has been passed on 08.09.2011 (Annexure No.8), which has been recalled vide office memo dated 16.01.2020 (Annexure No.1) i.e. after more than eight years. It is also to be noted here that just before 20 days of retirement of the petitioner the office memo dated 09.01.2018 (Annexure No.13) was passed determining the final salary of the petitioner to the tune of Rs.83300/- and the pension of the petitioner has been fixed on the basis of the aforesaid office memo dated 09.01.2018.

16. Considering the aforesaid facts and circumstances of the issue and the dictum of Hon'ble Apex Court in re: ***Sushil Kumar Singhal (supra)***, I hereby set aside/ quash the impugned order dated 16.01.2020 passed by the opposite party No.4 being illegal, arbitrary and violative of Article 14 and 16 of the Constitution of India.

17. Consequently, the order dated 28.05.2020 (Annexure No.2) whereby the Executive Engineer has issued direction to modify the pension of the petitioner is also quashed/ set aside.

18. A writ in the nature of mandamus is issued commanding the opposite parties not to reduce the pension of the petitioner pursuant to the office memo dated 16.01.2020, which has been quashed by this court and the petitioner shall also be entitled for all consequential benefits ignoring the impugned office memo dated 16.01.2020. The opposite parties shall make compliance of the aforesaid order within a period of two months from the date of presentation of a certified/ computerized copy of this order, failing which, the petitioner shall be entitled for

interest at the rate of 8% per annum on the dues.

19. Accordingly, the writ petition is ***allowed.***

20. No order as to cost.

(2021)08ILR A83
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.07.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 13284 of 2018

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

Counsel for the Petitioner:
Ajay Kishor Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – Arrears of salary - If the punishment order was declared non-est in the eyes of law, then the benefit of salary from the date of dismissal till the date of reinstatement may not be denied. It is normal rule that incumbent is entitled for all consequential benefits as for he was never terminated. (Para 5)

When an order of termination by way of punishment i.e dismissal or removal is set aside being in violation of principle of natural justice, such an order of punishment renders in nullity and legal consequence is that concerned employee was never terminated by way of removal or dismissal and has already continued in service. That being so, question of direction of reinstatement in fact is a misnomer. Since such a person in law continued in service without any interruption as if no order of termination was ever passed. It is only to avoid any administrative doubt that a direction of reinstatement is normally given but the nature of such an order is nothing but a declaration that termination of service by way of dismissal or removal is a nullity and the natural consequence is that incumbent concerned is deemed to continue in service as for he was never terminated.

Writ petition allowed. (E-3)

Precedent followed:

1. U.P.S.R.T.C. & ors. Vs Presiding Officer Labour Court, Faizabad & anr., 2019 (5) AWC 4287 (LB) (Para 4)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ajay Kishor Pandey, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. By means of this petition, the petitioner has prayed following reliefs:-

"i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 25/11/2017 passed by Opposite party no.3.

ii) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to pay all back wages, increment with 12% interest and the seniority maintained at the time of joining."

3. Learned counsel for the petitioner has contended that since the impugned order of dismissal was illegal and arbitrary, therefore, it was quashed by this Court vide judgment and order dated 17.11.2016 passed in Service Single No.9088 of 2016; Dharmendra Kumar Yadav Vs. State of U.P. and others. Sri Pandey has further

submitted that the judgment and order dated 17.11.2016 has not been assailed by the State Government by filing appeal before this Court or before the Hon'ble Supreme Court, therefore, the judgment and order dated 17.11.2016 has attained finality. Learned counsel for the petitioner has further submitted that even the reason indicated in the impugned order, which was quashed by this Court, has also lost its efficacy inasmuch as in the criminal case indicated in the impugned order, the petitioner has already been acquitted.

4. Learned Standing Counsel has, however, tried to defend the impugned order dated 25.11.2017 but on being confronted on the point that when the dismissal order has already been quashed by this Court treating the same as illegal and arbitrary, as to how the petitioner may be denied the benefit of arrears of salary w.e.f. the date of dismissal to his reinstatement, learned Standing Counsel could not explain the said anomaly of the impugned order dated 25.11.2017.

5. Having heard learned counsel for the parties and perused the material available on record, I am of the considered opinion that if the punishment order of dismissal has already been quashed by this Court and the order of this Court has attained finality, then it shall be presumed that the punishment order has lost its efficacy and it shall be treated as if it was not issued against the petitioner. Further, if the punishment order was declared non-est in the eyes of law, then the benefit of salary from the date of dismissal till the date of reinstatement may not be denied. This Court in re; **U.P.S.R.T.C. and others Vs. Presiding Officer, Labour Court, Faizabad and another, 2019 (5) AWC 4287 (LB),** has decided more or less the identical controversy holding that the employee whose punishment order has been set aside shall be entitled for all benefits. Paragraphs 20 to 24 of the aforesaid judgment are being reproduced herein below:-

"20. When an order of termination by way of punishment i.e dismissal or removal is set aside being in violation of principle of natural justice, such an order of punishment renders in nullity and legal consequence is that concerned employee was never terminated by way of removal or dismissal and has already continued in service. That being so, question of direction of reinstatement in fact is a misnomer. Since such a person in law continued in service without any interruption as if no order of termination was ever passed. It is only to avoid any administrative doubt that a direction of reinstatement is normally given but the nature of such an order is nothing but a declaration that termination of service by way of dismissal or removal is a nullity and the natural consequence is that incumbent concerned is deemed to continue in service as for he was never terminated. That being so, it is normal rule that incumbent is entitle for all consequential benefits as for he was never terminated. Consequently when an order of termination is set aside on the ground that it was not legally passed following the procedure laid down in law, the concerned employee is not supposed to be made to suffer for something for which he was not responsible inasmuch an illegal order obviously could have resulted due to negligence or illegality committed by concerned authorities i.e Enquiry Officer or Disciplinary Authority and above and for their fault employee concerned is not to be made to suffer otherwise it will amount to victimize a person for something for

which he was not at fault even if order of termination is found to be illegal and void ab initio.

21. In Pawan Kumar Agrawala Vs General Manager-II and Appointing Authority, State Bank of India and others, 2015 (13) SCALE 45, Court having considered various earlier authorities on the subject said in para 38:-

"38. The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. ...

iv) The cases in which the Labour Court/Industrial Tribunal ... finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the Court or Tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power Under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the

principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis--vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (1979) 2 SCC 80.

vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (2007) 2 SCC 433 that on reinstatement the employee/workman cannot claim continuity of service as matter of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman." (emphasis added)

22. Thereafter in the penultimate para 20 in Pawan Kumar Agrawala (supra), Court held that findings of Enquiry Officer on the charges are vitiated on account of non compliance of the statutory Rules and the principles of natural justice. In the absence of evidence, order of reinstatement without full back wages is unjustified in law. Court after setting aside judgment of High Court, awarded reinstatement with full back wages for the period from date of removal till the date employee attained age of superannuation on the basis of periodical revisions of salary but after deducting amount of pension already paid from back wages.

23. In K.S. Ravindran Vs Branch Manager, New India Assurance Company Ltd., 2015 (7) SCC 222, Court referred to legal principles laid down in its earlier decision in Mohan Lal Vs Bharat Electronics Ltd., 1981 (3) SCC 225 and quoted the following observation:

"But there is a catena of decisions which rule that where the termination is illegal especially where there is an ineffective order of retrenchment, there is neither termination nor cessation of service and a declaration follows that the workman concerned continues to be in service with all consequential benefits."

(emphasis added)

24. Earlier, in Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, 2013 (10) SCC 324, Court said;

"The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other

acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages."

(emphasis added)

6. Considering the entirety of the issue and the decision of this Court in re; **U.P.S.R.T.C.** (supra), I find that the impugned order dated 25.11.2017 passed by opposite party no.3 is not sustainable in law, therefore, the same is liable to be set aside being arbitrary and violative of Article 14 of the Constitution of India.

7. Accordingly, the writ petition is **allowed.** A writ in the nature of certiorari is issued quashing the impugned order dated 25.11.2017 passed by opposite party no.3. A writ in the nature of mandamus is issued commanding the opposite parties to make payment of full back wages to the petitioner with all consequential benefits including seniority etc., with promptness, preferably within a period of two months from the date of receipt of certified copy of this order, failing which the petitioner shall be entitled for the interest at the rate of 8% from the date the dues accrued till the date of its actual payment.

8. No order as to costs.

(2021)08ILR A87
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 15111 of 2021

Inspector(Civil Police) Rahul Shukla ...Petitioner

Versus

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

Counsel for the Petitioner:
Rakesh Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 - U.P. Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 1995 -The petitioner is discharging his duties as Inspector in the Police Department, his Appellate Authority would be the Deputy Inspector General of Police and his Revisional Authority would be the Inspector General of Police but against the impugned office memo dated 01.07.2021 he may not approach any of the authority i.e., the Appellate Authority or the Revisional Authority. Besides, the petitioner would have not approached any authority under the Rules, 1995 for the reason that the order impugned has been passed by the Highest Authority of the Home Department of the State of U.P. Therefore, the impugned office memo dated 01.07.2021 is not only unwarranted and uncalled for being passed without having any prescription under the relevant Rules, 1991 but has been passed by such authority against which no appeal or revision or representation can be filed before the Competent Authority. (Para 7)

The right of appeal or revision or statutory representation of an employee may not be curtailed/ washed off and if such inaction has been done by any of the authority, the said punishment order would be nullity in the eyes of law. (Para 8)

Writ Petition Allowed. (E-8)

List of Cases cited:-

1. Vijay Singh Vs St. of U.P. & ors. 2012 (2) LBESR 774 (SC) *(followed)*

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Rakesh Kumar Singh, learned counsel for the petitioner and Ms. Parul Bajpai, learned Standing Counsel for the State-respondents.

2. By means of this writ petition, the petitioner has assailed the office memo dated 01.07.2021 passed by the Additional Chief Secretary, Home Department, Government of U.P., Civil Secretariat, Lucknow, awarding special adverse entry to the petitioner.

3. Learned counsel for the petitioner has drawn attention of this Court towards Annexure No.5 of the writ petition, which is the dictum of Hon'ble Apex Court rendered in re: ***Vijay Singh vs. State of U.P. & others*** reported in ***[2012 (2) LBESR 774 (SC)*** by submitting that the punishment of special adverse entry is not provided under the relevant rules known as U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (here-in-after referred to as the "Rules, 1991"), therefore, such punishment may not be awarded.

4. Ms. Parul Bajpai, learned Standing Counsel has submitted that so far as the allegation levelled in the punishment order is concerned, it appears prima-facie that the petitioner has committed some misconduct, however, this punishment is not prescribed under Rules, 1991. She has submitted that there is statutory modalities to deal with such punishment by preferring a representation to the Competent Authority under the relevant provisions, namely, U.P. Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 1995 (here-in-after referred to as the "Rules, 1995").

5. Ms. Bajpai has further submitted that since the impugned punishment has not been awarded to the petitioner after conducting the departmental enquiry in terms of Rules, 1991, therefore, this punishment order may not be tested under the provisions of Rules, 1991.

6. On being confronted the learned Standing Counsel about the jurisdiction of the authority who has passed the order inasmuch as the order impugned has been passed by the Highest Authority of the Home Department i.e. the Additional Chief Secretary of the Home Department, Civil Secretariat, Lucknow against the petitioner who is serving on the post of Inspector and on account of the impugned order of punishment, the statutory remedy of the petitioner to file appeal or revision has been gone away inasmuch as against such order the petitioner would not be able to file any statutory appeal before the Appellate Authority, the learned Standing Counsel could not justify the order on this point.

7. The petitioner is discharging his duties as Inspector in the Police Department, his Appellate Authority would be the Deputy Inspector General of Police and his Revisional Authority would be the Inspector General of Police but against the impugned office memo dated 01.07.20201 he may not approach any of the authority i.e. the Appellate Authority or the Revisional Authority. Besides, the petitioner would have not approached any

authority under the Rules,1995 for the reason that the order impugned has been passed by the Highest Authority of the Home Department of the State of U.P. Therefore, the impugned office memo dated 01.07.2021 is not only unwarranted and uncalled for being passed without having any prescription under the relevant service Rules, 1991 but has been passed by such authority against which no appeal or revision or representation can be filed before the Competent Authority. The impugned office memo dated 01.07.2021 is prima facie an order passed without jurisdiction, therefore, it may not sustain in the eyes of law.

8. The right of appeal or revision or statutory representation of an employee may not be curtailed/ washed off and if such inaction has been done by any of the authority, the said punishment order would be nullity in the eyes of law.

9. In view of the above, the writ petition succeeds and is ***allowed.***

10. A writ in the nature of certiorari is issued quashing the order dated 01.07.2021, passed by the Additional Chief Secretary, Department of Home, Government of U.P., Civil Secretariat, Lucknow, which is contained as Annexure No.1 to the writ petition, being illegal, unwarranted and without jurisdictional order and also in violation of the dictum of Hon'ble Apex Court in re: ***Vijay Singh (supra)*** as the impugned punishment has not been prescribed under the Rules, 1991.

11. Consequences to follow.

12. However, it is always open to the authority/ authorities concerned to pass appropriate orders, but by following due procedure of law.

13. No order as to costs.

(2021)08ILR A89
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 15151 of 2020

Rajesh Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rajendra Kumar, Aarohi Bhalla, Sunil Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law - Vigilance Enquiry - the vigilance enquiry cannot be initiated on the same set of facts which has been inquired into vide a departmental enquiry. In the present case the vigilance enquiry conducted against the petitioner is regarding disproportionate assets which is entirely different from the grounds of the departmental enquiry. (para 31)

Writ Petition Dismissed. (E-8)

List of Cases cited:-

1. Dr. Dinesh Chandra Mishra Vs St. of U.P. & ors. Writ Petition No. 112 (S/B) of 2004

2. The St. of Assam & anr. Vs J.N. Roy Biswas AIR 1975 SC 2277

3. U.O.I. & ors. Vs Kunisetty Satyanarayana (2006) 12 SCC 28

4. Radhey Shyam Kejriwal Vs St. of W.B. & anr. (2011) SCC OnLine SC 363

5. Ashoo Surendranath Tewari Vs Deputy Superintendent of Police, EOW, CBI & anr. (2020) 9 SCC 636

6. Tata Cellular Vs U.O.I. (1994) 6 SCC 651

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Vivek Raj Singh, learned Senior Advocate assisted by Sri Rajendra Kumar, learned counsel for the petitioner and Sri Vivek Kumar Shukla, learned Additional Chief Standing Counsel for the State-respondents.

2. The order under challenge is an order dated 02.06.2020 passed by the Under Secretary, Department of Vigilance, Anubhag-3, Government of U.P., Civil Secretariat, Lucknow, which is contained as Annexure No.1 to the writ petition, initiating an open vigilance enquiry against the petitioner on the allegation of corruption having disproportionate assets beyond known source of income.

3. The petitioner has however not assailed the Annexure No.2, which is a letter dated 13.04.2018 preferred by the Joint Secretary, Department of Appointment, Anubhag-7, Government of U.P. addressing to the Under Secretary, Vigilance, Anubhag-3, Government of U.P., whereby the permission/ consent was granted for conducting vigilance enquiry against the petitioner.

4. The brief facts of the case are that the petitioner was erstwhile member of Provincial Civil Services and promoted in the year 2007. On 31.07.2016, the petitioner retired from the post of Vice-Chairman, Ayodhya Vikas Pradhikaran, Ayodhya.

5. The disciplinary proceeding was initiated against the petitioner on 16.09.2016 and the charge-sheet was served upon him on 30.09.2016. He submitted his defence reply to the charge-sheet on 24.11.2016. The enquiry concluded against the petitioner on 05.12.2017 and Enquiry Officer found Charge No.2 is partially proved. On 16.01.2018, the petitioner was served a show cause notice providing him findings of enquiry report and the petitioner submitted his reply to the show cause notice on 24.01.2018.

6. On 20.02.2018, the Disciplinary Authority completely exonerated the petitioner, however, in the meantime, vide order dated 12.01.2018 issued by the Under Secretary, Vigilance Department, Anubhag-3, Government of U.P., the vigilance enquiry against the petitioner started on the allegation that the petitioner has acquired disproportionate assets by corruption. On 07.03.2018, the Under Secretary, Department of Vigilance has issued a letter to the Joint Secretary, Department of Appointment, Government of U.P., making request that the details of the assets of the petitioner, so furnished to the department, be provided for conducting vigilance enquiury. In the aforesaid letter dated 07.03.2018, it has been categorically indicated that there are serious allegations against the petitioner regarding disproportionate assets indicating the details of some assets of the petitioner.

7. Replying to the aforesaid letter dated 07.03.2018 the Joint Secretary of the Department of Appointment apprised the Under Secretary of Vigilance Department

that after being promoted in the year 2007 the petitioner has not furnished the property details to the department. Further, if any vigilance enquiry is conducted against the petitioner, the government shall have no objection to that effect.

8. Pursuant to the aforesaid correspondences an open vigilance enquiry has been initiated against the petitioner by means of impugned order dated 02.06.2020.

9. The sole ground to assail the aforesaid order dated 02.06.2020 is that an open vigilance enquiry has been initiated on the same set of facts, which have already been considered by the Disciplinary Authority so the same may not be permitted to be conducted. The petitioner has however not assailed the order dated 13.04.2018 whereby the permission to conduct open vigilance enquiry has been granted.

10. Sri V. R. Singh, learned Senior Advocate for the petitioner has submitted that the State Government is reversing its own decisioin taken in the disciplinary proceedings against the petitioner which has attained finality. Therefore, it is a futile and punitive exercise just to harass and humiliate the petitioner for no cogent reason.

11. Sri V.R. Singh has placed reliance of the judgment of the Division Bench of this Court rendered in re: ***Writ Petition No.112 (S/B) of 2004; Dr. Dinesh Chandra Mishra vs. State of U.P. & others*** by submitting that in the identical circumstances the Division Bench of this Court considering the decision of Hon'ble Apex Court rendered in re: ***The State of Assam and another vs. J.N. Roy Biswas*** *reported in* ***AIR 1975 SC, 2277*** has held that if the departmental enquiry has been concluded against an employee, the said employee may not be subjected to further enquiry in the same issue unless there is some fresh or new material is found out of which no enquiry has been conducted.

12. Sri V. R. Singh, learned Senior Advocate has further submitted that the aforesaid decision of the Division Bench in re: ***Dr. Dinesh Chandra Misra (supra)*** has attained its finality inasmuch as the Hon'ble Apex Court has rejected the appeal as well as the review of the State Government.

13. Sri V. R. Singh, learned Senior Advocate has also placed reliance upon the decisions of Hon'ble Apex Court rendered in re: Union of India and another vs. ***Kunisetty Satyanarayana*** reported in ***(2006) 12 SCC 28, Radhey Shyam Kejriwal vs. State of West Bengal and another*** reported in ***(2011) SCC OnLine SC 363*** and ***Ashoo Surendranath Tewari vs. Deputy Superintendent of Police, EOW, CBI and another*** reported in ***(2020) 9 SCC 636*** supporting this aforesaid contention that if the departmental enquiry has already concluded, the employee should not be subjected to further enquiry on the same charges.

14. Sri V. R. Singh, learned Senior Advocate has referred para-18 of ***Kunisetty Satyanarayana (supra),*** which reads as under:-

"18. We agree with the learned counsel for the respondent that if the charge which has been levelled under the memo dated 23.12.2003 had earlier been eqnuired into in a regular enquiry by a competent authority, and if the respondent had been exonerated on that very charge, a

second enquiry would not be maintainable. However, in the present case, we are of the opinion that the charges levelled against the respondent under the charge memo dated 23.12.2003, had not been enquired into by any authority and he had not been exonerated on those charges. Hence, we are of the opinion that it is not a case of double jeopardy."

15. In the case of ***Radheshyam Kejriwal (supra),*** para-38 has been referred, which reads as under:-

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

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

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

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

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

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

(vi) The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and

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

16. Sri V. R. Singh, learned Senior Advocate has submitted that in the case of ***Ashoo Surendra Nath Tewari (supra),*** the Hon'ble Apex Court has followed the dictum of ***Radheshyam Kejriwal (supra)*** referring paras-13, 14 & 15, which read as under:-

"13. It finally concluded: (Radheshyam Kejriwal case, SCC p.598, para 39).

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

14. From our point of view, para 38(vii) is important and if the High Court had bothered to apply this parameter, then on a reading of the CVC report on the same facts, the appellant should have been exonerated.

15. Applying the aforesaid judgments to the facts of this case, it is clear that in view of the detailed CVC order dated 22.12.2011, the chances of conviction in a criminal trial involving the same facts appear to be bleak. We, therefore, set aside the judgment of the High Court and that of the Special Judge and discharge the appellant from the offences under the Penal Code."

17. Per contra, Sri Vivek Kumar Shukla, learned Additional Chief Standing

Counsel has submitted that by means of this writ petition the petitioner has assailed the order dated 02.06.2020 by which a decision has been taken by the State Government to initiate an open enquiry against the petitioner. An open enquiry is more or less a fact finding inquiry to collect the relevant informations from the employee strictly in terms of the modalities indicated under Section 3 of U.P. Vigilance Establishment Act, 1965 (here-in-after referred to as the "Act, 1965") read with notification issued on 29.08.1977. For convenience, Section 3 of the Act, 1965 is being reproduced here-in-below:-

"3. Offences to be investigated by the Vigilance Establishment.

The State Government may, by notification in the Gazette, specify the offences or clauses of offences which are to be investigated by the Uttar Pradesh Vigilance Establishment."

18. In exercise of powers confer by sub-section (2) of sub-section (3) of Section 2 and sub-section (1) of Section 4 of the Act, 1965, the Governor was pleased to issue the notification dated 29.08.1977 regulating the working and conduct of inquiries by the U.P. Vigilance Establishment. Clause 2 of the aforesaid notification describes functions of the Vigilance Establishment. For brevity, clause 2 is being reproduced here-in-below:-

"2. Functions- *The Vigilance Establishment shall perform the following functions:*

(a) Keep the Government informed of all the cases of corruption, bribery, misconduct, misbehavior and other malpractice involving public servants that come to its notice;

(b) Collect intelligence on its own initiative or on the orders of Government in the Vigilance Department relating to corruption of any individual public servant or public servants belonging to a department, class or category;

*(c) Make inquiries, secret or open, and investigations into cases of corruption, bribery, misconduct, misbehavior or other malpractices, that may be referred to it from time to time by the Government in the Vigilance Department. This condition shall not apply to trap cases against non-gazetted government servants and public servants of similar rank covered by *order No.UPA-7/65-Order/76 (Fifth), dated August 16, 1976;*

Provided that -

(1) The Vigilance Establishment is as before authorized to take up enquiry without prior permission of Government against a non-gazetted government servant, whose conduct may be involved with the conduct of a gazetted officer, against whom an enquiry had already been authorized by Government, but

(2) for taking up an independent enquiry or investigation against a non-gazetted official, prior orders of Government shall be obtained by the Vigilance Establishment."

19. Clause 3 of the aforesaid notification provides mechanism to enquire the case of corruption in case of public servant or against the private concern. In the present case, the order impugned has been passed well within the four corners of law defined under the Act, 1965 read with notification dated 29.08.1977.

20. Sri Vivek Kumar Shukla, learned Additional Chief Standing Counsel has further submitted that the allegation of the

petitioner that open vigilance enquiry initiated against the petitioner is the second enquiry in the same charges which have already been adjudicated under the departmental trial is misconceived inasmuch as the departmental trial/ proceedings were instituted against the petitioner by issuing the charge-sheet wherein only two charges were levelled, first the petitioner has allegedly exploited one Computer Operator Sri Ashok Kumar and compelled him to recharge his personal Mobile Phone and make payment of his house tax, electricity charges and other miscellaneous domestic expenses. The second charge reads that one Sri Halim Pappu and Sri Manoj Jaiswal made complaint against the petitioner that petitioner has accumulated money by making corruption and the said allegation may be verified from the Saving Bank Accounts, the details thereof has been given in such complaint. The enquiry was conducted and as per the findings of the Enquiry Officer, charge No.1 could not be proved, however, in respect of charge No.2 this much has been proved that family members/ Co-account Holders have made transactions, therefore, the petitioner should have taken care of such transactions made by the family members and Co-account Holders.

21. Sri Shukla has also submitted that the wife and children of the petitioner were the Co-account Holders with the petitioner. The Disciplinary Authority has passed the final order on 20.02.2018 whereby despite taking cognizance of the fact that charge No.2 was partially proved against the petitioner but the departmental enquiry was finalized without awarding any punishment to the petitioner.

22. Sri Shukla has submitted that the aforesaid order dated 20.02.2018 passed by the Disciplinary Authority is in violation of Rule 9 (2) of the Government Servant (Discipline & Appeal) Rules, 1999 which categorically provides that the Disciplinary Authority shall, if disagreed with the findings of the Enquiry Officer on any charge, records its own findings thereof for the reasons to be recorded. Therefore, he has submitted that despite the Charge No.2, which was serious in nature, having been proved partially, the Disciplinary Authority if was not in agreement with the findings of the Enquiry Officer, he must have recorded the reasons in the order finalizing the departmental proceedings without awarding any punishment. Since unexplained transaction was made in the accounts wherein either the wife or the children of the petitioner were Co-account Holders, therefore, either the petitioner should have been called fresh explanation to that effect considering the seriousness of the charge or any appropriate punishment should have been awarded to the petitioner. Even if the Disciplinary Authority was of the view that despite the aforesaid facts and circumstances no punishment would be awarded to the petitioner, the specific reasons should be indicated in the final order in terms of Rule 9 (2) of the Rules, 1999.

23. Sri Shukla has further referred Rule 9, sub-rule 3 of the Rules, 1999 which provides that the government servant may be exonerated in case the charges are not proved, but in the present case, one serious charge was partially proved against the petitioner, therefore, the petitioner could have not been exonerated from the charge.

24. Sri Shukla has further drawn attention of this Court towards the letter dated 12.01.2018 preferred by the Vigilante Department addressing to the Additional Chief Secretary, Department of

Appointment seeking approval/ consent for conducting vigilance enquiry against the petitioner. Further, the letter dated 07.03.2018 was issued by the Vigilance Department to the Secretary of the Appointment Department seeking the details of the petitioner regarding his movable and immovable properties. As per the information, so received to the Vigilance Department, the petitioner had accumulated huge properties at Lucknow having three storied house casting about crores, he is having six Bank Accounts with his wife and children having deposited huge amount, he has purchased one Flat at NOIDA having its value in crores after selling out, one property at Faizabad and he is having one CRETA Car worth Rs.15:00 lakhs in the name of his wife.

25. As per Sri Shukla learned Additional Chief Standing Counsel, the aforesaid four charges are entirely different from the charge in which the departmental enquiry was conducted against the petitioner wherein he was exonerated by the Disciplinary Authority despite the second charge having been proved against him partially.

26. Sri Shukla has lastly submitted that initiation of vigilant enquiry is well within the forecorners of law and the said enquiry being the fact finding enquiry, therefore, only after completion of the aforesaid fact finding enquiry it will be ascertained and decided that whether any formal / regular enquiry is necessary to be initiated against the petitioner or not. Referring the dictum of Hon'ble Apex Court in re: ***Tata Cellular vs. Union of India*** reported in ***(1994) 6 SCC 651*** has submitted that the scope of judicial review into administrative decision is not permitted. The Hon'ble Apex Court has held that the Court does not sit as a Court of appeal but merely reviewed the manner in which the administrative decision was made. The Court does not have expertise to correct the administrative decision. If the review of administrative decision is permitted, it will be substituting its own decision, without the necessary expertise which itself may be fallible.

27. Sri Shukla has therefore submitted that in the given circumstances, as submitted above, there is no infirmity or illegality in the impugned order dated 02.06.2020, so the writ petition may be dismissed with cost.

28. Having heard learned counsel for the parties and having perused the material available on the record as well as the case laws, so cited by the respective parties, I am of the considered opinion that initiation of open vigilance enquiry vide order dated 02.06.2020 has been made in terms of the provisions of the Act, 1965 read with notification dated 29.08.1977.

29. I have noted that the departmental enquiry was conducted and concluded against the petitioner for two charges, as considered above, and both the charges are different from the allegations levelled against the petitioner, for which, the open vigilance enquiry has been initiated. For sake of repetition, the enquiry against the petitioner was conducted for examining two charges. First charge is that the petitioner had exploited one Computer Operator serving in Ayodhya-Faizabad Development Authority when the petitioner was serving as Vice-Chairman, Ayodhya-Faozabad Development Authority. As per the complaint of the said Computer Operator, the petitioner has compelled such employee to deposit the house tax,

electricity charges, personal and domestic expenses, recharge the Mobile Phone, to make payment of other miscellaneous expenses of the petitioner etc. Whereas the second charge is based on the complaint of Sri Halim Pappu and Sri Manoj Jaiswal whereby both the persons apprised the department that the petitioner has accumulated huge property by making corruption, the details of Saving Banks Accounts were also provided. The Enquiry Officer after conducting enquiry found that the second charge is partially proved inasmuch as the petitioner could not explain the reasons as to how his joint accounts with his family members have been operated/ transacted without his information. However, the Disciplinary Authority despite taking cognizance of the aforesaid facts indicated by the Enquiry Officer exonerated the petitioner from the said charge without assigning specific reasons in violation of Rule 9 (2) (3) of the Rules, 1999. The aforesaid rules categorically provide that the employee can be exonerated if the charges are not proved and in case the charge is proved then while exonerating such employee the Disciplinary Authority shall assign specific reason as to why he is exonerating the employee concerned. In the exoneration order dated 20.02.2018 (Annexure No.8) no reasons of any kind whatsoever have been assigned, therefore, to that extent the final order dated 20.02.2018 is unwarranted and uncalled for.

30. I have also noted that the material available with the Vigilance Department, pursuant to which the open vigilance enquiry has been initiated, is entirely different from the charges which have been examined through the departmental trial. The open vigilance enquiry has been initiated to investigate mainly four charges, first, the petitioner has got three storied big house at Lucknow having value of one crores. Second, the petitioner has got six Bank Accounts, of which, the Joint Account Holders are either his wife or his children wherein huge amount has been deposited and transacted. Third, the petitioner has purchased one Flat at NOIDA of the value of crores after selling out his property at Village-Asarafpur Gangrela, Tehsil-Rudauli, District-Faizabad in 52 lakhs. Fourth, the petitioner has purchased one CRETA Car worth Rs.15:00 lakhs in the name of his wife. All the aforesaid four charges are absolutely different from the charges inquired by the Enquiry Officer through the departmental trial.

31. Therefore, in view of the above, the sole ground to assail the impugned order dated 02.06.2020 that the vigilance enquiry has been initiated on the same set of fact which has been inquired into vide a detailed departmental enquiry is not sustainable in the eyes of law, rather, the aforesaid ground is misconceived. The case laws so cited by the learned counsel for the petitioner would not be applicable in the present case inasmuch as the facts and circumstances of the present case are entirely different from the cases so cited by the learned counsel for the petitioner. Not only the above, the petitioner has enclosed the Annexure No.13 with the writ petition, which is the judgment and order dated 11.09.2008 passed by the Division Bench of this Court in re: ***Dr. Dinesh Chandra Misra vs. State of U.P. & others (supra)*** by submitting that in the identical facts and circumstances this Court had quashed the order dated 20.01.2004 whereby the vigilance enquiry was initiated against that petitioner to conduct the enquiry regarding disproportionate assets. The aforesaid

judgment and order dated 11.09.2008 was challenged before the Hon'ble Apex Court by filing *Special Leave to Appeal (Civil) No(s). 30044 of 2008* and the said appeal was rejected by the Hon'ble Apex Court vide order dated 27.04.2009, therefore, as per learned counsel for the petitioner, the judgment and order dated 11.09.2008 has attained its finality. So as to appreciate the ratio of the judgment of the Division Bench of this Court rendered in ***Dr. Dinesh Chandra Misra (supra),*** the last paragraphs thereof are being reproduced here-in-below:-

"Learned counsel for the petitioner further relying upon the provisions of the Uttar Pradesh Vigilance Establishment Act, 1965 contended that there is absolutely no provision for holding an enquiry on the subject on which an enquiry has already been held.

Learned counsel for the respondents submitted that the employer has right to hold an enquiry and the order holding enquiry that to say enquiry by Vigilance Establishment is justified and the writ petition is liable to be dismissed.

So far as the proposition of right to hold the enquiry is concerned, we are not disputing that proposition, but as held in the case of State of Assam (supra), the enquiry having come to its logical ends by either resulted into the punishment of the employee concerned or exoneration, the matter should come to an end and unless there is some fresh or new material no enquiry should be held because ultimately that will affect the functioning of the government servant and efficiency in performing the government work.

In this view of the matter since nothing has been brought to the notice of this Court except what has been submitted before us by learned counsel for the parties, this writ petition therefore succeeds and is allowed. The impugned order dated 20.01.2004 Annexure-'12' to the writ petition is quashed. It is further directed that no enquiry shall be conducted by the respondents, unless there is some fresh materials against the petitioner. Needless to say that pendency of the writ petition without affect the petitioner's right, if any, of promotion to the higher post."

32. In the aforesaid judgment, the submission of learned counsel for the petitioner was that no vigilance enquiry should be conducted on the subject on which an enquiry has already been held. However, the submission of the respondents before the Division Bench was that the employer has right to hold an enquiry and the order holding that to say enquiry by the Vigilance Establishment is justified. The Division Bench has categorically observed that in view of the decision of Hon'ble Apex Court in re: ***State of Assam and another vs. J.N. Roy Biswas AIR 1975 SC 2277***, the enquiry having come to its logical ends by either resulted into the punishment of the employee concerned or exoneration, the matter should come to an end unless there is some fresh or new material no enquiry should be held because ultimately that will affect the functioning of the government servant and efficiency in performing the government work. Therefore, it is very much clear perusing the judgment of the Division Bench in re: ***Dr. Dinesh Chandra Misra (supra)*** that in case there are some fresh or new material with the Government/ Vigilance Department, the enquiry may be initiated.

33. In the present case, there is no dispute that all the four allegations pursuant to which the open vigilance enquiry has

been initiated are altogether different from two charges of which the departmental enquiry has been conducted. Besides, despite the second charge having been proved partially the Disciplinary Authority has exonerated the petitioner without assigning any reason to that effect, therefore, such exoneration order dated 20.02.2018 is not only unwarranted and uncalled for but the same is violative of Rule 9 (2) (3) of the Rules, 1999.

34. In view of what has been considered above, I do not find any infirmity or illegality in the order dated 02.06.2020 passed by the Vigilance Department initiating the open vigilance enquiry against the petitioner, which is contained as Annexure No.1 to the writ petition. However, it is needless to say that while conducting the open vigilance enquiry the authority concerned shall follow the due procedure of law. The petitioner shall be afforded an opportunity of hearing strictly in accordance with law and no prejudice shall be caused to the petitioner for the reason that he has approached this Court assailing the order dated 02.06.2020.

35. Accordingly, the writ petition is devoid of merits, deserves to be dismissed, and is hereby ***dismissed.***

36. No order as to costs.

(2021)08ILR A98
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.07.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE RAVI NATH TILHARI, J.

Service Bench No. 15161 of 2019

State of U.P. & Ors. ...Petitioners
Versus
Smt. Brajesh Kumari & Ors. ...Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
Bir Bahadur Singh, Ratnesh Chandra

A. Practice & Procedure - Once a final order of punishment has been passed, then merely because appeal has been filed and during its pendency the appellant-employee dies, the punishment order by itself will not abate nor will it get nullified. The legal heirs can pursue the appeal on the basis of available records in a case of dismissal, removal etc. which has monetary consequences for them. (Para 16)

Shri Mukesh Pal Singh was visited with the punishment of dismissal from service while he was alive and had preferred an appeal against it. He died during the pendency of that appeal. The legal heirs of Shri Mukesh Pal are entitled to pursue the appeal filed by him, but instead they preferred the abovementioned claim petition for the monetary reliefs and also for seeking compassionate appointment. However, the appellate authority had rejected the appeal subsequent to the death of late Mukesh Pal on merits and not as having abated which is erroneous in the eyes of law. The appellate authority could not have passed the order on merits in appeal against a dead person. The Court opined that the appropriate course would be to allow an opportunity to the legal heirs of late Mukesh Pal to pursue the appeal as it was not only a question of punishment, but consequences which would flow from such punishment, especially the monetary benefits to which his legal heirs would be disentitled as a consequences thereof. (Para 21)

Writ Petition Allowed. (E-8)

List of Cases cited:-

1. Bachhatar Singh Vs St. of Punj. & ors. AIR 1963 SC 395 *(distinguished)*

2. Smt. Rajeshwari Devi Vs St. of U.P. Writ Petition No. 28935 of 2007 *(distinguished)*

3. Prema Marandi Vs St. of Jharkh. Writ Petition No. 5987 of 2008 *(distinguished)*

4. BasudeoTiwary Vs Sido Kanhu University & ors. 1998 (8) SCC 194 *(distinguished)*

5. State of Bihar Vs Shanti Kumari L.P.A. No. 247 of 2015

6. Sri Lakhi Ram Manjhi Vs Management of Sangramgarh Colliery & ors. (1994) 1 SCC 292 *(followed)*

7. Gwalior Rayons, Manvoor Vs Labour Court (1978) 2 LLJ 188 (Ker.)

8. Bank of Baroda Vs Workmen (1979) 2 LLJ 57 (Guj.)

9. Sudha Srivastava (Smt.) Vs Comptroller & Auditor General of India (1996) 1 SCC 63

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

1. Heard Sri Manjeev Shukla, learned Counsel for the petitioner and Shri Ratnesh Chandra, learned counsel appearing for the contesting opposite parties.

2. U.P. Public Services Tribunal at Lucknow (hereinafter referred as "the Tribunal") has, by means of the impugned judgement dated 30.11.2018 passed in claim petition no. 1775 of 2018 allowed the claim petition of the private opposite parties herein on the ground that late Mukesh Pal Singh who was serving the State of UP as Lekhpal was visited with the punishment of dismissal from service vide order dated 20.1.2008 and had preferred an appeal against the said judgement on 17.3.2008, but, unfortunately, as he died on 6.7.2012, therefore, the entire proceedings including the one which led to his punishment vide order dated 20.1.2008 as also the appellate order passed after his death on 15.4.2017 stood abated and that his legal representatives, i.e. private opposite parties herein were entitled to all the retiral dues, i.e., death-cum- retirement gratuity, family pension, GPF, GIS, leave encashment etc. as also compassionate appointment.

3. The submission of Shri Manjeev Shukla, learned Addl. C.S.C. for the State of U.P., is that while doing so it has relied upon three decisions rendered by Hon'ble the Supreme Court of India which in fact do not deal with this issue. In the case of ***Bachhatar Singh vs State of Punjab & ors. others (AIR 1963 SC 395)*** no such proposition of law that the punishment order would abate if the employee dies during pendency of appeal against it, has been laid down Secondly, it has relied upon a division bench judgement of this court rendered in ***writ petition no. 28935 of 2007, Smt. Rajeshwari Devi vs State of UP,*** which, according to him, is also not a judgement on the issue as to whether the punishment order itself would abate if the employee dies subsequently, instead, it deals with such abatement during pendency of enquiry, i.e., prior to any determination of punishment in respect thereof. Thirdly, he says that the learned Tribunal has relied upon a judgement of the Jharkhand High Court rendered in ***writ petition no. 5987 of 2008, Prema Marandi versus State of Jharkhand***, which again, according to him, is not in terms of basic principles of service jurisprudence, therefore, reliance on it is misconceived.

4. The submission of learned counsel for the petitioner is that once, after enquiry, in which the delinquent employee has

participated, a final order of punishment is passed, then, the punishment order would not abate merely because the employee has died. Of course if he had preferred an appeal, but had died during its pendency, then the appeal should have been proceeded on merits after hearing the legal heirs, if any, and not otherwise, unless it was to be dismissed as abated, but, this does not mean, as has been held by the learned Tribunal, that once the delinquent employee dies, then the entire proceedings including the punishment order stands abated. He says that the Tribunal has taken an erroneous view which has grave consequences not only for the present case as it would entitle the legal heirs to post retiral benefits which would otherwise not be available because of the dismissal of late Mukesh Pal Singh, but, also for other similar cases.

5. Shri Ratnesh Chandra, learned counsel for the contesting opposite party nos. 1 to 4 relied on the various decisions which have been relied by the learned Tribunal. He also referred to a decision of Hon'ble the Supreme Court as referred in the judgement of the Jharkhand High Court in Prema Marandi's case (supra), i.e., in the case of ***Basudeo Tiwary Vs. Sido Kanhu University and ors. reported in 1998 (8) SCC 194.***

6. Having heard learned counsel for the parties and perused the records we are of the considered opinion that the Supreme Court of India in Bachhatar Singh's case (supra) did not deal directly with the issue as to whether a punishment order and appellate proceedings initiated thereafter would stand automatically abated if the delinquent employee dies during pendency of appeal. It merely says that there are two stages in a disciplinary proceedings and in both of them a judicious decision is required to be taken. We do not see how this judgement helps the cause of private opposite parties or for that matter how it sustains the judgement impugned herein.

7. We have also perused the decision of the Supreme Court of India in Basudev Tiwari's case (supra). We find that even in this case the question which has arisen before us did not directly fall for consideration before the Supreme Court of India. It was a matter pertaining to termination of service on the ground of the appointment itself being illegal or unauthorised and the Supreme Court of India held that a notice was necessary before taking any such action. The termination of services of Basudev Tiwari was held to be illegal only on this ground. In Basudev Tiwari's case the Supreme Court of India after quashing the termination of service of Sri Tiwari on the ground of denial of opportunity of hearing declined to issue further direction either as to further inquiry or reinstatement as the appellant Basudev Tiwari had expired during pendency of the said proceedings. In view of death of Sri Tiwari neither any inquiry was possible nor could he be reinstated. Consequent to his termination being held as illegal he was treated as having died in harness. We do not see as to how this judgement, which has been referred in the decision of the Jharkhand High Court, would come to the rescue of the private opposite parties herein.

8. Now the third judgement referred and relied by the Tribunal has been rendered by a Single Judge bench of this court in the case of Smt. Rajeshwari Devi (supra). We have considered it also. It was a case where departmental inquiry was pending and the delinquent employee died,

therefore, obviously, the proceedings abated as there was no determination or final order in such proceeding having any civil consequences. This decision also does not apply to the facts of the present case.

9. As regards the Single Judge Bench decision of the Jharkhad High Court in the case of Prema Marandi we find that the dismissal order had been passed therein by the Secretary of the Department concerned, therefore, no appeal could be filed against such order, accordingly based on this and also on the reasoning that husband of Prema Marandi was denied an opportunity to appeal against the punishment order, it declared the termination of service as invalid and held that the appellant's husband would be deemed to have died in harness. In this context reliance was placed on Basudev Tiwari's case (supra). We have already considered the decision of Hon'ble the Supreme Court in Basudev Tiwari's case and do not see as to how the said case could be of help in this case.

10. We may also point out that a similar view taken by a Single Judge of the Patna High Court, as has been taken by the Tribunal, was disapproved by Division Bench of the said Court in the case of State of ***Bihar v. Shanti Kumari, L.P.A. No. 247 of 2015,*** decided on 23.02.2018. Relevant extract of judgment in Shanti Kumari (supra) is quoted below:

"Before we would proceed to consider the issues raised by the deceased Government employee in his appeal, we would definitely examine the opinion of the learned Single Judge which is the foundation for the present appeal and even though there is no infirmity on the principles followed by the learned Single Judge to hold the appellate order unsustainable having been passed by the Disciplinary Authority himself while discharging appellate functions, his opinion as to the abatement of the disciplinary proceeding by virtue of death of the delinquent is strictly not in tune with the legal position nor is supported by the judgment rendered in the case of Ashok Kumar Singh (supra), on which he has chosen to rely.

A death of the delinquent at the stage of disciplinary proceeding and at the stage of appellate proceeding is vastly different. In fact if the death of a delinquent occurs in the midst of the disciplinary proceeding there can be no confusion that the proceeding would abate instantly. But the situation would be vastly different if the death takes place after the proceeding has concluded and the matter is resting with the Disciplinary Authority for final orders or after orders are passed or where the death takes place at the appellate stage.

In our opinion while there would be no contest with the legal position in case where the death of a delinquent takes place in the midst of the disciplinary proceeding which would abate the disciplinary proceeding, but if the death takes place after the enquiry is concluded in the disciplinary proceeding and the matter is posted for orders or at the appellate stage, then the situation is different and there cannot be an abatement of disciplinary proceedings which has already attained finality. In such cases the right to sue survives and the legal heirs who wish to contest the finding of guilt in the punishment order passed by the Disciplinary Authority can pursue the appeal if already filed by the deceased delinquent or file appeal, in case he has deceased after passing of the order of penalty. In case while pursuing the appellate remedy the legal heirs are able to

show that the matter would require reconsideration at the original stage of the disciplinary authority by remand, then the proceedings can be held abated, otherwise not."

11. We may in this context refer a decision of Hon'ble the supreme Court of India in the case of Sri Rameshwar Manjhi (deceased) through his son ***Sri Lakhi Ram Manjhi v. Management of Sangramgarh Colliery & ors., (1994) 1 SCC 292,*** wherein a question arose as to whether an industrial dispute survives when the workman concerned dies during its pendency ? Can the proceedings before the Tribunal/Labour Court be continued by the legal heirs/representatives of the deceased workman ? Hon'ble the Supreme Court had the occasion to consider divergent views expressed on these questions by various High Courts. After such consideration it held as under :

12. The maxim 'actio personalis moritur cum persona' though part of English Common Law has been subjected to criticism even in England. It has been dubbed as unjust maxim, obscure in its origin, inaccurate in its expression and uncertain in its application. It has often caused grave injustice. This Court in a different context, in considering the survival of a claim for rendition of accounts, after the death of the party against whom the claim was made, in Girja Nandini Devi v. Bijendra Narain Choudhury (AIR 1967 SC 1124) observed as under:

"The maxim 'actio personalis moritur cum persona' a personal action dies with the person has a limited application. It operates in a limited class of actions ex delicto such as actions for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory. An action for account is not an action for damages ex delicto, and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could not be enjoyed after death, or granting it would be nugatory."

13. It is thus obvious that the applicability of the maxim 'actio personalis moritur cum persona' depends upon the 'relief claimed' and the facts of each case. By and large the industrial disputes under Section 2-A of the Act relate to the termination of services of the concerned workman. In the event of the death of the workman during pendency of the proceedings, the relief of reinstatement, obviously, cannot be granted. But the final determination of the issues involved in the reference may be relevant for regulating the conditions of service of the other workmen in the industry. Primary object of the Act is to bring industrial peace. The Tribunals and Labour Courts under the Act are the instruments for achieving the same objective. It is, therefore, in conformity with the scheme of the Act that the proceedings in such cases should continue at the instance of the legal heirs/representatives of the deceased workman. Even otherwise there may be a claim for back wages or for monetary relief in any other form. The death of the workman during pendency of the proceedings cannot deprive the heirs or the legal representatives of their right to continue the proceedings and claim the benefits as successors to the deceased workman.

12. While opining as aforesaid Hon'ble the Supreme Court quoted in extenso the reasoning of the Kerala High Court in the case of ***Gwalior Rayons,***

Mavoor v. Labour Court, (1978) 2 LLJ 188 (Ker.), and of the Gujrat High Court in the case of ***Bank of Baroda v. Workmen, (1979) 2 LLJ 57 (Guj.)*** and it agreed and also approved the said reasoning and conclusions reached therein. We may also refer to paragraphs 14 and 15 of the decision of Hon'ble the Supreme Court in Sri Rameshwar Manjhi (supra) wherein aforesaid decisions of the Kerala High Court and Gujrat High Court have been quoted :

"14. In Gwalior Rayons, Mavoor v. Labour Court3 Chandrasekhara Menon, J. of the Kerala High Court sitting singly dealt with the question with utmost clarity and erudition. We quote hereunder, with approval the reasoning of the learned Judge:

"The scope of adjudication by a Tribunal under the Industrial Disputes Act is much wider than determination of legal rights of the parties involved or redressing the grievances of an aggrieved workman in accordance with law. As Gajendragadkar, J., points out in Cawnpore Tannery Ltd. v. S. Guha, (1978) 2 LLJ 188 (Ker) the adjudication by the Industrial Disputes Act is only an alternative form of settlement of industrial disputes on a fair and just basis. The primary duty of the Industrial Tribunal is to establish peace in the industry between employer and workmen. Any unfair action by the management even against an individual worker might cast its shadow on the general body of workers who might get perturbed by such 8 AIR 1967 SC II 24, 1131 : (1967) 1 SCR 9 (1961) 2 LLJ 110, 112: AIR 1967 SC 667 action. A resolution of the dispute might then become necessary for industrial peace notwithstanding the death of the workman concerned pending proceeding. The personal relief to the workman concerned to a certain extent occupies a subsidiary place in the scheme of things. Not that it is not important. It is only a consequential result of the decision primarily arrived at securing industrial peace settling the apprehension of the workmen without losing sight of the interest of the industry. As Rajamannar, C.J. stated in Sri Meenakshi Mills Ltd. v. Labour Appellate Tribunal, (1953) 2 LLJ 326, the essential object of enacting the Industrial Disputes Act is to provide recourse to a given form of procedure for the settlement of disputes in the interest of maintenance of peaceful relations between the parties without apparent conflicts such as are likely to interrupt production and entail other damages. In the circumstances proceedings before the Labour Court or the Industrial Tribunal under the Industrial Disputes Act cannot be equated to a personal action in torts in a Civil Court which would come to an end with the death of the aggrieved party to the dispute. In the general set up of an industry, in the nature of the relationship between the employer and the employees, a dispute between an employer and even an individual employee generally affects the entire community of workmen in the industry. They acquire an interest in the dispute. It ceases to be an individual dispute and becomes an industrial dispute affecting the interest of the entire body of workmen. Any decision of the Labour Court will affect the interest of the whole body of workmen and the dispute, therefore, cannot die with the death of the individual workman. Before Section 2-A of the Act was introduced the Courts had said that an individual dispute should be taken up by the workmen as such before it can become an industrial dispute. Section 2-A makes an individual dispute though not taken up by the collective body of workers, an industrial dispute." The learned Judge further observed: "Even in respect of

ordinary judicial proceedings can it be said that the death of party to the proceedings will terminate the action in all cases? Even under the English Common Law before the Law Reform (Miscellaneous Provisions) Act, 1934 was passed to provide generally for the survival of causes of action in tort, death was considered as extinguishing liability only in respect of cause of action in tort. 'This was' Winfield says in his Law of Tort, 'due in part to the historical connection of the action of trespass, from which much of our law of tort is derived, with the criminal law and in part to the reference often made to the maxim action personals moritur cum persona which, though traceable to the fifteenth century, probably did no more originally than state in Latin a long-established principle concerning torts such as assault and battery, of which it was neither the historical cause nor the 10 (1953) 2 LLJ 326 rational explanation. Actions in contract generally escaped the rule, and so too did those in which property had been appropriated by a deceased person and added to his own estate.' Therefore, I see no reason why the Labour Court should cease to exercise jurisdiction in considering the question whether the termination of the services of the two employees was justified or not merely because they died during the course of the proceedings. A decision on that is certainly in the interest of the other employees. And the benefits that would be due to the deceased employees on the finding of the Labour Court can be realised on behalf of their estate by their legal heirs under Section 33-C(2) of the Act."

15. In Bank of Baroda v. Workmen, (1979) 2 LLJ 57 (Guj.) a Division Bench of the Gujarat High Court, followed the reasoning of Chandrasekhara Menon, J. in Gwalior Rayons case. B.J. Divan, C.J. speaking for the Bench quoted verbatim from Gwalior Rayons case and in addition observed as under:

"It may be pointed out that under Section 306 of the Indian Succession Act, 'All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.' In this context, it must be pointed out that, so far as the granting of relief of reinstatement is concerned, it would be nugatory on the death of the workman concerned pending the reference before the Tribunal or the Labour Court, as the case may be. However, reinstatement involves the concept of back wages also and very often the Tribunal has to pass orders providing for the back wages from the date of wrongful termination of the services till the date of reinstatement. It is only under the Industrial Disputes Act that in the field of industrial relations, the Tribunal concerned can direct reinstatement of the workman, Under the ordinary civil law, it is not open to a civil court to direct reinstatement of a workman. The only thing that a civil court can do is to provide for damages for wrongful termination of service or wrongful dismissal.

Again, the whole concept under the Industrial Disputes Act of the Tribunal ascertaining whether the termination of services was proper, legal and just, is unknown to the civil courts. So, in the case of a deceased workman where the reference is under Section 2A of the Industrial Disputes Act, the heirs and legal

representatives can agitate the question, firstly, whether the termination of the deceased workman was just, legal and proper, and secondly, if it was wrongful and invalid, then, what compensation in terms of money could have been given to the workman from a particular date fixed by the Tribunal till the date of reinstatement and if reinstatement cannot be granted because of the death of the workman, till the date of his death. It is therefore in this context of Section 306 of the Succession Act that the right to prosecute these special proceedings before the Industrial Tribunal survives to the administrators, executors, heirs and legal representatives of the deceased workman. It is only a cause of action for personal injury or in the case of defamation or assault or battery or malicious prosecution which cannot be said to survive after the death of person concerned."

13. Hon'ble the Supreme Court has given two reasons for continuance of proceedings after death of workmen, firstly, is the nature of the industrial dispute in reference to which the reference is made which may be of relevance to similar disputes as also the rights of other similarly situated employees, secondly, it has also held that even otherwise there may be a claim for backwages or for monetary relief in any other form. The death of the workman during pendency of the proceedings cannot deprive the heirs or the legal representatives of their right to continue the proceedings and claim the benefits as successors to the deceased workman.

14. The aforesaid decision in the case of Sri Rameshwar Manjhi has been followed by Hon'ble the Supreme Court in a subsequent decision in the case of ***Sudha Srivastava (Smt.) v. Comptroller & Auditor General of India, (1996) 1 SCC 63,*** which was a case where widow of an employee had filed a writ petition for enforcement of decision taken regarding her late husband's promotion and Hon'ble the Supreme Court held that she had locus to maintain the petition considering the monetary aspect involved therein.

15. The application of the maxim 'Actio personalis moritur cum persona' has been considered by the Supreme Court at length in the case of Shri Rameshwar Manjhi (supra), relevant extract of which has already been quoted above. Proceedings get abated on the death of the initial initiator of the proceedings if the right to sue does not survive in his legal heirs/legal representatives especially in a case based on personal claim as a personal claim dies with the claimant. However, in cases of dismissal and removal apart from the severance of master and servant relationship by way of punishment there is a pecuniary aspect involved as in such cases the delinquent employee becomes disentitled to the post-retirement benefits. It is for this reason that in such cases of dismissal or removal, legal heirs/representatives of such delinquent employee have been held entitled to challenge such orders in the event the delinquent dies, as there are monetary consequences involved and it affects their right to succeed to the estate of such employee, the post-retirement or death-cum-retirement dues being part of such estate which devolve upon the successor.

16. Reliance placed by the Tribunal upon the decisions referred by it, in our opinion, is misplaced and misconceived. The Tribunal has not given any other reasoning for arriving at the conclusion that

the punishment and the appellate proceedings had abated. We do not find any reason to sustain this conclusion. Once a final order of punishhment has been passed, then merely because appeal has been filed and during its pendency the appellant-employee dies, the punishment order by itself will not abate nor will it get nullified. The legal heirs can pursue the appeal on the basis of available records in a case of dismissal, removal etc. which has monetary consequences for them.

17. In view of the aforesaid the private opposite parties herein were entitled to pursue the appeal filed by late Mukesh Pal Singh and as legal heirs they could pursue such proceedings, therefore, the conclusion of the Tribunal that the punishment order had abated as the delinquent employee had died during pendency of the appeal, is contrary to the aforesaid legal position and is unsustainable.

18. In fact we find that the claim petition before the Tribunal was filed by the legal heirs/representatives of late Mukesh Pal Singh wherein they had not challenged the dismissal order, but had sought a direction to the opposite parties for paying them all the service benefits, i.e., death gratuity, family pension, etc. on account of death of the government servant after ignoring the statutory appeal dated 17.3.2008 which was pending before the appellate authority against the punishment order dated 20.1.2008 as the delinquent employee had died on 6.7.2012. They had also sought compassionate appointment.

19. The legal heirs/representatives of late Mukesh Pal Singh could have pursued the appeal filed by him against his dismissal, but they did not do so, yet, the Tribunal proceeded to decide the matter in the aforesaid terms which in our opinion could not have been done.

20. In the present case it is an admitted position that Shri Mukesh Pal Singh was visited with the punishment of dismissal from service vide order dated 20.1.2008 while he was alive and he had preferred an appeal against it. Thus, there was a final determination in the disciplinary proceedings as to his work and conduct and also as to what punishment should be imposed upon him. No doubt he was entitled to file an appeal and as informed by learned counsel for the parties he had preferred an appeal within the time prescribed. He died during pendency of this appeal. The legal heirs representatives of late Mukesh Pal Singh were entitled to pursue the appeal filed by him, but they did not do so, instead, they preferred the abovementioned claim petition for the reliefs already referred above.

21. However, to the extent the appellate authority has rejected the appeal subsequent to the death of late Mukesh Pal Singh, i.e., on 15.4.2017 on merits and not as having abated, the appellate authority has erred. The appellate authority could not have passed an order on merits in appeal against a dead person. In our opinion in such a scenario where the employee files an appeal under Rule 11 of the U.P. Government Servant (Discipline & Appeal) Rules 1999, but dies subsequently, his legal heirs are entitled to pursue such appeal for the reason given in this judgment and the words 'Government Servant' referred in Rule 11 would, in such a situation, include his legal heirs/legal representatives. In our opinion the appropriate course was to allow an opportunity to the legal heirs of late Mukesh Pal Singh to pursue the appeal as it

was not only a question of punishment, but the consequences which would flow from such punishment, especially the monetary benefits to which late Mukesh Pal Singh and after him his legal heirs would be disentitled as a consequence thereof. In the event they did not contest the appeal, it could have dismissed it as having abated.

22. We, however, cannot sustain the judgement of the Tribunal by which it has held that the entire proceedings including the punishment order should abate. We accordingly **set aside the decision of the Tribunal dated 30 November 2018,** however, with the caveat that the appellate order dated 15.4.2017 shall also stand set aside. Consequently the appeal preferred by late Mukesh Pal Singh stands revived. The opposite party herein shall get themselves substituted in such appeal in place of Late Mukesh Pal Singh, and, if they so desire, they may pursue the same. The appellate authority shall hear them out and thereafter shall decide the appeal on merits. Based on this consequences will follow accordingly as per law.

23. At this stage Shri Ratnesh Chandra, learned counsel for the opposite parties submits that his clients do not have the punishment order nor the appellate order and they had applied for the same under the Right to Information Act, but, they have not been provided the same. We accordingly provide that the petitioner-State shall provide the entire records of the disciplinary proceedings pertaining to late Mukesh Pal Singh to the opposite party nos. 1 to 4 including the punishment order, the appellate proceedings and the appellate order passed therein. To further clarify this aspect, the charge-sheet, reply if any submitted by late Mukesh Pal Singh, correspondence between him and the enquiry officer or the disciplinary authority, of any nature, all the evidence which may have been referred in the chargesheet or may have been led during enquiry or any other document or correspondence which may have taken place during the course of enquiry, shall also be provided to the opposite parties herein.

24. The claim petition bearing no. 1775 of 2013 stands disposed of in the aforesaid terms.

25. With the above observations/ directions this writ petition is **allowed in the aforesaid terms.**

(2021)08ILR A107
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.08.2021

BEFORE

THE HON'BLE ABDUL MOIN , J.

Service Single No. 15271 of 2019

Pramod Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Umesh Chandra Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law - Appointment - The petitioner is agitating since the year 2000 for his rights as Subject Specialist but since no reason whatsoever has been provided by the Scrutiny Committee in its report, even though it find the case of the petitioner to be correct. It was for the respondents to have called upon the Scrutiny Committee to indicate the reasons, if any, but then sitting over the recommendations of the Scrutiny Committee which was formed in

pursuance to the directions of the Writ Court would not be fit and fair. (Para 20)

The Court imposed cost of Rs. 50,000 on the respondents as their casual behavior has harassed the petitioner and had led to unnecessary litigation as well. (Para 28)

Writ Petition Allowed. (E-8)

List of Cases cited:-

1. Varunesh Chandra Shukla Vs St.of U.P. & ors. Writ Petition No. 6216 of 2015

2. Sangita Srivastava Vs University of Allahabad & ors. (2002) 3 UPLBEC 2502 *(followed)*

3. Sheela Devi Vs Managing Director & ors. (2007) 2 UPLBEC 1853 *(followed)*

4. Commissioner, Karnataka Housing Board Vs C. Muddaiah (2007) 1 SCC 689

5. Subrata Roy Sahara Vs U.O.I. & ors. (2014) 8 SCC 470 *(followed)*

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. Present petition has been filed praying for quashing of the order dated 26.04.2019 passed by opposite party no.1, a copy of which is Annexure-1 to the writ petition, by which the claim of the petitioner for appointment as Subject Specialist has been rejected. A further prayer is for a mandamus commanding the respondents to issue appropriate order of appointment treating the appointment of the petitioner to be a notional appointment and pay salary in terms of order passed in case of Awadhesh Kumar.

3. The case set forth by the petitioner is that in pursuance to an advertisement dated 12.12.1999 for the post of Subject Specialist, a selection had been held in which the petitioner also qualified along with one Awadhesh Kumar. The petitioner claims to have submitted his joining as a Subject Specialist at R.R. Inter College, Sandila, District Hardoi. Subsequently, the selection was stayed by the order of the respondents dated 12.10.2000.

4. In the meanwhile, a selected person namely Awadhesh Kumar filed writ petition at Allahabad bearing Writ A No.10448 of 2001 in re: **Awadhesh Kumar vs. State of U.P. and others,** and this Court vide order dated 09.03.2010, a copy of which is Annexure-4 to the writ petition, after considering that there were certain irregularities in the selection by which ineligible persons had been permitted to participate in the selection, was of the view that mass cancellation of the selection held in pursuance to the advertisement dated 12.12.1999 is legally unsustainable and accordingly required the State Government to constitute a Scrutiny Committee in respect of the selection in question for segregating the good part from bad part after examining the records of each of the selected candidate separately.

5. The petitioner also filed Writ Petition No.7474 (SS) of 2000 before this Court which remained pending. The same was decided vide order dated 26.03.2012 requiring the respondents to decide the representation of the petitioner in light of the judgment of **Awadhesh Kumar (supra).** The said representation was decided vide order dated 11.01.2013, a copy of which has been filed as Annexure-6 to the writ petition, whereby the claim of the petitioner was rejected. Being aggrieved, the petitioner filed Writ Petition No.1369 (SS) of 2013. The said petition

was disposed of requiring the respondents to consider the case of the petitioner vide order dated 07.07.2015, a copy of which is Annexure-7 to the writ petition. Again the claim of the petitioner was rejected vide order dated 10.09.2015, a copy of which has been filed as Annexure-8 to the writ petition.

6. Being aggrieved, the petitioner filed a third writ petition namely Writ Petition No.6217 (SS) of 2015 and the same was allowed vide judgment and order dated 10.11.2016, a copy of which has been filed as Annexure-3 to the writ petition, in terms of the decision of this Court in the case of **Varunesh Chandra Shukla vs. State of U.P. and others** passed in Writ Petition No.6216 of 2015. The judgment of **Varunesh Chandra Shukla (supra)** is Annexure RA-1 to the rejoinder affidavit filed by the petitioner. The writ Court in the case of Varunesh Chandra Shukla (supra) required the matter to be considered by the State Government in light of the direction issued in the case of **Awadhesh Kumar (supra).**

7. Incidentally, all the three judgments of this Court passed in the case of the petitioner attained finality.

8. Again the claim of the petitioner was rejected vide order dated 22.01.2018, which lead to a fourth round of litigation by the petitioner by filing Writ Petition No.6001 of 2018. The writ petition has been allowed vide judgment and order dated 25.09.2018, a copy of which has been filed as Annexure-2 to the writ petition, whereby the respondents were required to consider the appointment of the petitioner on the post of Assistant Teacher (Subject Specialist).

9. The claim of the petitioner has once again been rejected vide order dated 26.04.2019, a copy of which has been filed as Annexure-1 to the writ petition. Being aggrieved, the petitioner is before this Court.

10. Perusal of the impugned order dated 26.04.2019 would indicate that the respondents have stated that the Scrutiny Committee has found the case of the petitioner to be correct but no reasons have been assigned by the Scrutiny Committee as to why it has done so.

11. Learned counsel for the petitioner argues that in case the reasons are not forthcoming then the respondents should have asked the reasons from the Scrutiny Committee but once in terms of the directions issued by the writ Court in the case of **Awadhesh Kumar (supra)** of constituting a Scrutiny Committee and the Scrutiny Committee having found the claim of the petitioner to be correct in the eyes of law, there was no occasion for the respondents to have blown hot and cold in the same breath i.e. by indicating that the Scrutiny Committee has found the claim of the petitioner to be correct and thereafter not acting upon the report of the Scrutiny Committee by contending that no reasons are forthcoming from the said said order. It is thus contended that the impugned order is patently bad in the eyes of law and reflects patent non-application of mind.

12. Learned counsel for the petitioner further argues that in paragraph 13 of the counter affidavit, the respondents have admitted that Awadhesh Kumar, upon filing of the contempt petition, had been issued with a letter dated 22.11.2001, meaning thereby that Awadhesh Kumar has been given the benefit of the judgment passed at

Allahabad whereby his case has been found to be genuine by the Scrutiny Committee and thus there cannot be any occasion for the respondents to not extend the benefit to the petitioner once admittedly even the case of the petitioner has been found to be correct as per the Scrutiny Committee.

13. Per contra, learned State Counsel on the basis of averments contained in the counter affidavit contends that though the Scrutiny Committee has found the claim of the petitioner to be correct yet no reasons are forthcoming in the report of the Scrutiny Committee as to why the claim of the petitioner is correct therefore despite the petitioner's claim having been found correct it has not been acted upon.

14. Heard learned counsel for the parties and perused the records.

15. From perusal of the records, it is apparent that the selection of Subject Specialist and its cancellation was challenged before the writ Court at Allahabad in the case of **Awadhesh Kumar (supra)** wherein the writ Court specifically directed that mass cancellation of the selection held in pursuance to the advertisement cannot be legally sustained more so when a large number of persons have already been appointed and they have joined in pursuance to the selection so held. Accordingly, the State Government was required to constitute a Scrutiny Committee in respect of the selection in question for segregating the good part from bad part after examining the records of each of the selected candidate separately and thereafter to take appropriate action.

16. In the instant case the petitioner had joined after a selection as a Subject Specialist at R.R. Inter College, Sandila, District Hardoi, on 12.10.2000 as would be apparent from a perusal of the impugned order dated 26.04.2019.

17. In pursuance to the directions issued by the writ Court at Allahabad in the case of **Awadhesh Kumar (supra)** a Scrutiny Committee had been constituted, which, as per orders issued by the respondents, found the case of the petitioner to be correct. However, from perusal of the impugned order, it comes out that no reasons were forthcoming from the Scrutiny Committee as to why the case of the petitioner has been found to be correct. Once the Scrutiny Committee had been constituted in pursuance to the directions issued by the writ Court and the respondents themselves have acted upon the same in the case of Awadhesh Kumar accordingly they cannot be allowed to do a volte face by contending that though the Scrutiny Committee has found the petitioner to be eligible yet no reasons are forthcoming, as such recommendations of the Scrutiny Committee cannot be upheld. Further, the respondents themselves have admitted in paragraph 13 of the counter affidavit that Awadhesh Kumar had filed a Contempt Petition and thus action was taken by the State. In the instant case, it is apparent that the petitioner has been litigating right since the year 2000 i.e. for a period of 21 years. Five petitions have been filed and in four of the earlier petitions, the writ Court primarily required the respondents to consider the case of the petitioner in light of the directions issued in the case of **Awadhesh Kumar (supra)**. All the orders passed by the writ Court attained finality as they were never challenged by the respondents. As already indicated above, the respondents have indicated in the impugned order that the Scrutiny Committee has found the case of the

petitioner to be correct yet have not proceeded further on the ground that the Scrutiny Committee has not assigned reasons. At the risk of repetition, once the Scrutiny Committee has found the case of the petitioner to be correct and in case the reasons were not forthcoming, it was for the respondents to have called upon the Scrutiny Committee to indicate the reasons, if any, but then sitting over the recommendations of the Scrutiny Committee which, as already indicated above, was formed in pursuance to the directions of the writ Court, would not be in the fitness and fairness of things.

18. Keeping in view the aforesaid discussions, it is apparent that the impugned order dated 26.04.2019 is legally unsustainable in the eyes of law and the writ petition deserves to be allowed.

19. However, whether the matter is to be remitted back to the authorities concerned the fifth time to reconsider the matter or whether a direction should be issued by the writ Court is the next issue which has to be considered by this Court.

20. As already indicated above, this is the fifth round of litigation for the petitioner and the petitioner is continuously agitating since the year 2000 for his right. Admittedly, the Scrutiny Committee has also found the case of the petitioner to be correct but the respondents, through the impugned order dated 26.04.2019, have rejected the claim of the petitioner on the ground that no reasons are forthcoming from the report of the Scrutiny Committee. Thus, it is admitted that the petitioner is eligible but for the impugned order passed by the respondents.

21. A Division Bench of this Court in the case of **Sangita Srivastava vs. University of Allahabad and others-** (2002) 3 UPLBEC 2502 has considered the issue that in cases where an authority does not take a decision on relevant considerations or totally misdirects itself and the objective material on the basis of which such decision is to be taken is before the Court, then the Court, in certain exceptional circumstances, can itself take that decision instead of remanding the matter to the authority, particularly when such remand would entail further delay and hardship.

22. For the sake of convenience, the relevant observations of the Division Bench of this Court in the case of **Sangita Srivastava (supra)** are reproduced below:-

"30. We may, however, also consider the matter from the point of view of Section 31 (3) (c). We have already observed that the petitioner fulfils the conditions in Sub-clauses (i) and (ii) of the above provision. The question is about Sub-clause (iii) which requires that he (or she) should be found suitable for regular appointment by the Executive Council. The Executive Council by its resolution dated 4.5.2002 has rejected the petitioner's claim, relying on the report of the Committee dated 2.5.2002 (Annexure-C.A. 3). We have already observed that the Committee's report is incorrect and based on misconceptions. Hence, we quash the said report dated 2.5.2002 as well as the Executive Council's resolution dated 4.5.2002 (Annexure-C.A. 4). The question is now what is to be done? We could have remanded the matter to the Executive Council, but the Executive Council having already disclosed its mind, a remand would be an exercise in futility. No doubt Clause (iii) of Section 31 (3) (c) states that the opinion regarding suitability should be of

the Executive Council. But here we find that the Executive Council has only relied on the report of a Committee which is totally incorrect and misconceived. A remand to the Executive Council would entail further delay and harassment for the petitioner as the Executive Council would attain set up a Committee and we cannot say what would happen thereafter.

31. In our opinion, if a statute requires that a decision on a matter is to be taken by a certain authority, and if that authority does not take the decision on relevant considerations or totally misdirects itself, and the objective material on the basis of which such decision is to be taken is before the Court, then the Court, in certain exceptional circumstances, can itself take that decision instead of remanding the matter to the authority, particularly when such remand would entail further delay and hardship. This proposition gets support from the decision of the Supreme Court in B.C. Chaturvedi v. Union of India. 1995 (6) SCC 749, where it was held (in para 18) that although ordinarily it is for the authority concerned to decide the punishment of an employee found guilty, in exceptional circumstances the High Court itself can impose the punishment.

32. In the State of Bihar v. Dr. Braj Kumar Mishra and Ors., 1999 (9) SCC 546, the Supreme Court observed (in paragraph 7) :

"It is true that normally the Court, in exercise of its power under Article 226/227 of the Constitution of India, after quashing the impugned order should remand the matter to the authority concerned particularly when such authority consists of experts for deciding the issue afresh in accordance with the direction issued and the law laid down by it but in specified cases, as the instant case, nothing prevented the Court from issuing directions when all the facts were admitted regarding the eligibility of respondent No. 1 and his possessing the requisite qualifications. Remand to the authorities would have been merely a ritual and ceremonial. Keeping in mind the lapses attributable to the Commission which had failed to take appropriate action despite recommendation made in favour of respondent 1, the learned single Judge as also the Division Bench of the High Court felt it necessary to declare respondent No. 1 promoted with effect from 1.2.1985. We do not find any illegality or error of jurisdiction."

33. In the present case, all the objective material for deciding the petitioner's suitability is before the Court. Her academic qualifications are before us. She has got first class first in B.Sc. and M.Sc. She has taught and done other work of regular lecturer for 12 years continuously, including the work of taking classes (in fact she has done more work than regular lecturers vide paragraph 8 of the writ petition, setting papers, examining answer copies, conducting examinations, etc. She has done Ph.D. and NET, even though these were not essential. There is no allegation in the counter-affidavit that her work was not satisfactory during these 12 years.

34. Ordinarily, suitability is to be judged by the Executive Council and not by this Court. But what are we to do when the Executive Council acts in a patently unfair manner, as it has done in this case? This Court is a Court of Justice. No doubt it has to do justice based on law, but the Court will interpret law in a way that leads to justice and not injustice.

35. On the facts of this case, and in view of the fact that the Executive Council has acted on irrelevant considerations and has misdirected itself,

and since a remand to it would lead to further delay and harassment of the petitioner, we ourselves have Judged the petitioner's suitability and we find her suitable to be appointed as regular lecturer, and we hold that she fulfils all the requirements of Section 31 (3) (c) of the Act.

36. In the circumstances, a mandamus is issued to the respondents to regularise the petitioner as lecturer in Home Science forthwith and pay her salary of regular lecturer. The petition is allowed. No order as to costs."

23. Likewise, this Court in the case of **Sheela Devi vs. Managing Director and others** - (2007) 2 UPLBEC 1853 while placing reliance on the judgment of **Sangita Srivastava (supra),** in the case of compassionate appointment after repeated rounds of litigation, has held as under:-

"15. Normally, the Court is very loathe to grant a mandate itself for appointment but as has been noted hereinabove, twice the Bank has raised the same bogey and misleading grounds to reject the claim of the widow. Since the Bank appears to have a closed mind on the issue and is harassing a young widow by forcing her to approach the Court time and again it would be against the interest of justice to remand the matter for decision afresh. Applying the ratio of a Division Bench of this Court rendered in the case of Dr. Sangeeta Srivastava v. University of Allahabd and Ors. (2002) (3) U.P.L.B.E.C. 2502, which has been affirmed by the Apex Court, remand would be futile.

16. For the reasons above, this petition succeeds and is allowed and the impugned order dated 3.5.2005 is hereby quashed and the respondent bank is directed to grant compassionate appointment to the petitioner expeditiously, preferably within a period of six weeks from the date of submission of a certified copy of this order. Petitioner would be entitled to her costs."

24. Considering the aforesaid proposition of law as laid down by the Division Bench in the case of **Sangita Srivastava (supra) and Sheela Devi (supra)** and this being a fifth round of litigation for the petitioner, the writ petition is **allowed**. A writ of certiorari is issued quashing the order dated 26.04.2019, a copy of which is Annexure-1 to the writ petition. A writ of mandamus is issued directing the respondents to act upon the recommendations of the Scrutiny Committee within a period of three months from the date of communication of a certified copy of this order with respect to the petitioner.

25. In case the petitioner is appointed then the consequences of his appointment at par with Awadhesh Kumar, who, as per the averments made in paragraph 13 of the counter affidavit is said to have been issued letter dated 22.11.2001, will follow.

26. Before parting with the case and considering the harassment of the petitioner and this being the fifth round of litigation starting from the year 2000 and culminating in the present petition, which has resulted in the impugned order which is being set-aside by this Court, whether some costs should be imposed upon the respondents who have continued with their stand of rejecting the claim of the petitioner on one ground or the other?

26. In this regard, from a perusal of the discussion made above, it is apparent that the respondents have adopted an

adamant attitude while reiterating the earlier order despite the specific observations of this Court in the earlier round of litigations. It is thus apparent that the respondents have not taken pain to look into the earlier judgment of this Court and primarily the same grounds have been reiterated in the impugned order as already indicated above.

27. The Apex Court in the case of **Commissioner, Karnataka Housing Board Vs. C. Muddaiah** reported in **(2007) 1 SCC 689** has considered somewhat akin facts that even if the Court's order is wrong and illegal, that is binding on the parties unless that order is challenged in the superior Court. The Hon'ble Supreme Court also held that if this principle is not adhered to by the State, there will be end of the rule of law.

28. The relevant observations of the Hon'ble Supreme Court in this regard are reproduced below :-

"32. We are of the considered opinion that once a direction is issued by a competent court, it has to be obeyed and implemented without any reservation. If an order passed by a court of law is not complied with or is ignored, there will be an end of the rule of law. If a party against whom such order is made has grievance, the only remedy available to him is to challenge the order by taking appropriate proceedings known to law. But it cannot be made ineffective by not complying with the directions on a specious plea that no such directions could have been issued by the Court. In our judgment, upholding of such argument would result in chaos and confusion and would seriously affect and impair administration of justice. The argument of the Board, therefore, has no force and must be rejected.

33. The matter can be looked at from another angle also. It is true that while granting a relief in favour of a party, the court must consider the relevant provisions of law and issue appropriate directions keeping in view such provisions. There may, however, be cases where on the facts and in the circumstances, the court may issue necessary directions in the larger interest of justice keeping in view the principles of justice, equity and good conscience. Take a case, where ex facie injustice has been meted out to an employee. In spite of the fact that he is entitled to certain benefits, they had not been given to him. His representations have been illegally and unjustifiably turned down. He finally approaches a court of law. The court is convinced that gross injustice has been done to him and he was wrongfully, unfairly and with oblique motive deprived of those benefits. The court, in the circumstances, directs the authority to extend all benefits which he would have obtained had he not been illegally deprived of them. Is it open to the authorities in such case to urge that as he has not worked (but held to be illegally deprived), he would not be granted the benefits? Upholding of such plea would amount to allowing a party to take undue advantage of his own wrong. It would perpetrate injustice rather than doing justice to the person wronged."

28. The Hon'ble Supreme Court in the case of **Subrata Roy Sahara Vs. Union of India and ors.** reported in **(2014) 8 SCC 470** has held as to when the Court should impose cost to check the frivolous writ petition and the orders which are cause of explosion of dockets of the Court. As already observed above, the impugned order herein has been a cause of unnecessary and avoidable litigation had

the respondents applied their mind to the observations of this court in the earlier judgment.

29. For the sake of convenience, the relevant observation of the Hon'ble Supreme Court in the case of **Subrata Roy Sahara (supra)** are being reproduced below:-

"191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. ***One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his.*** *Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs"."*

30. Accordingly, taking into consideration the law laid down by the Hon'ble Supreme Court in the case of **Subrata Roy Sahara (supra)**, while allowing the writ petition, this Court imposes cost of Rs. 50,000/- on the State to be paid to the petitioner. It would be open for the State to recover the said cost from the officer concerned who has passed the impugned order dated 26.04.2019 and whose action has resulted in such avoidable litigation causing repeated harassment to the petitioner.

31. Let this order be complied within four weeks from the date of receipt of a certified copy of this order.

(2021)08ILR A115
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.07.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
HON'BLE RAVI NATH TILHARI, J.

Service Bench No. 15499 of 2021

Arun Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shivam Sharma

Counsel for the Respondents:
C.S.C., Shikhar Anand

A. Practice & Procedure - The law does not permit the extension of period of limitation by mere filing of the representation. (para 5)

Writ Petition Rejected. (E-8)

List of Cases cited:-

1. State of Tripura & ors. Vs Arabinda Chakraborty & ors. (2014) 2 SCC (L&S) 300

2. Jacob Vs Director of Geology & Mining &anr. (2008) 10 SCC 115

(Delivered by Hon'ble Rajan Roy, J.

&
Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Shivam Sharma, learned counsel for the petitioner and learned Standing Counsel for the State.

2. The claim petition bearing No. 486 of 2019 has been rejected on the ground of limitation. The petitioner was initially appointed under the opposite parties vide order dated 29.07.1982 as Dispatcher in the pay-scale of Rs. 200-5-250-EB-6-260-EB-8-320 on temporary basis. His services were terminated without any notice. The petitioner has continued as Dispatcher w.e.f. the date of his joining in the year 1982 itself.

3. During the course of argument, Sri Shivam Sharma, learned counsel for the petitioner fairly informed the Court that in the year 1991, the petitioner had preferred a writ petition before this Court bearing No. 6965 of 1991, which was dismissed for want of prosecution on 06.12.2012. This fact was not mentioned before the Tribunal nor has it been mentioned in the writ petition. Nevertheless, it has been brought to our notice by the counsel himself during arguments. Thereafter, the petitioner moved a representation on 07.09.2015, claiming entitlement to the post of Junior Clerk in the clerical cadre and seniority thereon with consequential benefits of promotion etc. This claim was apparently moved after 33 years of his appointment as Dispatcher. The petitioner was given the benefits of Dispatcher. The petitioner without disclosing the factum of having filed a writ petition before the High Court bearing no. 6965 of 1991, as noticed hereinabove filed a claim petition before the U.P. Public Service Tribunal at Lucknow bearing no. 2053 of 2015, which was disposed of with a direction to the concerned opposite party to decide petitioner's representation dated 07.09.2015.

4. We have perused the said judgment dated 25.07.2017, though it is not under challenge before us, we are constrained to observe that the Tribunal did not delve into the question of limitation, which every court is bound to see irrespective of the fact as to whether objection has been raised or not by any opposite party. The claim petition was filed in the year 2015 seeking a declaration to treat him as substantively appointed clerk w.e.f. 29.07.1982. The cause of action, if at all, arose in the year 1982, but, the Tribunal did not go into this question, instead, it simply passed an order for disposal of petitioner's representation dated 07.09.2015. Now in pursuance thereof on 18.07.2018, an order was passed by the Chief Conservator of forest/Director, Rajya Anusandhan Sansthan, U.P., Kanpur rejecting the claim of the petitioner. This order was challenged by the petitioner by means of writ petition before this Court bearing no. 1538 (SS) of 2019, as is mentioned in the judgment of the Tribunal, which was dismissed on 21.01.2019 on the ground of lack of territorial jurisdiction. The petitioner thereafter filed the abovementioned claim petition bearing no. 486 of 2019 before the Tribunal at Lucknow. The claim petition has been declined by the Tribunal on the ground of limitation. Relevant extract of the judgment are quoted hereinbelow:-

"14. It is clear that the petitioner was appointed as Dispatcher in the Forest department in 1982. It was in compliance of the Government order dated 08.06.1982, whereby a list of visually handicapped persons was circulated amongst various department for appointment in available

vacancies forthwith. The letter specifies the posts against which identified persons were directed to be appointed. However, it did not specifically mention whether they were to be appointed against cadre or ex-cadre posts. The petitioner was appointed in place of Sri Dorji, who too was included in the list circulated by the Government vide its G.O dated 8.6.1982.

15. As the Government order did not clearly state whether the appointment was to be made on cadre or ex-cadre posts, the choice was left to the departments to appoint the nominated persons in available departmental vacancies. The fact that the petitioner was appointed against a vacant post of a Junior Clerk does not automatically bestow upon him the rights of a junior clerk. He was specifically appointed as a Dispatcher which was an ex-cadre position. The petitioner did not raise any objection to this appointment and joined service. It is also clear from record that in 1986, when other employees were regularised, the petitioner did not raise any objection. His first representation in this regard is dated 07.09.2015, which is about 33 years after his initial appointment and 29 years after regularisation of the other clerks with whom he is claiming parity. During the intervening period, he raised no objection which gives support to the claim of the respondents that the matter is heavily time barred. Even in 2014, when he first approached the Hon'ble High Court in Writ Petition no. 2464(S/S) of 2014, his prayer was not to seek regularisation from the date of his substantive appointment but only for grant of ACP. The Court had granted him that benefit and he was subsequently, vide order dated 30.10.2014, provided ACPs, he had requested.

16. The grant of ACP assumes that the petitioner was treated as regular employee, as the benefit of ACP is available only to regular employees, who have completed varied years of satisfactory service. Thus, the substantive claim of regularisation of the petitioner has already been recognised and granted. It is also significant that ACP is a substitute mechanism for promotions. The respondents have unambiguously stated that the petitioner has been provided all the service benefits that he was entitled to as an ex-cadre employee. The petitioner has not stated anywhere that he has been deprived of pensionary benefit too.

17. The Claim Petition, filed by the petitioner at the Tribunal, bearing no 2053 of 2015, does not extend the limitation provided in Section-5 of the Tribunal Act, 1976. It is settled law that delayed or repeated pensionary representations do not extend the period of limitation. In the instant case, the cause of action clearly arose on 29-07-1982, when petitioner was initially appointed as dispatcher on an ex-cadre post or at best on 31.03.1986, when 9 junior clerks with whom he claimed parity, were regularised and he was left out. The delay in representing or seeking judicial redressal cannot help the petitioner in obtaining the benefit of extending the bar of limitation. This principle has been categorically and unequivocally upheld by the Hon'ble Supreme Court in State of Tripura and others vs Arabinda Chakraborty and others (2014) 2 SCC (L&S) 300, The Hon'ble Supreme Court held that:

"In our opinion, the suit is hopelessly barred by law of limitation. Simply by making a representation, when there is no statutory provision or there is no statutory appeal provided, the period of limitation would not get extended. The law does not permit extension of period of limitation by mere filing of representation.

"In Jacob vs. Director of Geology and Mining and another (2008) 10 SCC 115 the Hon'ble Supreme Court

has held that a mere disposal representation by any authority under orders of a Court or Tribunal to consider and decide that representation does not extend the period of limitation automatically. The Court observed as follows:

"When a direction is issued by a court/tribunal to consider or deal with the representation, usually the directee (person direceted) examines the matter on merits, being under the impression that failure to do may amount to disobedience. Whien an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or Tribunal, such an order does not revive the stale claim, nor amount to some kind of ''acknowledgement of a jural relationship' to give rise to a fresh cause of action.

18. In light of the above, we find that the claim of the petitioner is clearly barred by limitation and hence not maintainable.

5. On bare perusal of the judgment of the Tribunal, we find that it is based on the decisions of Hon'ble Supreme Court on the point of limitation. The Tribunal has referred to the decisions of Hon'ble Supreme Court in the case of **State of Tripura and others vs. Arabinda Chakraborty and Others [(2014) 2 SCC (L & S) 300],** wherein it has been held that simply by making a representation when there is no statutory provision or there is no statutory appeal provided, the period of limitation would not get extended. The law does not permit the extension of period of limitation by mere filing of the representation. In another decision rendered by Hon'ble Supreme Court in the case **Jacob vs. Director of Geology and Mining and Another [(2008) 10 SCC 115]** which has also been relied by the Tribunal, it has been held that when a direction is issued by a Court/Tribunal to consider or deal with the representation, usually the Directee (person directed) examines the matter on merits, being under the impression that failure to do would amount to disobedience. When an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or Tribunal, such an order does not revive the stale claim, nor amount to some kind of 'acknowledgement of a jural relationship' to give rise to fresh cause of action.

6. The case at hand is fairly covered by the aforesaid pronouncements and we are of the opinion that the Tribunal had rightly rejected the claim on the ground of it being barred by limitation and there is no reason for this Court to interfere with its judgment.

7. It is made clear that though the claim of the petitioner to the post of Junior Clerk is barred, however, as far as the issue of sanction of post of Dispatcher etc is concerned, which is said to be pending before the State Government, as has been observed in the order dated 18.07.2018, the same still survives before the State Government, which the Government is obliged to decide at the earliest, but, the present proceedings do not relate to the post of Dispatcher, therefore, we do not find any error in the judgment of the Tribunal and accordingly dismiss this writ petition, especially as, the writ petition filed by the petitioner in this regard in the year 1991 before this Court was dismissed for want of prosecution and the petitioner did not take any steps thereafter to get it restored. The petitioner may pursue the matter before the State Government so far as the post of Dispatcher is concerned.

9. Copy of this judgment be sent to Chairman, U.P. Public Service Tribunal for circulating the same amongst all its Members, so that the learned Members while deciding the claim petition, in the event of disposing of the claim petition with a direction to decide the representation of the petitioner, should not overlook the point of limitation, which they are otherwise obliged to consider, otherwise, this leads to unnecessary complications and revival of stale claims, which is not appropriate.

(2021)08ILR A119
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.07.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN , J.

Service Single No. 15979 of 2021

Satish Kumar Sonker ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ajeet Srivastav

Counsel for the Respondents:
C.S.C., Ramesh Chandra Pandey

A. Service Law - Suspension Order - Keeping any employee under suspension without contemplating any departmental enquiry or pending departmental enquiry is not a suspension order but the same is punishment order, which is absolutely illegal and unwarranted. Moreover, its been more than one year nine months since the petitioner is under suspension. Therefore, such an order prolonged suspension order without contemplating or pending departmental enquiry is not only illegal, arbitrary but the same is harassment of the employee. (Para 6)

Writ Petition Allowed. (E-8)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ajeet Srivastava, learned counsel for the petitioner, learned Standing Counsel for the opposite party Nos.1 to 4 and Sri Ramesh Chandra Pandey, learned counsel for the opposite party Nos.5 and 6.

2. The order under challenge is the suspension order dated 11.10.2019 passed by the Executive Officer, Nagar Palika Parishad, District-Raebareli placing the petitioner under suspension.

3. Learned counsel for the petitioner has assailed the aforesaid suspension order mainly on two grounds. Firstly, this suspension order has been issued neither in contemplation of the departmental enquiry nor pending departmental enquiry and the law is trite on the point that an employee may be placed under suspension if there is pending departmental enquiry or in contemplation of departmental enquiry and there may not be other eventuality for placing under suspension. The next ground to assail the impugned suspension order is that more than one year and nine months period have already passed since the date of passing the suspension order but neither any charge-sheet has been served upon the petitioner nor any enquiry has been contemplated.

4. Learned counsel for the petitioner has lastly submitted that along with the petitioner one Rahul Tiwari serving on the post of B.L.O. was suspended but he was reinstated by the subsequent order dated 27.11.2019 (Annexure No.2), but no such order has been passed in the case of the petitioner. As per learned counsel for the

petitioner, the petitioner being a Class-IV employee should not be harassed by passing illegal order of suspension.

5. On being confronted asking the reply on the aforesaid submission of learned counsel for the petitioner, Sri Ramesh Chandra Pandey, learned counsel for the Nagar Palika Parishad could not justify the impugned order of suspension.

6. Having heard learned counsel for the respective parties and having perused the material available on record, I am of the considered opinion that the impugned suspension order, if passed without contemplation or pending departmental enquiry, is absolutely illegal and unwarranted. Keeping any employee under suspension without contemplating any departmental enquiry or pending departmental enquiry is not a suspension order but the same is punishment order, which is not permissible. The suspension order is not a tool to harass the employee but it is a method to adjudicate the issue keeping an employee aside from his regular duties till completion of the departmental enquiry paying him subsistence allowance. More than one year and nine months period have passed since the petitioner is under suspension, therefore, this is a prolonged suspension order without contemplating or pending departmental enquiry is not only illegal, arbitrary but the same is harassment of the employee who is serving on Class-IV post.

7. Accordingly, the writ petition is ***allowed.***

8. A writ in the nature of certiorari is issued quashing the impugned suspension order dated 11.10.2019 passed by the Executive Officer, Nagar Palika Parishad, District-Raebareli, which is contained as Annexure No.1 to the writ petition. A writ in the nature of mandamus is also issued commanding the Executive Officer, Nagar Palika Parishad, District-Raebareli to reinstate the petitioner in service forthwith and he shall be paid his full salary and other consequential service benefits treating him as duty if he was not under suspension.

9. The compliance of the aforesaid order shall be made within a period of one month, failing which, the petitioner shall be entitled for interest at the rate of 8% on admissible dues of the petitioner.

10. No order as to cost.

(2021)08ILR A120
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN , J.

Service Single No. 16548 of 2021

Shilpi Singh(Smt.) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ramesh Kumar Mishra, Ashwani Kumar Mishra

Counsel for the Respondents:
C.S.C., Alok Saran

A. Service Law - Dying-in Harness Rules, 1975 - Rule 2(c) - Appointment - The married daughter comes within the purview of 'family' in terms of Rule 2(c) of the Dying-in-Harness Rules. (Para 4)

Writ Petition Disposed of. (E-8)

List of Cases cited:-

1. Smt. Vimla Srivastava Vs St. of U.P. & anr. 2016 (1) ADJ 21 *(followed)*

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ashwani Kumar Mishra, learned counsel for the petitioner, Ms. Parul Bajpai, learned Standing Counsel for opposite party no.1 and Sri Alok Saran, learned counsel for opposite parties no.2 to 4.

2. By means of this petition, the petitioner has assailed the order dated 7.1.2021 issued by the Personal Officer of Madhyanchal Vidyut Vitran Nigam Limited, Lucknow by means of which claim of the petitioner for providing any appropriate/ suitable appointment under Dying-in-Harness Rules has been rejected on the sole ground that the petitioner being a married daughter so she does not come within the purview of 'family' as per Rule 2 of Dying-in-Harness Rules.

3. The sole question for consideration before this Court is that as to whether married daughter comes within the purview of definition 'family' so defined under Dying-in-Harness Rules, 1975 particularly in view of the dictum of the Full Bench of this Court in re; **Smt. Vimla Srivastava Vs. State of U.P. and another,** reported in **2016 (1) ADJ 21.**

4. The Full Bench after considering the provisions of Dying-in-Harness Rules and relevant case laws on the subject has held that the married daughter comes within the purview of 'family' in terms of Rule 2 (c) of the Dying-in-Harness Rules. Relevant paragraphs no.25, 26, 27 & 28 are being reproduced herein below:-

"25. During the course of submissions, our attention was also drawn to the judgment rendered by a learned Single Judge of this Court in Mudita vs. State of U.P., 2015 (9) ADJ 16. The learned Single Judge while proceeding to deal with an identical issue of the right of a married daughter to be considered under the Dying-in-Harness Rules observed that a married daughter is a part of the family of her husband and could not therefore be expected to continue to provide for the family of the deceased government servant. The judgment proceeds on the premise that marriage severs all relationships that the daughter may have had with her parents. In any case it shuts out the consideration of the claim of the married daughter without any enquiry on the issue of dependency. In the view that we have taken we are unable to accept or affirm the reasoning of the learned Single Judge and are constrained to hold that Mudita does not lay down the correct position of the law.

26. In conclusion, we hold that the exclusion of married daughters from the ambit of the expression "family" in Rule 2 (c) of the Dying-in-Harness Rules is illegal and unconstitutional, being violative of Articles 14 and 15 of the Constitution.

27. We, accordingly, strike down the word 'unmarried' in Rule 2 (c) (iii) of the Dying-in-Harness Rules.

28. In consequence, we direct that the claim of the petitioners for compassionate appointment shall be reconsidered. We clarify that the competent authority would be at liberty to consider the claim for compassionate appointment on the basis of all the relevant facts and circumstances and the petitioners shall not

be excluded from consideration only on the ground of their marital status."

5. Therefore, in view of the decision of the Full Bench of this Court in re; **Smt. Vimla Srivastava** (supra), I find that the impugned order dated 7.1.2021 has not been passed by the authority concerned strictly in accordance with law. Therefore, I hereby decide this writ petition finally at the admission stage, with the consent of the learned counsel for the parties, quashing/ setting aside the impugned order dated 7.1.2021 passed by the Personal Officer of Madhyanchal Vidyut Vitran Nigam Limited, Lucknow, which is contained in Annexure No.1 to the writ petition, remanding back the same issue to the competent authority concerned to consider and decide the claim of the petitioner strictly in accordance with law and also in conformity with the decision of Full Bench of this Court in re; **Smt. Vimla Srivastava** (supra) and appropriate orders be passed with expedition, preferably within a period of two months from the date of receipt of certified copy of this order and decision thereof shall be communicated to the petitioner forthwith. While passing appropriate order, required opportunity of hearing to the petitioner and other affected person, if any, may be provided by the authority concerned.

6. It is expected that if there is no legal impediment, the appropriate order shall be passed on the compassionate ground in view of the observations made herein above.

7. In the aforesaid terms, the writ petition is **disposed of.**

(2021)08ILR A122
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 16.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 17495 of 2021

Jubeda Bano ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Piyush Mishra, Amit Mishra

Counsel for the Respondents:
C.S.C., Ajay Kumar, Ran Vijay Singh

A. Appointment - The petitioner has applied for appointment on the post of Assistant Teacher in the Primary School. She declared her percentage as per clause 13 of the Government Order dated 04.12.2020 and such declaration can be verified from her educational documents itself. Therefore, her candidature should not be rejected on the basis of para-2(1) of the Government Order dated 05.03.2021 rather, her candidature should be considered in the light of the Government Order dated 04.12.2020. (Para 12)

Writ Petition Allowed. (E-8)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Piyush Mishra, learned counsel for the petitioner, Sri Ran Vijay Singh, learned Additional Chief Standing Counsel for opposite party Nos.1 to 4 and Sri Ajay Kumar, learned counsel for the opposite party No.5.

2. On the first date of admission, this Court has passed the order dated 12.08.2021 as under:-

"Heard learned counsel for the petitioner, learned Standing Counsel for respondent Nos.1, 3 and 4, Sri Ranvijay Singh, learned counsel for the respondent No.2 and Sri Ajay Kumar, learned counsel for respondent No.5.

In compliance of the judgment and order passed by this Court vide order dated 14.12.2020 in Writ Petition No.11079 (S/S) of 2020, the respondent has passed the impugned order dated 14.7.2021, rejecting the claim of the petitioner.

Submission of learned counsel for the petitioner is that the respondent has not applied its mind and in total disregard of the direction issued by this Court, has proceeded to pass the impugned order. Next submission is that the petitioner has passed his high school examination from the C.B.S.E. Board. In the mark sheet, only grade is provided and specified the percentage of marks grade-wise. By multiplying the total marks of the subject, he filled up the marks obtained in the high school in the application form, which has not been taken into consideration while passing the impugned order.

On the other hand, Sri Ranvijay Singh, learned counsel for respondent No.2 requested for the grant of one day time to seek instruction in the matter and assured this Court that in case the petitioner is found eligible and qualified as per the appendix framed under the 1981 Rules, his claim shall be given consideration.

Accordingly, put up this matter as fresh on 16.8.2021."

3. Sri Ran Vijay Singh, learned Additional Chief Standing Counsel, has submitted that however he has not received complete instructions in the matter but on the basis of telephonic instructions he has been apprised that the case of the petitioner has been considered in terms of the Government Order dated 05.03.2021 and pointing out that the application form of the petitioner has not been filled up as per the documents relating to her examination, her candidature has been rejected.

4. Learned counsel for the petitioner has drawn attention of this Court towards Annexure No.12 of the writ petition, which is a final order dated 09.02.2021 passed by this Court in the case of the petitioner bearing *Writ Petition No.3723 (S/S) of 2021; Jubeda Bano vs. State of U.P. & others* whereby the petitioner has raised her bonafide grievance before the Court by submitting that for the recruitment on the post of Assistant Teacher by holding written examination in the year 2019 she applied for and got successful in the written examination. In the application form, due to inadvertence mistake she filled up the column of percentage of marks despite the requirement of total marks obtained out of the marks of the subjects.

5. Learned counsel for the petitioner had submitted before the Court in that writ petition that in the case of marks shown in the percentage is calculated as per requirement of the department, it will be the same as 89.3%. Therefore, while disposing of the said writ petition finally giving liberty to the petitioner to approach the Secretary, Basic Education Board, Prayagraj taking shelter of the Government Order dated 04.12.2020 and appropriate decision was to be taken in terms of the Government Order dated 04.12.2020.

6. In compliance of the aforesaid order dated 09.02.2021, the petitioner preferred a representation to the Competent Authority but the said representation was rejected by passing the impugned order dated 14.07.2021 in the light of the

Government Order dated 05.03.2021 instead of in the light of the Government Order dated 04.12.2020.

7. Learned counsel for the petitioner has enclosed the Government Order dated 04.12.2020 as Annexure No.8 to the writ petition and has referred clause-13 whereof, which clearly indicates and mandates that in case of any factual anomalies relating to counting the marks, such marks of the candidates shall be calculated on the basis of C.G.P.A.

8. At this stage, learned counsel for the petitioner has drawn attention of this Court towards the High School marksheet of the petitioner wherein the Cumulative Grand Point Average (C.G.P.A.) of the petitioner is 9.4 and such C.G.P.A. shall be multiplied by 9.5 in the case of the petitioner. If 9.5 is multiplied with 9.4, the marks of the petitioner would 89.3%.

9. Learned counsel for the petitioner has further drawn attention of this Court towards the application form of the petitioner (Annexure No.4) wherein she has declared her marks in the High School as 536 out of 600 and percentage there of would be 89.3%. Since the marksheet issued by the C.B.S.C. Board does not indicate the total marks obtained by the petitioner, therefore, the petitioner has got no other option except to make calculation on the basis of clause 13 of the Government Order dated 04.12.2020.

10. Considering the aforesaid facts, this Court has categorically directed to the opposite parties vide judgment and order dated 09.02.2021 (Annexure No.12) to dispose of the issue of the petitioner in the light of the Government Order dated 04.12.2020 but the issue of the petitioner has been decided in the light of the Government Order dated 05.03.2021.

11. Having heard learned counsel for the parties and having perused the material available on the record, I find that the petitioner has not misleaded the authorities in her application form and she indicated her percentage for the High School marksheet strictly in accordance with clause 13 of the Government Order dated 04.12.2020. As a matter of fact, the petitioner had got no other option except to declare her marks of High School in the manner as indicated in the Government Order dated 04.12.2020.

12. Even if the Government Order dated 05.03.2021 (Annexure No.15) is seen at this stage, para-1 thereof clearly indicates that if any candidate discloses/ declares his/ her details erroneously without having relevant documents supporting the same, his/ her candidature shall be cancelled, but in the preset case, the petitioner was having her High School marksheet and she categorically declares her percentage as per the clause 13 of the Government Order dated 04.12.2020 and such declaration of the petitioner may be verified from her educational documents itself. Therefore, her case might have not been rejected on the basis of para-2 (1) of the Government Order dated 05.03.2021, rather, her candidature should have been considered in the light of the Government Order dated 04.12.2020 in compliance of the directions being issued by this Court vide order dated 09.02.2021 passed in Writ Petition No.3723 (S/S) of 2021 (Annexure No.12).

13. Therefore, I do not find any good ground to provide some more time to learned counsel for the opposite parties to

seek further instructions and I decide this writ petition finally at the admission stage quashing the impugned order dated 14.07.2021 passed by the Secretary, Basic Education Board, Prayagraj, which is contained as Annexure No.1 to the writ petition. The direction is issued to the Secretary, Basic Education Board, Prayagraj to consider the petitioner's candidature for appointment on the post of Assistant Teacher in the Primary School run by the U.P. Basic Education Board by passing such order within a period of three weeks from the date of presentation of a certified/ computerized copy of this order.

14. Since this order has been passed considering the peculiar facts and circumstances of the present issue, therefore, this order may not be cited as precedence in other cases.

15. Accordingly, the writ petition is ***allowed.***

16. No order as to costs.

(2021)08ILR A125
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN , J.

Service Single No. 17614 of 2021

Ashok Kumar Singh ...Petitioner
Versus
U.P. State Food & Essential Commodities Corp. & Ors. ...Respondents

Counsel for the Petitioner:
Mahendra Pratap Singh, Abhishek Dwivedi

Counsel for the Respondents:
Shreeprakash Singh

A. Service Law - Post-retiral dues - If there is no provision, rules or regulations authorizing the Competent Authority to make deduction of any amount or to punish employee after retirement on any of the misconduct, no such order can be passed against such employee after his retirement. (para 7)

Writ Petition Allowed. (E-8)

List of Cases cited:-

1. Bhagirath Jena Vs Board of directors, O.S.F.C. & ors. (1999) 3 SCC 666 *(followed)*

2. Dev Prakash Tewari Vs Uttar Pradesh Cooperative Institutional Service Board, Lucknow & ors. (2014) 7 SCC 260 *(followed)*

3. Shri Prakash Upadhyaya Vs St.of U.P. & ors. Writ Petition No. 1106 (S/S) of 2021

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard learned counsel for the parties.

2. This Court has passed the order dated 13.08.2021 as under:-

"Heard Sri M.P. Singh, learned counsel for the petitioner and Sri Devak Vardhan, Advocate holding brief of Sri Shree Prakash Singh, learned counsel for the opposite parties.

By means of this writ petition, the petitioner has submitted that he was retired from service on 31.12.2015, however, at that point of time one departmental enquiry against the petitioner was pending wherein the charge-sheet dated 02.07.20215 was served upon the petitioner on 08.09.2015.

Sri M.P. Singh, learned counsel for the petitioner has submitted that that

due to compelling circumstances the petitioner could not submit the defency reply to the charge-sheet before his retirement. After his retirement, the petitioner requested the authorities concerned to make payment of his post retiral dues but no payment of post retiral dues of the petitioner except the amount of P.F. has been paid to the petitioner.

Sri M.P. Singh, learned counsel for the petitioner has drawn attention of this Court towards the judgment and order dated 18.01.2021 passed by this Court in ***Writ Petition No.1106 (S/S) of 2021; Shriprakash Upadhyaya vs. State of U.P. & others*** *of the same department, whereby the legal question was decided as to whether after retirement of an employee, the departmental enquiry can be initiated if such prescription is not provided under the statutory rules etc. This Court considering the dictum of Hon'ble Apex Court in re:* ***Bhagirathi Jena vs. Board of Directors, O.S.F.C. and other (1999) 3 SCC 666,*** *has clearly held that if there is no provision, rule or regulation authorizing the Competent Authority to conduct the departmental enquiry after retirement, no such departmental enqiry can be conducted and in that case no prejudice may be caused to an employee. In the judgment of* ***Shriprakash Upadhyaya (supra),*** *another judgment of this Court in re:* ***Chandra Prakash Verma vs. Chairman, U.P. Govt. Employees Welfare Corpn. and another [2018 (36) LCD 82]*** *has been considered whereby the dictum of Hon'ble Apex Court in re:* ***Bhagirathi Jena (supra)*** *has been considered.*

On being confronted learned counsel for the opposite parties as to how the departmental proceeding against the petitioner can be conducted and concluded when there is no statutory prescription to that effect and in that case as to how the retiral dues of the petitioner can be withheld, learned counsel for the opposite parties has prayed that two days' time may be granted to seek complete instructions in the matter.

The time prayed for is granted.

List / put up this case on 18.08.2021 as fresh in the additional cause list."

3. In compliance of the aforesaid order, Sri Devak Vardhan, Advocate holding brief of Sri Shree Prakash Singh, learned counsel for the opposite parties has submitted that the present petitioner had committed misconduct during his service period. Therefore, the departmental proceeding was initiated against him but the same could not be concluded for the reason of non-cooperation of the petitioner with the enquiry proceedings. As per him, the department has suffered huge loss on account of misconduct of the petitioner. So far as the dictum of Hon'ble Apex Court in re: ***Bhagirathi Jena vs. Board of Directors, O.S.F.C. and others, (1999) 3 SCC 666*** and subsequent judgments relying upon the judgment of ***Bhagirathi Jena (supra)*** by the Hon'ble Apex Court, he has nothing to say.

4. Sri M.P. Singh, learned counsel for the petitioner has drawn attention of this Court towards Annexure No.6 of the writ petition, which is the dictum of Hon'ble Apex Court rendered in re: ***Dev Prakash Tewari vs. Uttar Pradesh Cooperative Institutional Service Board, Lucknow and others*** reported in ***(2014) 7 SCC 260*** whereby the Hon'ble Apex Court considering the dictum of ***Bhagirathi Jena (supra)***, issued positive directions against the opposite parties vide paras-8 and 9 of such judgment. For convenience, paras-8 & 9 are being reproduced here-in-below:-

"8. Once the appellant had retired from service on 31.03.2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits.

9. The question has also been raised in the appeal with regard to arrears of salary and allowances payable to the appellant during the period of his dismissal and up to the date of reinstatement. Inasmuch as the inquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him."

5. Sri Singh has also drawn attention of this Court towards judgment and order dated 18.01.2021 passed by this Court in ***Writ Petition No.1106 (S/S) of 2021; Shri Prakash Upadhyaya vs. State of U.P. & others,*** whereby while considering the identical facts and circumstances and legal position, this Court allowed the said writ petition directing the opposite parties to make payment of admissible dues to that writ petitioner. As per Sri Singh, the aforesaid order was assailed before the Appellate Court but later on such appeal was withdrawn, therefore, the decision of this Court rendered in re:Shri Prakash Upadhyaya (supra) has attained finality for all practical purposes.

6. The sole question before this Court to adjudicate is that if there is no provision, rules or regulations authorizing the Competent Authority to make deduction of any amount or to punish employee after retirement on any of the misconduct, as to whether such employee may be compelled to face the departmental trial after retirement and whether any punishment order may be awarded against him after his retirement.

7. Admittedly, the aforesaid question is no more res integra after the dictum of ***Bhagirathi Jena (supra)*** and it has been held by the Hon'ble Apex Court that if there is no such statutory prescription to make deduction of any amount from the employee or to punish him/ her after his/ her retirement for any misconduct, no such order can be passed against such employee after his/ her retirement. Even the Hon'ble Apex Court in re: ***Dev Prakash Tewari (supra)*** has held that not only such departmental enquiry would lapse after retirement of such employee, he/ she shall be entitled for the emoluments payment to him/ her.

8. In view of the above, the writ petition succeeds and is ***allowed.***

9. A writ in the nature of certiorari is issued quashing the charge-sheet dated 02.07.2015 and the disciplinary proceedings in pursuance thereto, which is contained as Annexure No.1 to the writ petition. A writ in the nature of mandamus is also issued commanding the opposite parties to pay all the post retiral benefits to the petitioner as well as arrears of subsistence allowance, if the same has not been paid till date, with expedition, preferably within a period of three months, failing which, the petitioner may claim the admissible interest on delayed payment at the rate of 6% per annum.

10. No order as to costs.

(2021)08ILR A128
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN , J.

Service Single No. 19723 of 2020

Rabi Kant Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Meenakshi Singh Parihar, Ashok Shukla

Counsel for the Respondents:
C.S.C., Manjive Shukla, R.K. Upadhyay

A. Service Law - Disciplinary enquiry - It is a settled proposition of law that once the Court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, the Court cannot reinstate the employee rather it remits the matter to the disciplinary authority who conducts the enquiry from the point where it stood vitiated and conclude the same. (Para 11) (E-8)

List of Cases cited:-

1. Chairman, LIC of India & ors. Vs Masilamani (2013) 6 SCC 530 *(followed)*

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri H.G.S. Parihar, learned Senior Advocate assisted by Ms. Meenakshi Singh Parihar, learned counsel for the petitioner, Sri Manjive Shukla, learned Additional Chief Standing Counsel for the State-respondent and Sri R.K. Upadhyay, learned counsel for respondent no.4.

2. In the proposed order, notices to opposite party nos. 5 and 6 are dispensed with as no prejudice is caused to respondent nos. 5 & 6 by means of the impugned order.

3. The order under challenge is a punishment order dated 01.10.2020 passed by the Additional Chief Secretary, Cooperative Department, Government of U.P., Lucknow awarding major punishment to the petitioner reverting him from the post of Additional Commissioner/Additional Registrar to the post of Joint Commissioner/Joint Registrar in the minimum pay scale withholding two increments with cumulative effect.

4. Counter affidavit and rejoinder affidavit have been exchanged, but Sri Manjive Shukla, learned Additional Chief Standing Counsel has submitted that for the redressal of his grievance the present petitioner has got two alternative remedies and before exhausting those two remedies his writ petition under Article 226 of the Constitution of India may not be entertained.

5. As per Sri Manjive Shukla, since the order impugned has been passed after due approval from the Governor, therefore, the petitioner may very well file either revision under Rule 13 or review under Rule 14 of UP Government Servant (Discipline & Appeal) Rules, 1999. Secondly, the alternative remedy to approach the UP State Public Services Tribunal, Lucknow is also available to the petitioner. As per Sri Manjive Shukla, both the aforesaid grounds have been taken in the counter affidavit.

6. I am also of the considered opinion that the alternative statutory remedy may not be circumvented and the person/employee concerned should first

avail the alternative statutory remedy only then he should approach this Court under Article 226 of the Constitution of India.

7. In the present case, Sri H.G.S. Parihar, learned Senior Advocate has submitted that the petitioner has been discriminated from the very beginning i.e. from the date when the petitioner was placed under suspension on 04.10.2018. Despite the orders being passed by this Court neither the inquiry was concluded within time nor the final order has been passed well in time, therefore, this Court passed the order dated 29.04.2019 allowing the *Writ Petition No. 9754 (S/S) of 2019 (Rabi Kant Singh vs. State of U.P. and others)* setting aside the suspension order permitting the competent authority to take final decision in the matter.

8. Sri Parihar has submitted that the law is settled that if the competent authority has decided to award major punishment to the employee, the full fledged departmental inquiry should be conducted and concluded strictly in accordance with law by affording an ample opportunity of hearing in two stages. First stage is at the stage of inquiry proceedings wherein after receiving the defence reply to the charge-sheet the date, time and place shall be fixed for oral inquiry and the onus would be upon the authority to prove the charges following the principles of preponderance of the probabilities. The Hon'ble Apex Court in catena of cases has held that no major punishment order can be passed on the basis of defence reply or supplementary defence reply to the charge-sheet but the same can be passed after conducting the oral inquiry to prove the charge by fixing date, time and place. The second stage would be, the incumbent employee shall be provided the copy of the inquiry report and explanation shall be called apprising to subjective satisfaction of the disciplinary authority regarding the proposed punishment and the incumbent may file his explanation showing his *bona fide*. After considering the aforesaid explanation, the disciplinary authority may pass appropriate orders.

9. In the present case, the learned counsel for the petitioner has drawn the attention of this Court towards para 26 & 27 of the writ petition wherein he has categorically indicated that after submitting the defence reply to the charge-sheet no date, time and place was fixed to conduct oral inquiry, however, one letter dated 26.12.2018 was issued seeking representation of the petitioner on any working day and the petitioner submitted his explanation on 31.12.2018 personally to the Inquiry Officer. Those documents have been enclosed as Annexure nos. 15 & 16 to the writ petition. By means of explanation dated 31.12.2018, the petitioner has again categorically denied the charges levelled against him and submitted his *bona fide* enclosing therewith some documents on that Sri Parihar has rightly submitted that the aforesaid reply may be treated at best as supplementary defence reply but this letter dated 31.12.2018 of the petitioner may not be treated as if he appeared before the Inquiry Officer to examine/cross-examine the material/person if any. Since, the date, time and place for oral inquiry is fixed to examine/cross-examine the relevant material and person, however, said exercise has not been carried out by the Inquiry Officer.

10. Sri Manjive Shukla has drawn the attention of this Court towards para 24 of the counter affidavit wherein the recital has been given that the Inquiry Officer has

wrote a letter dated 26.12.2018 to the petitioner fixing date for 31.12.2018 and the petitioner appeared before the Inquiry Officer but did not make any request for producing any material/witness. However, no such date has been fixed for the petitioner to appear before the Inquiry Officer, as considered above.

11. I am of the considered opinion that the letter dated 26.12.2018 may not be treated as if any date, time and place was fixed for oral inquiry and preferring the representation by the petitioner dated 31.12.2018 on the letter dated 26.12.2018 may not be sufficient to treat as the date for oral inquiry. Therefore, for all practical purposes no date, time and place was fixed to conduct oral inquiry. Therefore, in view of the above instead of relegating the matter to the Public Service Tribunal for filing reference petition as it would be a futile exercise, I hereby set-aside/quash the order dated 01.10.2020 remanding back the issue before the disciplinary authority to direct the Inquiry Officer to conduct the inquiry from the stage of defect in terms of para 09 of the judgment of Hon'ble Apex Court rendered in re:- ***Chairman, LIC of India & others vs. A. Masilamani*** [reported in (2013) 6 SCC 530] which reads as under:-

"9. It is a settled legal proposition, that once the Court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, the Court cannot reinstate the employee. It must remit the concerned case to the disciplinary authority, for it to conduct the enquiry from the point that it stood vitiated, and conclude the same. (Vide: ***Managing Director, ECIL, Hyderabad etc.etc. v. B. Karunakar etc.etc.,*** *AIR 1994 SC 1074;* ***Hiran Mayee Bhattacharyya v. Secretary, S.M. School for Girls & Ors.,*** *(2002) 10 SCC 293;* ***U.P. State Spinning C. Ltd. v. R.S. Pandey & Anr.,*** *(2005) 8 SCC 264; and* ***Union of India v. Y.S. Sandhu, Ex- Inspector,*** *AIR 2009 SC 161)."*

12. It is further directed that in case the departmental inquiry is conducted against the petitioner from the stage of defect in terms of the judgment of Hon'ble Supreme Court in re:- ***Chairman, LIC of India (supra),*** the same shall be conducted and concluded strictly in accordance with law by affording him ample opportunity of hearing subject to proper cooperation of the petitioner with the inquiry proceedings, inasmuch as, no inquiry proceedings/departmental proceedings may be concluded to its logical conclusion unless the employee cooperates with the inquiry proceedings. The inquiry shall be concluded within a period of four months. Thereafter, the disciplinary authority may pass appropriate orders strictly in accordance with law as directed above with expedition without keeping the issue pending for unlimited period.

13. Consequences to follow.

14. The writ petition is, accordingly, **allowed.** No order as to costs.

(2021)08ILR A130
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN , J.

Service Single No. 21568 of 2020

Manoj Kumar Giri ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anurag Shukla, Abhishek Mishra, Suryansh Narula

Counsel for the Respondents:
C.S.C.

A. Service Law - Promotion - In the present case, the issue of the petitioner was kept under seal cover for the reason that the departmental inquiry was pending against him and on conclusion of departmental inquiry on 24.01.2020 by the disciplinary authority, the petitioner should have been promoted in terms of the recommendations so made by the DPC. Moreover, failure to consider candidature based on the uncommunicated adverse entry against the petitioner for the year 2015-16 is not tenable in the eyes of law. (Para 14)

Writ Petition Allowed. (E-8)

List of Cases cited:-

1. Arun Kumar Goel Vs U.O.I .& ors. 2015 (8) ADj 732 (DB) (LB) *(followed)*

2. Gurdial Singh Gijji Vs St, of Punj, AIR 1979 SC 1622 *(followed)*

3. U.P. Jal Nigam &oOrs. Vs P.C. Jain & ors. 1996 SCC (2) 363*(followed)*

4. Devdutt Vs U.O.I. & ors. 2008 (8) SCC 725*(followed)*

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Anurag Shukla, learned counsel for the petitioner and Sri Rajesh Kumar, learned Standing Counsel for the State.

2. By means of this petition the petitioner has prayed following relief:-

"i. Issue a writ, order or direction in the nature of Certiorari to quash the impugned order dated 29.10.2020 passed by Respondent No.2, which has been as ***ANNEXURE No.1*** *to this Writ Petition.*

ii. Issue a Writ or direction in the nature of Mandamus, commanding the respondents to immediately promote the Petitioner from the post of Junior Clerk to the post of MARKETING INSPECTOR w.e.f. 26.09.2019 alongwith maintaining his seniority will all consequential benefits.

iii. Issue a Writ or direction in the nature of Mandamus, commanding the respondents to take the necessary stern action against the erring persons found responsible for unnecessary delaying the petitioner's promotion without any intelligible cause."

3. Learned counsel for the petitioner has drawn attention of this Court towards order dated 24.01.2020 passed by the regional Food Controller (annexure no.4) whereby the petitioner has been exonerated from all the charges for which the departmental inquiry against the petitioner was pending. By means of order dated 24.01.2020, the departmental inquiry was finalized by the disciplinary authority with strong warning to the petitioner, therefore, for all practical purposes no departmental inquiry was pending against the petitioner w.e.f. 24.01.2020.

4. Learned counsel for the petitioner has contended that earlier the DPC met on 20.09.2019 for making promotion of Junior Clerks and the candidature of the petitioner was kept under seal cover for the pendency of departmental inquiry which has been finalized on 24.01.2020 .

5. After the order dated 24.01.2020 being passed the petitioner approached the competent authority for opening seal cover for providing him promotion which has

been recommended by the DPC in terms of office memo dated 28.05.1997 which provides the modalities of keeping any matter under seal cover and opening the same.

6. As per the learned counsel for the petitioner his case was squarely covered with the conditions and guidelines of Government Order dated 28.05.1997 (Annexure No.14) in as much as the pending departmental inquiry against the petitioner was finalized by the disciplinary authority vide order dated 24.01.2020, therefore the petitioner should have been promoted on the post of Marketing Inspector from the date of DPC.

7. As per learned counsel for the petitioner when no suitable order was passed by the competent authority the petitioner filed a writ petition bearing Service Single No. 14736 of 2020 in re: Manoj Kumar Giri and State of U.P. which was decided by this Court on 16.09.2020 directing the opposite party to take appropriate decision in the issue of the petitioner within a period of six weeks.

8. The Commissioner of Food and Civil Supply passed an impugned order dated 29.10.2020 (Annexure-1) rejecting the claim of the petitioner.

9. Sri Anurag Shukla, learned counsel for the petitioner has assailed the aforesaid rejection order by saying that the reasons indicated in the impugned order are misconceived. Basically the reasons so taken by the competent authority in the impugned order is that the petitioner was awarded one adverse entry in the year 2015-16, therefore, his candidature shall be considered in the next DPC. The impugned order itself says that such adverse entry has not been communicated to the petitioner. On that Sri Anurag Shukla, learned counsel for the petitioner has drawn attention of this Court towards Annexure No.15 which is the judgement of the Division Bench of this Court in re: **Arun Kumar Goel Vs. Union of India & Ors. 2015(8) ADJ 732 (DB) (LB)** referring para 7 which reads as under:-

"7. In the case of State of Orissa v. Dr. (Miss) Binapani Dei and others, AIR 1967 SC 1269, the Hon'ble Supreme Court has held that material adverse to the petitioner which is not communicated to him, cannot be relied upon adversely affecting his civil rights. The same proposition has been laid down by the Hon'ble Supreme Court in subsequent decisions. Those are referred as under:

(1) Gurdial Singh Gijji vs. State of Punjab, AIR 1979 SC 1622

(2) U.P. Jal Nigam and others vs. P.C. Jain and others, 1996 SCC (2) 363

(3) Devdutt vs. Union of India and others 2008 (8) SCC 725."

10. Sri Anurag Shukla, learned counsel for the petitioner has drawn attention of this Court towards Annexure- 5 which is an order dated 26.09.2021 passed by the Commissioner Food and Civil Supply indicating therein that the employees against whom the departmental inquiry has been finalised shall be given notional promotion w.e.f. the date such promotion has been given to similarly placed employees. He has also drawn attention of this Court towards Annexure No.9 which is an order dated 18.02.2020 which indicates that the petitioner has not been communicated the adverse entry for the year 2015-16. Annexure-10 is an office order dated 14.08.2020 passed by the Commissioner Food Inspector Supply

providing promotion to the identically placed persons namely Sri Ashish Kumar Shukla w.e.f. the date of recommendation by DPC.

11. Therefore, Sri Anurag Shukla, learned counsel for the petitioner has submitted that the impugned order dated 29.10.2020 is patently, illegal and arbitrary and has been passed without considering the factual and legal matrix of the issue, therefore, the same may be set aside and the direction may be issued to the opposite party to promote the petitioner on the post of Marketing Inspector w.e.f. 26.09.2019 when the promotion order has been passed in favour of the similarly placed employees.

12. Sri Rajesh Kumar, learned Standing Counsel for the State has drawn attention of this Court towards para 6 to 8 of the counter affidavit by submitting that the candidature of the petitioner for promotion shall be considered by the next DPC, however, none of the submissions so made by Sri Anurag Shukla, learned counsel for the petitioner has been disputed in the counter affidavit and if some of the contents have been disputed but no cogent material to this effect has been placed before this Court.

13. Having heard learned counsel for the parties and having perused the material on record, I am of the considered opinion that if the issue of any employee is kept under seal cover, in view of the Office Memo/GO dated 28.05.1997, appropriate order must be passed by the competent authority immediately after the particular condition is over as the issue of such employee may not be kept pending for no cogent reasons.

14. In the present case, the issue of the petitioner was kept under seal cover on 28.09.2019 for the reason that the departmental inquiry was pending against him and the departmental inquiry has been finally concluded vide order dated 24.01.2020 (Annexure No.-04) by the disciplinary authority, therefore, the petitioner should have been provided promotion in terms of the recommendation so made by the DPC dated 20.09.2019. Further, one ground so taken in the impugned order that on account of one adverse entry against the petitioner for the year 2015-16 such recommendation of DPC dated 20.09.2019 may not be taken into account and his candidature shall be considered in the next DPC is not tenable in the eyes of law in as much as uncommunicated adverse entry shall not be given effect to in view of the settled provision of law by the Apex Court and by this Court. Undisputedly, the petitioner has not been communicated the adverse entry for the year 2015-16. Besides, the similarly placed employees have been given the promotion notionally pursuant to the recommendations of DPC, therefore, the petitioner may not be discriminated in as much as the concerning opposite party has got no cogent explanation discriminating the petitioner with the similarly placed employees.

15. In view of the facts and circumstances stated above and also in view of the dictum of Apex Court in re: **Gurdial Singh Gijji vs. State of Punjab**(supra), **U.P. Jal Nigam and others vs. P.C. Jain and others**(supra), **Devdutt vs. Union of India and others** (supra) and view of this Court in re:**Arun Kumar Goel**

vs. Union of India (supra) the impugned order dated 29.10.2020 passed by the Commissioner Food and Civil Supply (Annexure No.1) is not sustainable in the eyes of law being illegal, arbitrary, discriminatory and violating the Article 14 of the Constitution of India and is liable to be set aside/quash.

16. Accordingly, the writ petition is **allowed.**

17. A writ in the nature of certiorari is issued quashing the impugned order dated 29.10.2020 passed by the Commissioner Food and Civil Supply(respondent No.2) which is contained as Annexure No.01.

18. A writ in the nature of mandamus commanding the opposite parties to promote the petitioner from post of Junior Clerk to the post of Marketing Inspector w.e.f. 26.09.2019. The petitioner shall be entitled for all consequential service benefits including seniority etc.

19. No order as to costs.

(2021)08ILR A134
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN , J.

Service Single No. 24589 of 2020

Lalta Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Prahlad Maurya

Counsel for the Respondents:
C.S.C.

A. Service Law - Post-retiral dues - The petitioner was given pay-scale of Rs. 4500-7000 after completion of 24 years of service and later on after modification of the Government Order the pay-scale was upgraded to Rs. 5000-8000. The competent authority carried out the impugned exercise after 15 months from retirement of the petitioner without modifying the order until the petitioner approached this Court for retrieving his post retiral dues. The competent authority cannot deduct the excess payment from the post retiral dues of the petitioner without modifying the order by providing him the opportunity of hearing. (Para 8)

Writ Petition Allowed. (E-8)

List of Cases cited:-

1. St. of Punj. & ors. Vs Rafiq Masih (White Washer) (2015) 4 SCC 334 *(followed)*

2. Sushil Kumar Singhal Vs Principal Secretary, Irrigation & ors. (2014) 16 Supreme Court Cases 444

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Prahlad Maurya, learned counsel for the petitioner and Sri Virendra Kumar Srivastava, learned Standing Counsel for the State respondents.

2. By means of this petition the petitioner has prayed following relief:

(i) issue a writ of certiorari by quashing the order impugned dated 21.09.2020 and 19.11.2020 passed by the opposite party no. 2 contained in Annexure No. 1 & 2 respectively.

(ii) writ order or direction in the nature of mandamus commanding the opposite parties by directing them to release the amount Rs. 7,61,124/- which was stopped illegally, with compound interest to the petitioner, in the interest of justice."

3. The learned counsel for the petitioner has contended that the petitioner retired on 30.6.2019 from the post of Health Educator, Class III post in the Leprosy Department from the office of District Leprosy Officer, Azamgarh. After his retirement he completed all requisite formalities of getting post retiral dues but the dues have not been paid to him till the month of July, 2020, therefore, he filed a writ bearing ***Service Single No. 10724 of 2020 (Lalta Ram vs. State of U.P. Thru Addl. Chief Secy. Medical & Health & Ors.)*** and the said writ petition was decided finally on 10.7.2020 whereby this Court directed the opposite parties to dispose of the writ petition of the petitioner dated 20.6.2020 whereby he has requested for payment of post retiral dues. Such order has been enclosed with the writ petition as Annexure no. 15. After getting certified copy of the order dated 10.7.2020 the petitioner preferred a representation dated 14.7.2020 to all opposite parties requesting that his port retiral dues be paid.

4. In compliance of the order dated 10.7.2020 passed by this Court the Finance Controller of the office of Director General, Medical, Health & Family Welfare disposed of the representation of the petitioner by passing order dated 21.9.2020. By means of order dated 21.9.2020 the pay scale of the petitioner has been revised with effect from 12.7.2002 when the petitioner had completed 24 years of his service. Not only the above consequent to the order dated 21.9.2000 the amount to the tune of Rs. 7,61,124/- has been deducted from the retiral dues of the petitioner on the ground that such amount has been paid excess to the petitioner by wrong fixation of his salary in the year 2002. Both the orders dated 21.9.2020 and 19.11.2020 have been impugned in the writ petition enclosing Annexure nos. 1 & 2 respectively.

5. The learned counsel for the petitioner has submitted that in view of the para 18 of the judgment of Hon'ble Apex Court in re **State Of Punjab & Ors vs Rafiq Masih (White Washer) (2015) 4 SCC 334** no such recovery can be made from the post retiral dues of the petitioner, after his retirement as he retired from the post of Class-III. For convenience para 18 of the judgment is being reproduced herein below:

"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

6. He has further submitted that even otherwise his promotional pay scale to the tune of Rs. 4500-7000 was not refixed but in terms of government order dated 3.9.2001 (Annexure no. 4) the pay scale of Rs. 4500-7000 has been upgraded up to Rs. 5000-8000. The order dated 31.3.2009 (Annexure no. 5) was issued by the Chief Medical Officer, Azamgarh without any representation or misrepresentation on the part of the petitioner and the petitioner got such pay scale and other consequential benefits till his retirement by 30.6.2019. He has also submitted that when the post retiral benefits have not been paid to the petitioner after his retirement for more than one year and this Court has indulged directing the opposite party to dispose of the representation regarding payment of post retiral dues, the impugned order dated 21.9.2020 has been passed. The impugned order dated 21.9.2020 has been passed after about 15 months from the dated of retirement of the petitioner. As per Sri Prahlad Maurya if any modification was at all required, it could have been done after 31.3.2009 before 30.6.2019. However, no such modification was at all required inasmuch as the petitioner was paid the proper pay-scale strictly in accordance with law and as per various government orders.

7. Per contra, learned Standing Counsel has submitted that the fixation of pay scale of the petitioner as Rs. 5000-8000 in place of Rs. 4500-7000 is wrong inasmuch as those government servants whose post is not promotional are entitled for the promotional pay scale but the petitioner had already got two promotions and after getting promotion his pay-scale was fixed as Rs. 4500-7000, therefore, he should not be given the upgraded pay scale of Rs. 5000-8000. Learned Standing Counsel has also placed reliance on para no. 3 of the counter affidavit by saying that a deduction of earlier payment was made from the petitioner on account of wrong pay fixation.

8. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that in view of para 18 of the judgment of ***Rafiq Masih (supra)*** the impugned order dated 21.9.2020 could have not been passed and the consequential deductions could have also not been made from the post retiral dues of the petitioner. It has nowhere been indicated in the entire counter affidavit that for getting the benefit of revised pay-scale of Rs. 5000-8000 petitioner had ever mis-represented to the competent authorities, rather vide order dated 31.3.2009 passed by Chief Medical Officer, Azamgarh (Annexure no. 5) the petitioner was allowed the pay-scale of Rs. 4500-7000 after completion of 24 years of service and later on after modification of the Government Order the pay-scale of Rs. 4500-7000 is upgraded in pay scale of Rs. 5000-8000. If at all there was any error in making such payment vide order dated 31.3.2009, the authority competent could have modified this order by providing an opportunity of hearing to the petitioner on or before his retirement as the petitioner

retired from service on 30.6.2019 but no such exercise has been carried out. Admittedly, the impugned exercise has been carried out after 15 months from retirement of the petitioner when the petitioner approached this Court for getting post retiral benefits and this Court directed the competent authority to dispose of the representation of the petitioner. Therefore, the concerned opposite parties may not deduct excess payment from the post retiral dues of the petitioner who retired from Class III post in view of the dictum of Hon'ble Apex Court in the case of ***Rafiq Masih (supra)***. It is also to be noted that before passing impugned order no opportunity of hearing of any kind whatsoever had been provided to the petitioner, therefore, on that account too the impugned order dated 21.9.2020 is patently illegal, arbitrary, discriminatory and uncalled for and same is not sustainable in the eyes of law.

9. Besides, in view of the dictum of Apex Court in re: ***Sushil Kumar Singhal vs. Principal Secretary, Irrigation and others reported in (2014) 16 Supreme Court Cases 444*** neither the excess amount, which has been paid w.e.f. 12.7.2002 when the petitioner completed 24 years of service, may be recovered from the petitioner nor his pension can be reduced. Para 7 of the aforesaid judgment is being reproduced herein below :

"Upon perusal of the aforestated G.O, and the submission made by the learned counsel appearing for the appellant, it is not in dispute that the appellant had retired on 31-12-2003 and at the time of his retirement his salary was Rs 11.625 and on the basis of the said salary his pension had been fixed as Rs 9000 Admittedly, if any mistake had been committed in pay fixation, the mistake had been committed in 1986 i.e. much prior to the retirement of the appellant and therefore, by virtue of the aforestated G.O. dated 16-1-2007, neither any salary paid by mistake to the appellant could have been recovered nor pension of the appellant could have been reduced."

10. Accordingly, the writ petition is ***allowed.***

11. A writ in the nature of ***certiorari*** is issued quashing the order dated 21.9.2020 passed by the Finance Controller, Medical & Health Services, U.P., Lucknow (Annexure no. 1 to the writ petition).

12. A writ in the nature of ***mandamus*** is issued commanding the opposite parties not to deduct any amount from the petitioner in the name of excess amount paid and release his entire amount already deducted from the post retiral dues of the petitioner with promptness preferably within a period of three months failing which the petitioner shall be entitled for the interest @ 8%.

13. No order as to costs.

(2021)08ILR A137
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.08.2021

BEFORE

THE HON'BLE ABDUL MOIN, J.

Service Single No. 24958 of 2018

Pradeep Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rajesh Kumar

Counsel for the Respondents:
C.S.C.

A. Service Law - U.P. Subordinate Police Officers (Punishment and Appeal) Rules, 1991 - Rule 8(2)(b) - The grounds i.e., (a) the petitioner not being available and (b) the matter pertains to indiscipline, indicated by the competent authority while summarily dismissing the petitioner from service, would not stand the test for not holding a regular departmental inquiry. (Para 14-15)

The petitioner is alleged to have committed misconduct i.e., having been drunk on duty, opened the armory, taken out a rifle and threatened the personnel who were present there. On medical examination, he was found to be drunk on duty. (Para 10)

Writ Petition Partly Allowed. (E-8)

List of Cases cited:-

1. U.O.I. Vs Tulsiram Patel (1985) 3 SCC 398 *(followed)*

2. Risal Singh Vs St. of Hary. & ors. (2014) 13 SCC 244 *(followed)*

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and Sri Saharsh, learned Standing counsel appearing for the State-respondents.

2. The present petition has been filed praying for quashing of the order dated 30.03.2018 passed by the respondent no. 2, a copy of which is annexure 2 to the writ petition by which the petitioner has been dismissed from service as well as the order dated 25/27.07.2018 passed by the respondent no. 3, a copy of which is annexure 3 to the writ petition by which the appeal filed by the petitioner against the dismissal order has been dismissed. A further prayer is for a mandamus commanding the respondents to reinstate the petitioner in service.

3. Bereft of unnecessary details, the facts set forth by the petitioner is that an incident took place on 29.03.2018 wherein the petition is alleged to have gone to the office in a drunken state, of having threatened the service personnel working there and having opened the armoury, taken out a rifle and having cocked the same and threatened the personnel. The petitioner was counselled, caught and taken for medical examination wherein he was found to be drunk. The petitioner was placed under suspension and thereafter through the impugned order dated 30.03.2018, a copy of which is annexure 1 to the writ petition, the petitioner has been dismissed from service by invoking Rule 8 (2) (b) of the Uttar Pradesh Subordinate Police Officers (Punishment and Appeal) Rules, 1991 (hereinafter referred to as "Rules, 1991"). The petitioner had initially approached this Court by filing Writ Petition No. 22292 (SS) of 2018 Inre; Pradeep Kumar Vs. State of U.P and Ors which was disposed of with a direction to the respondent no. 3 to decide the pending appeal of the petitioner. The appeal has been rejected vide order dated 25/27.07.2018, a copy of which is annexure 3 to the writ petition and hence the present petition.

4. Learned counsel for the petitioner contends that though the competent authority has got the power to invoke Rule 8 (2) (b) of the Rules, 1991 and to dismiss an employee summarily but then the reasons as to why it is not found reasonably

practicable to hold an inquiry should form part of record. He contends that a perusal of the impugned order dated 30.03.2018 would indicate that only two reasons have been recorded in the impugned order namely (a) the petitioner not being available and (b) the matter pertains to indiscipline. Learned counsel for the petitioner contends that both the grounds reflect patent non application of mind inasmuch as even in case the petitioner was not available though the order was being passed the very next day of the alleged incident, the respondents could very well have issued a charge sheet and could have proceeded ex-parte in case of non availability of petitioner but the same cannot be a ground for invocation of Rule 8 (2) (b) of the Rules, 1991. So far as it has been indicated in the impugned order that as the matter pertains to indiscipline, as such the said rule is being invoked, learned counsel for the petitioner contends that even the said ground is meaningless inasmuch as disciplinary proceedings after issue of a charge sheet can always be done in case the matter pertains to indiscipline and the same cannot be a ground for invocation of Rule 8 (2) (b) of the Rules, 1991 for dismissing the petitioner summarily. He also contends that the appellate order being also based on the impugned order dated 30.03.2018 and having not referred to the two grounds on which Rule 8 (2) (b) has been invoked also merits outright quashing as the same reflects non application of mind.

5. In this regard, learned counsel for the petitioner has placed reliance on the Constitution Bench judgment in the case of **Union of India Vs. Tulsiram Patel** reported in **(1985) 3 SCC 398** to contend that where a dismissal order had been passed by invoking Article 311 (2) proviso (b) which is *pari materia* to Rule 8 (2) (b) of the Rule, 1991, the Apex Court has held that Article 311 (2) proviso (b) can only be invoked where it is not reasonably practicable to hold an inquiry and the illustrations in this regard have also been given by the Apex Court. Placing reliance on the said judgment, it is contended that none of the principles as have been laid down by the Apex Court in the case of **Tulsiram Patel (supra)** are attracted in the facts of the present case so as to dispense with the regular inquiry, as has sought to be done by the respondents.

6. Reliance has also been placed on the judgment of the Apex Court in the case of **Risal Singh Vs. State of Harayana and Ors reported in (2014) 13 SCC 244** wherein, after following the judgment of **Tulsiram Patel (supra),** the Apex Court has set aside an order of dismissal which had been passed by invoking Article 311 (2) (b).

7. Placing reliance on the aforesaid judgments, it is contended that once both the grounds on which the competent authority has not found it reasonably practicable to hold an inquiry are patently frivolous reflecting patent non application of mind, as such the impugned order merits to be quashed with the further direction for reinstatement of the petitioner.

8. On the other hand, Sri Saharsh, learned Standing counsel submits that the conduct of the petitioner itself is of a heinous nature inasmuch as he was firstly drunk on duty and secondly had opened the armoury, taken out a rifle and had cocked the same on the employees present and it is only after much persuasion that the petitioner was counselled, caught and taken to the doctor for medical examination. He

also submits that in case any untoward incident would have happened, the same would have spoiled the discipline of the armed forces apart from having injured or killed or seriously maimed the personnel who were present there and hence by invoking Rule 8 (2) (b), the impugned order has correctly been passed by the authority concerned.

9. Heard learned counsel appearing for the contesting parties and perused the records.

10. From a perusal of record it is apparent that the petitioner is alleged to have committed misconduct on 29.03.2018 i.e having been drunk on duty, opened the armoury, taken out a rifle and threatened the personnel who were present there. The petitioner had been caught and after medical examination, he was found to be drunk on duty. The respondents, instead of holding a departmental inquiry, have proceeded to summarily dismiss the petitioner after invoking Rule 8 (2) (b) of the Rules, 1991. The grounds indicated as to why it is not reasonably practicable to hold the inquiry are (a) the petitioner not being available and (b) the matter pertains to indiscipline.

11. So far as both the grounds are concerned, in case the petitioner was not found present for the purpose of proceeding with disciplinary proceedings, it was always open for the competent authority to have issued a charge sheet and in case the petitioner failed to appear in the inquiry, could have been proceeded ex-parte. So far as the matter pertaining to indiscipline in the office is concerned, needless to mention that once the inquiry proceedings could have been held, the indiscipline of the petitioner could also have seen in the said inquiry proceedings.

12. Though the matter as alleged pertaining to the conduct of the petitioner is serious yet both the grounds, as have been indicated by the competent authority while summarily dismissing the petitioner from service, would not stand the test for not holding a regular departmental inquiry as has been laid down by the Apex Court in the case of **Tulsiram Patel (supra)** wherein the Apex Court has held as under:-

132. The condition precedent for the application of Clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by Clause (2) of Article 311. ***What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished : feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner : to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by Clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not***

be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidate witnesses who are going to given evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through other thretens, intimidates and terrorizes the officer who is the disciplinary authority or member of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. *The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that Clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail.*

The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concernedand in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India and Ors., MANU/ SC/ 0265/ 1984MANU/SC/0265/1984 : (1984) IILLJ17SC , is an instance in point. In that case, the appellant was working as a senior clerk in the office of the Chief Commercial Superintendent, Northern Railway, Varanasi. The Senior Commercial Officer wrote a. letter to the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscipline mostly relating to the Deputy Chief Commercial Superintendent. The appellant submitted his explanation and on the very next day the Deputy Chief Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the Deputy Chief Commercial Superintendent passed an order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accusor, the chief witness and also the judge of the matter.

13. Likewise, the Apex Court in the case of **Risal Singh (supra)** has held as under:-

In the said case the Constitution Bench, while dealing with the exercise of power Under Article 311(2)(b), has ruled thus:

130. The condition precedent for the application of Clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by Clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform: capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by Clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.

7. In Jaswant Sing v. State of Punjab and Ors. (1991) 1 SCC 362 the Court, while dealing with the exercise of power as conferred by way of exception Under Article 311(2)(b) of the Constitution, opined as follows:

Clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observation at page 270 of Tulsiram case: (SCC p. 504, para 130)

A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the department's case against the government servant is weak and must fail.

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer.

8. After so stating, the two-Judge Bench quashed the order of dismissal and directed the Appellant to be reinstated in service forthwith with the monetary benefits. Be it noted, it was also observed therein that it would be open to the employer, if so advised, notwithstanding the lapse of time, to proceed with the disciplinary proceedings.

9. Recently, in Reena Rani v. State of Haryana (2012) 10 SCC 215, after referring to the various authorities in the field, the Court ruled that when reasons are not ascribed, the order is vitiated and accordingly set aside the order of dismissal which had been concurred with by the Single Judge and directed for reinstatement in service with all consequential benefits. It has also been observed therein that the order passed by this Court would not preclude the competent authority from

taking action against the Appellant in accordance with law.

14. Once the grounds which have been taken by the competent authority for not holding an inquiry are tested on the touchstone of the law laid down by the Apex Court in the case of **Tulsiram Patel (supra) & Risal Singh (supra)** it comes out that both the grounds on which the competent authority has found it not reasonably practicable to hold an inquiry, are not such grounds wherein the inquiry was not possible. It is not contended that there was any threat by the petitioner along with his associates to terrorize, threaten or intimidate witnesses who were going to depose against him or threaten the members of the family of the disciplinary authority or there was any indiscipline or insubordination prevailing in the department which could have co-erced or terrified any individual.

15. Accordingly, considering the law laid down by the Apex Court in the case of **Tulsiram Patel & Risal Singh (supra)** it is apparent that both the grounds which have been invoked by the competent authority for summarily dismissing the petitioner from service are totally unsustainable in the eyes of law. As such, the impugned order dated 30.03.2018 is patently bad in the eyes of law not standing the tests as laid down by the Apex Court in the case of Tulsiram Patel (supra). On the same grounds, the appellate order dated 25/27.07.2018 is also bad in the eyes of law.

16. Considering the aforesaid, the writ petition is partly allowed. The impugned orders dated 30.03.2018 and 25/27.07.2018, copies of which are annexures 2 and 3 to the writ petition are quashed.

17. Consequences to follow.

18. However, it would be open to the respondents to proceed against the petitioner for any act of his misconduct in accordance with law and rules.

(2021)08ILR A143
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN , J.

Service Single No. 24979 of 2020
&
Service Single No. 17225 of 2021

P.N.O. 052150337 Mohd. Farman
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Shujauddin Waris

Counsel for the Respondents:
C.S.C.

A. Service Law - Disciplined forces - Not cutting the beard despite being informed by the Station House Officer when he was posted as a constable is a violation of direction/circular, being issued by the higher officials. This is not only wrong behavior but the same is misdemeanor, misdeed and delinquency of the petitioner. (Para 22)

The member of the disciplined force must strictly follow the executive order or circulars or instructions issued by the department or by the higher authority of the department as those orders etc. are as good as service conditions. Furthermore, police force being a law enforcing agency have to keep a secular image which strengthens the countenance of national integration. (Para 20)

The petitioner taking the protection for growing beard as a member of disciplined force may not be protected under Article 25 of the Constitution of India as the Article does not confer absolute right in this regard. (Para 23)

Writ Petition Rejected. (E-8)

List of Cases cited:-

1. Secretary, Ministry of Defence & ors. Vs Prabhash Chandra Mirdha (2012) 11 Supreme Court Cases 565

2. St. of Orissa & anr. Vs Sangram Keshari Misr & anr. (2010) 13 Supreme Court Cases 311

3. U.O.I. & ors. Vs Upendra Singh (1994) 3 Supreme Court Cases 357

4. St. of U.P. Vs Shri Brahm Datt Sharma & anr. AIR 1987 SC 943

5. Bijoe Emmanuel & ors. Vs St. of Kerala & ors. (1986) 3 SCC 615

6. Zahiroddin Shamsoddin Bedade Vs St.of Mah. & ors. 2013 (3) MH. LJ page 701

7. Shree Chamundi Mopeds Ltd. Vs Church of South India Trust Association CSI Cinod Secretariat, Madras (1992) 3 SCC 1

8. Mohammed Zubair Corporal No. 781467-G Vs U.O.I. & ors. (2017) 2 SCC 115

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Amit Bose, learned Senior Advocate assisted by Sri Abhishek Bose, learned counsel for the petitioner and learned Standing Counsel for the State-respondent.

2. By means of first writ petition, the petitioner has assailed the Circular dated 26.10.2020 issued by the Director General of Police, U.P. Lucknow (Annexure No.01) whereby the guidelines have been issued in respect of wearing proper uniform and proper appearance warranted for the member of disciplined force.

3. The petitioner has also assailed the suspension order dated 05.11.2020 passed by Deputy Inspector General of Police/Senior Superintendent of Police, Ayodhya (Faizabad) (Annexure no.02) whereby the petitioner has been placed under suspension in contemplation of departmental inquiry for the reason that the petitioner despite being the member of disciplined force is maintaining his beard and despite the specific direction being issued by the superior authority to shave the beard he did not follow such direction.

4. The petitioner has also assailed the order dated 13.11.2020 passed by Deputy Inspector General of Police/Senior Superintendent of Police, Ayodhya (Faizabad) (Annexure No.03) rejecting the application of the petitioner dated 03.11.2020 whereby the petitioner had sought permission to maintain his beard in accordance with tenets of Muslim religion.

5. Whereas, by means of second Writ Petition (S/S) No. 17225 of 2021 the petitioner has assailed the charge-sheet dated 29.07.2021 issued by Superintendent of Police (Rural Area), Ayodhya (Faizabad) which is contained as Annexure No.04 to the writ petition.

6. Since the facts of both the cases are common, therefore, both the writ petitions are being decided by the common judgment/order.

7. In the first writ petition so far as the order of suspension dated 05.11.2020 is concerned, it is to be noted here that the charge-sheet has been issued against the

petitioner on 29.07.2021 which has been challenged in the second writ petition, therefore, as per my considered opinion if the charge-sheet is issued against any employee who is under suspension, the employee should submit his defence reply taking all pleas and grounds which are available to him enclosing therewith the copies of relevant documents which are necessary for disposal of the issue and the departmental inquiry should be conducted and concluded strictly in accordance with law by following the principals of natural justice with expedition preferably within a period of three months from the date the defence reply to the charge-sheet has been filed. Thereafter, the disciplinary authority may pass final order providing copy of the inquiry report and seeking explanation from the petitioner as per law. Therefore, the suspension order may not be interfered at least for the aforesaid period of three months till the departmental inquiry concludes. However, if the departmental inquiry does not conclude subject to the proper cooperation of the petitioner with the inquiry proceedings within a period of three months from the date of receipt of the defence reply to the charge-sheet, the suspension order shall be kept in abeyance and the petitioner shall be entitled for consequential relief. However, in that case the departmental inquiry may go on and final order may be passed but strictly in accordance with law.

8. So far as the Circular dated 26.10.2020 issued by the Director General of Police, U.P. Lucknow (Annexure No.01) issuing guidelines in respect of wearing proper uniform and maintaining the appearance in a manner required for member of disciplined force is concerned, I am of the considered opinion that this is a domain of competent authority to issue guidelines in respect of wearing proper uniform and keeping the appearance in a manner required for the members of disciplined force and no interference should be done, inasmuch as, maintaining and wearing proper uniform as well as maintaining physical appearance is one of the first and foremost requirement of the members of disciplined force. The parameters determined for the members of disciplined force are not the same as of parameters relating to the members of other services. By means of Circular dated 26.10.2020, the Director General of Police, U.P. Lucknow has followed other circulars referred in the circular itself issued from time to time with effect from 1985 till 2018 and the members of disciplined force are strictly following such guidelines.

9. Therefore, I do not find any infirmity or illegality in the Circular dated 26.10.2020. Likewise, the application of the petitioner dated 03.11.2020 has been rejected in terms of Circular dated 26.10.2020 assigning the reasons, therefore, I do not find any infirmity or illegality in the order dated 13.11.2020 rejecting the application of the petitioner dated 03.11.2020 whereby he had requested to maintain his beard in accordance with the tenets of Muslim religion. The order dated 13.11.2020 is a speaking and reasoned order, therefore, it may not be interfered.

10. In view of aforesaid facts and reasons stated herein above, the first Writ Petition (S/S) No. 24979 of 2020 is hereby **dismissed.**

11. It is needless to say that the Inquiry Officer shall conduct and conclude the departmental inquiry strictly in accordance with law, following the

principals of natural justice with expedition preferably within a period of three months subject to the cooperation of the petitioner, inasmuch as, no departmental inquiry may be concluded to its logical end unless the employee cooperates with the inquiry proceedings properly.

12. So far as the prayer of second writ petition is concerned whereby the petitioner has assailed the charge-sheet dated 29.07.2021 which is contained as Annexure No.04 to the writ petition, learned Additional Chief Standing Counsel has raised preliminary objection regarding maintainability of the writ petition by submitting that this is a premature writ petition, inasmuch as, the writ court may normally not interfere with the charge-sheet or show-cause-notice. So as to strengthen his aforesaid objection regarding maintainability of the writ petition, Sri Vivek Kumar Shukla has placed reliance on the judgment of the Hon'ble Apex Court in re:- ***Secretary, Ministry of Defence and others vs. Prabhash Chandra Mirdha*** *[reported in (2012) 11 Supreme Court Cases 565]* referring para 10 which is being reproduced herein below:-

"10. Ordinarily a writ application does not lie against a charge-sheet or show-cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person having no jurisdiction/competence to do so. A writ lies when some right of a party is infringed. In fact, charge-sheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a charge-sheet or show-cause notice in disciplinary proceedings should not ordinarily be quashed by the court. (Vide State of U.P. v. Brahm Datt Sharma25, Bihar State Housing Board v. Ramesh Kumar Singh26, Ulagappa v. Commr.27, Special Director v. Mohd. Ghulam Ghouse28 and Union of India v. Kunisetty Satyanarayana29.)"

13. He has further drawn the attention of the Court towards dictum of Hon'ble Apex Court in re:- ***State of Orrisa and another vs. Sangram Keshari Misra and another*** *[reported in (2010) 13 Supreme Court Cases 311]* referring para 10 which reads as under:-

"10. Though there appears to be some merit in the said contentions of the first respondent, it is unnecessary to examine the correctness of these contentions as normally a charge-sheet is not quashed prior to the conducting of the enquiry on the ground that the facts stated in the charge are erroneous. It is well settled that the correctness or truth of the charge is the function of the disciplinary authority (vide Union of India v. Upendra Singh1 SCC p. 362, para 6). Therefore we reject the contention that the charge ought to have been quashed without reserving to the State to proceed in accordance with law."

14. Further, he has drawn the attention of the Court towards dictum of the Hon'ble Apex Court in re:- ***Union of India and others vs. Upendra Singh*** *[reported in (1994) 3 Supreme Court Cases 357]* referring para 6 which reads as under:-

"6. In the case of charges framed in a disciplinary inquiry the tribunal or court can interfere only if on the charges framed (read with imputation or

particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. At this stage, the tribunal has no jurisdiction to go into the correctness or truth of the charges. The tribunal cannot take over the functions of the disciplinary authority. The truth or otherwise of the charges is a matter for the disciplinary authority to go into. Indeed, even after the conclusion of the disciplinary proceedings, if the matter comes to court or tribunal, they have no jurisdiction to look into the truth of the charges or into the correctness of the findings recorded by the disciplinary authority or the appellate authority as the case may be. The function of the court/tribunal is one of judicial review, the parameters of which are repeatedly laid down by this Court. It would be sufficient to quote the decision in H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal v. Gopi Nath & Sons5. The Bench comprising M.N. Venkatachaliah, J. (as he then was) and A.M. Ahmadi, J., affirmed the principle thus : (SCC p. 317, para 8)

"Judicial review, it is trite, is not directed against the decision but is confined to the decision-making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorised by law to decide, a conclusion which is correct in the eyes of the Court. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself."

15. He has also placed reliance on the decision of Hon'ble Apex Court in re:- ***State of U.P. vs. Shri Brahm Datt Sharma and another*** *[reported in AIR 1987 SC 943)* by submitting that the Hon'ble Apex Court has held that when a show-cause notice was issued to a government servant under the statutory provisions calling upon him to show cause, ordinarily the government servant must place his case before the authority concerned by showing cause and the courts should be reluctant to interfere with the notice at that stage unless the notice is shown to have been issued palpably without any authority of law. The purpose of issuing show cause is to afford opportunity of hearing to the government servant and once cause is shown it is open to the Government to consider the matter in the light of the facts and submissions placed by the government servant and only thereafter a final decision in the matter could be taken. Interference by the Court before that stage would be premature.

16. Therefore, on the basis of aforesaid settled propositions of law, the learned Additional Chief Standing Counsel, Sri Vivek Kumar Shukla has submitted that the charge-sheet should not be interfered by this Court.

17. However, Sri Amit Bose, learned Senior Advocate appearing on behalf of the petitioner has submitted that since the alleged conduct of the petitioner does not come within the purview of misconduct, therefore, no departmental inquiry against the petitioner should be conducted in the light of dictum of Hon'ble Apex Court in re:- ***Upendra Singh (supra).*** Therefore, the

impugned charge-sheet is a nullity in the eyes of law.

18. Sri Amit Bose referring the dictum of the Hon'ble Apex Court in re:- ***Bijoe Emmanuel and others vs. State of Kerala and others*** *[reported in (1986) 3 SCC 615]* has submitted that the Hon'ble Apex Court has held that even if any student or set of students does or do not sing National Anthem in school prayer due to their religion belief, even such right is protected under Article 25 of the Constitution of India, therefore, rejecting the request of the petitioner for maintaining beard in the light of Circular dated 26.10.2020 is violative of Article 25 of the Constitution of India.

19. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that a member of a disciplined force must strictly follow the executive orders or circulars or instructions issued by the department or by the higher authority of the department as those executive orders etc. are as good as service condition.

20. As a matter of fact such executive intimation/order has been issued to maintain the discipline in the force directing to keep the appearance and uniform befitting for the members of disciplined force. Further, police force has to be a disciplined force and being a law enforcing agency, it is necessary that such force must have secular image which strengthen the countenance of national integration. Sri Amit Bose, learned Senior Advocate while assailing the charge-sheet has submitted that the conduct of the petitioner not cutting his beard despite the specific direction being issued by the superior authority does not come within the purview of misconduct, therefore, no charge-sheet should have been issued against the petitioner to conduct the departmental inquiry.

21. So as to appreciate the aforesaid submission of Sri Amit Bose, I am considering the definition of *"Misconduct"* as per Black's Law Dictionary Ninth Edition is a dereliction of duty; unlawful or improper behaviour. As per The New International Webster's Comprehensive Dictionary of the English Language (Encyclopedic 2013 Edition), the *"Misconduct"* is to behave improperly, to mismanage or bad behaviour. As per P. Ramanatha Aiyar's The Law Lexicon Encyclopedic Law Dictionary with Legal Maxims, Latin Terms and Words & Phrases Second Edition, the *"Misconduct"* means a transgression of some established and defend rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, willful incharacter, improper or wrong behaviour, misdemeanor, misdeed, misbehaviour, delinquency, impropriety, mismanagement etc.

22. Therefore, non-cutting the beard despite making the petitioner aware by the In-charge Station House Officer of police station Khandasa when the petitioner was posted as constable to the effect that the police personnel may not have beard as it is a violation of direction/circular being issued by the higher officials is not only a wrong behaviour but the same is misdemeanor, misdeed and delinquency of the petitioner. So the submission of Sri Amit Bose is not acceptable to the effect that the alleged conduct of the petitioner is not misconduct. However, his misconduct/misdeed shall be examined by the Inquiry Officer during the course of inquiry, strictly in accordance with law by

affording him an opportunity of hearing on that no observations of this Court are required.

23. So far as the submission regarding protection of fundamental right enshrined under Article 25 of the Constitution of India is concerned, it is clear that Article 25 guarantees freedom of conscience and free profession, practice and propagation of religion, therefore, having beard by a member of disciplined force may not be protected under Article 25 of the Constitution of India, inasmuch as, Article 25 of the Constitution of India does not confer absolute right in this regard, all the rights have to be viewed in the context and letter and sprit in which they have framed under the Constitution. As a matter of fact rights guaranteed under Article 25 of the Constitution of India have inbuilt restrictions.

24. Sri Amit Bose, learned Senior Advocate has drawn the attention of the Court towards Annexure no.12 which is judgment and order dated 12.12.2012 passed by the Division Bench of Mumbai High Court in re:- ***Zahiroddin Shamsoddin Bedade vs. State of Maharashtra and others*** *[reported in 2013 (3) MH. LJ page 701]* whereby the Division Bench has held that keeping beard by a police constable professing Islam is not a fundamental right guaranteed under Article 25 and 26 of the Constitution of India. Sri Bose has submitted that the aforesaid judgment and order dated 12.12.2012 passed by the Mumbai High Court has been assailed before the Hon'ble Apex Court by filing Special Leave Petition (Civil) No. 920 of 2013. The Hon'ble Apex Court has issued notices to the parties granting interim protection to that petitioner staying the disciplinary proceedings vide order dated 22.01.2013. Therefore, Sri Bose has submitted that since the final adjudication is yet to come by the Hon'ble Apex Court in the identical issue, the pending departmental proceedings against the present petitioner may be stayed.

25. Replying the aforesaid point, Sri Vivek Kumar Shukla, learned Additional Chief Standing Counsel has referred the dictum of Hon'ble Apex Court in re:- ***Shree Chamundi Mopeds Ltd. vs. Church of South India Trust Association CSI Cinod Secretariat, Madras*** *[reported in (19992) 3 SCC 1]* by submitting that the Hon'ble Apex Court has not stayed the judgment and order dated 12.12.2012 passed by the Division Bench of Mumbai High Court. Even if such order was stayed issuing notices to the opposite parties, in that case the judgment and order of Mumbai High Court would have been a good law unless such order is quashed/set-aside by the Hon'ble Apex Court. As per Sri Shukla, since the notices have been issued in that case by the Hon'ble Apex Court without staying the operation of the judgment and order dated 12.12.2012, only the disciplinary proceedings have been stayed, therefore, the judgment and order dated 12.12.2012 passed by the Division Bench of Mumbai High Court may not be treated as nonest in the eyes of law. As a matter of fact till the quashing of judgment and order passed by the Mumbai High Court, such judgment shall hold the field and shall be treated as good law.

26. Three Judges of the Hon'ble Apex Court in re:- ***Mohammed Zubair Corporal No. 781467-G vs. Union of India and others*** *[reported in (2017) 2 SCC 115]* has held that regulations and policies in regard to personal appearance are not intended to discriminate against religious beliefs nor do

they have effect doing so. Their object and purpose is to ensure uniformity, cohesiveness, discipline and order which are indispensable to the force.

27. In this case also the Hon'ble Apex Court was examining the question as to whether the police personnel can keep beard taking shelter of Article 25 and 26 of the Constitution of India. Before the Hon'ble Apex Court in re:- ***Mohammed Zubair (supra)*** this fact could not be established by the litigant as to whether there is any specific mandate in Islam which prohibits the cutting of hairs or shaving the facial hairs and no substantial material was placed before the Hon'ble Apex Court to convince that a police personnel professing Islam may not cut his beard or hairs. Para 15 & 18 of the judgment are being reproduced herein below:-

"15. During the course of the hearing, we had inquired of Shri Salman Khurshid, learned Senior Counsel appearing on behalf of the appellants whether there is a specific mandate in Islam which "prohibits the cutting of hair or shaving of facial hair". The learned Senior Counsel, in response to the query of the Court, indicated that on this aspect, there are varying interpretations, one of which is that it is desirable to maintain a beard. No material has been produced before this Court to indicate that the appellant professes a religious belief that would bring him within the ambit of Regulation 425(b) which applies to "personnel whose religion prohibits the cutting off the hair or shaving off the face of its members". The policy letters which have been issued by the Air Headquarters from time to time do not override the provisions of Regulation 425(b) which have a statutory character. The policy circulars are only clarificatory or supplementary in nature."

"18. We see no reason to take a view of the matter at variance with the judgment under appeal. The appellant has been unable to establish that his case falls within the ambit of Regulation 425(b). In the circumstances, the Commanding Officer was acting within his jurisdiction in the interest of maintaining discipline of the Air Force. The appellant having been enrolled as a member of the Air Force was necessarily required to abide by the discipline of the Force. Regulations and policies in regard to personal appearance are not intended to discriminate against religious beliefs nor do they have the effect of doing so. Their object and purpose is to ensure uniformity, cohesiveness. discipline and order which are indispensable to the Air Force, as indeed to every Armed Force of the Union."

28. In view of the facts, reasons and case laws so cited by the respective parties, I do not find any infirmity or illegality in the impugned charge-sheet dated 29.07.2021 issued against the petitioner by the Senior Superintendent of Police, Ayodhya/Faizabad (Annexure No.04 to the writ petition). I am also of the considered opinion that the departmental inquiry against the petitioner should be conducted and concluded to its logical end as directed above. The judgment of Hon'ble Apex Court in re:- ***Upendra Singh (supra)*** may not rescue the petitioner, inasmuch as, the allegation levelled in the charge-sheet, *prima facie*, constitute misconduct subject to the specific findings of the Inquiry Officer on that.

29. Therefore, I hereby dismiss the writ petition being misconceived and direct

the Inquiry Officer to conduct and conclude the inquiry against the petitioner in a manner directed above and the disciplinary authority may pass final order strictly as per law.

30. It is, however, made clear that no prejudice shall be caused to the petitioner for the reason that he has filed the aforesaid writ petitions challenging the suspension order and charge-sheet.

31. No order as to costs.

(2021)08ILR A151
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.07.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 29822 of 2017

Ramu & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Prashant Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law - Wages - If any employee is discharging his duties on daily wages basis for substantially long period, he should be paid minimum of pay scale admissible for Class-IV employee. (para 4)

Writ Petition Allowed. (E-8)

List of Cases cited:-

1. Sabha Shanker Dube Vs Divisional forest Officer & ors. (2019) 12 SCC 297 *(followed)*

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

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

2. By means of this petition, the petitioners have prayed following relief;

"(a) issue a writ, order or direction in the nature of MANDAMUS commanding the opposite parties to consider the cases of the petitioners for payment of the wages equivalent to the minimum of pay scale of Class IV employee with permissible allowances in the Forest Department within a specified period."

3. Contention of learned counsel for the petitioners is that the petitioners were appointed between November, 1994 to November, 2009 on daily wages basis in the Forest Department, Lakhimpur Kheri on different dates and are continuing on daily wages against Group-D post till date. He has further submitted that so many similarly placed employees are getting payment of minimum of pay scale. He has further submitted that the Hon'ble Apex Court in catena of cases has held that if any employee is discharging his duties on daily wages basis for substantially long period, his regularization should be considered and till consideration of regularization, he should be paid minimum scale of pay admissible for Class-IV employee.

4. Having heard learned counsel for the parties and perusing the material available on record, I am of the considered opinion that if the petitioners are continuously discharging their duties since their initial engagement as daily wagers,

then they should be paid minimum of pay scale admissible for Class-IV employee in view of the dictum of the Hon'ble Apex Court in re; **Sabha Shanker Dube v. Divisional Forest Officer and others,** (2019) 12 SCC 297. Paragraphs 12, 13 & 14 of the aforesaid judgment are being reproduced herein below:-

"12. In view of the judgment in Jagjit Singh [State of Punjab v. Jagjit Singh, (2017) 1 SCC 148 : (2017) 1 SCC (L&S) 1] , we are unable to uphold the view of the High Court that the appellants herein are not entitled to be paid the minimum of the pay scales. We are not called upon to adjudicate on the rights of the appellants relating to the regularisation of their services. We are concerned only with the principle laid down by this Court initially in Putti Lal [State of U.P. v. Putti Lal, (2006) 9 SCC 337 : 2006 SCC (L&S) 1819] relating to persons who are similarly situated to the appellants and later affirmed in Jagjit Singh [State of Punjab v. Jagjit Singh, (2017) 1 SCC 148 : (2017) 1 SCC (L&S) 1] that temporary employees are entitled to minimum of the pay scales as long as they continue in service.

13. We express no opinion on the contention of the State Government that the appellants are not entitled to the reliefs as they are not working on Group 'D' posts and that some of them worked for short periods in projects.

14. For the aforementioned reasons, we allow these appeals and set aside the judgments of the High Court holding that the appellants are entitled to be paid the minimum of the pay scales applicable to regular employees working on the same posts. The State of Uttar Pradesh is directed to make payment of the minimum of pay scales to the appellants with effect from 1-12-2018."

5. Accordingly, the writ petition is **allowed.** A writ in the nature of mandamus is issued commanding the opposite parties to pay the minimum of pay scale to the petitioners applicable to a regular employee working on the same post forthwith, preferably within a period of one month from the date of receipt of certified copy of this order.

6. No order as to costs.

(2021)08ILR A152
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2021

BEFORE

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

Writ A (Rent Control) No. 960 of 2011

Noor Ahmad ...Petitioner
Versus
Qazi Zafar Ahmad & Anr. ...Respondents

Counsel for the Petitioner:
Sri A.K. Mehrotra, Sri Pranjal Mehrotra

Counsel for the Respondents:
Sri Manish Tandon

A. Civil Law - Code of Civil Procedure, 1908 – Order I Rule 10 – Rent suit – Nature and Scope – Impleadment – Permissibility – Enlargement of cause of action altering it in a Title suit – Extent of – Held, cause of action cannot be enlarged so as to alter the scope of a rent suit to a title suit – *Ex-hypothesi*, no party can be impleaded who seeks to bring in a cause of action that would ultimately convert the rent suit into a title suit – This position of the law is beyond cavil, going by consistent authority – Courts below have not committed any error of law in declining the petitioner's prayer to be impleaded in a rent suit. (Para 7 and 11)

Writ dismissed. (E-1)

Cases relied on :-

1. Shafiq Ahmad Vs Vth A.D.J., Varanasi & ors., 1998 (2) ARC 329

2. Ram Rikh Das Thakur Das (M/S) & anr. Vs D.J. & ors., 2009 (3) ARC 734

3. Sharafat Hussain & ors. Vs XIth A.D.J., Moradabad, 1992(2) ARC 307

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

1. Case called on. No one appears on behalf of the petitioner.

2. Mr. Manish Tandon, appears on behalf of the respondent no.1.

3. Since the point involved is short and parties have exchanged affidavits, this Court proceeds to determine the petition on merits.

4. S.C.C. Suit No. 19 of 2006 was filed by respondent no.1 against respondent no.2 for ejectment and recovery of arrears of rent. In the said suit, the petitioner, who is a third party, has made an application seeking impleadment under Order I Rule 10 CPC. The ground seeking impleadment is that he is owner of the demised premises to the extent of a half share. He has claimed title as a co-owner to the extent of half share with the plaintiff on the basis of an oral gift *(Hiba)* from one Smt. Nawab Jahan Begum. The plaintiff-respondent no.1 has refuted the petitioner's claim by filing objections. The second-respondent-tenant, on the other hand, does not dispute the fact that he is a tenant in the demised premises. The suit is one for eviction brought on the relationship of a landlord-tenant between respondent nos.1 and 2.

5. The courts below have refused the petitioner's application for impleadment on the ground that suit is one instituted for eviction based on a landlord-tenant relationship, where a third party cannot be permitted to be impleaded.

6. This Court has perused the impugned orders and the materials on record. It is apparent from the plaint filed by the first respondent, who is the plaintiff in the suit brought against the second respondent, the sole defendant to the suit, that the suit is one for ejectment and arrears of rent brought by the plaintiff-respondent against the defendant-respondent on the basis of a relationship of landlord and tenant *vis-a-vis* the demised premises. In the event, the petitioner, who is a third party, is permitted to be impleaded as a party to the suit, the Court would be called upon to adjudicate a title dispute *inter se* the petitioner and respondent no.1. If that were to happen, the rent suit would be converted into a title suit.

7. It is against the settled principle governing disposition of rent suits, that the cause of action cannot be enlarged so as to alter the scope of a rent suit to a title suit. *Ex-hypothesi*, no party can be impleaded who seeks to bring in a cause of action that would ultimately convert the rent suit into a title suit. This position of the law is beyond cavil, going by consistent authority.

8. In this connection, reference may be made to the decision of this Court in ***Shafiq Ahmad Vs. Vth Additional District Judge, Varanasi and Others, 1998 (2) ARC 329,*** where it has been held :

6. On the facts and circumstances narrated above it is apparent that there is no title dispute concerning the property in suit. It is a simple ejectment proceeding by a landlord against a tenant. Smt. Shakila

has admittedly paid rent to Smt. Hamida Bano. The suit has been filed on the ground that the tenant is a defaulter whose tenancy has been terminated by the landlord through a notice Under Section 106 of the Transfer of Property Act. Therefore, the suit has to be decided on the interse relationship and conduct of the landlord and the tenant. The controversy as to whether there was or not any oral gift by the landlady Smt. Hamida Bano in favour of the petitioner will be absolutely foreign to the issues involved. Again, in view of the respective averments made by the petitioner and Smt. Hamida Bano it is more than apparent that while the petitioner claims through an oral gift, the said Hamida Bano refutes loudly the said allegation. Therefore, I am of the opinion that neither it will be in the interest of justice nor desirable for safeguarding the interest of parties to direct the impleadment of the petitioner as a plaintiff in the suit. The learned Counsel for the petitioner has drawn my attention to the case reported in : AIR 1987 Bom 276. The facts of the said case were entirely different in as much as therein matter of title were to be gone into. Therefore, the authority does not help the petitioner in any way. No other ruling was cited and no other point has been argued. The order passed by the trial court is neither illegal nor suffers from any factual error and is upheld.

9. Likewise in a decision of this Court in ***Ram Rikh Das Thakur Das (M/S) and another Vs. District Judge and others, 2009 (3) ARC 734,*** it has been held thus:

" 3. The facts as alleged in the writ petition are that petitioners No. 1, 2 and respondents No. 3 to 5 claim themselves to be the owners of the property and respondents No. 6 to 9 are the tenants. It is the case of the petitioners that initially the rent was being realized by respondents No. 3 to 5 and the receipts to that effect were being issued to the respondents No. 6 to 9 and the share of rent was being distributed amongst the petitioners No. 1 and 2 as well as respondents No. 3 to 5. During pendency of the suit, an application was filed on behalf of the tenant-respondent that petitioners No. 1 and 2 may be impleaded being co-owners of the property and they should be impleaded as one of the parties in the said proceeding. The said application was rejected. Then the petitioners No. 1 and 2 made an application to be impleaded in the said proceeding as one of the parties claiming themselves to be the landlord but the said application was rejected on the ground that this is a proceeding regarding ejectment and arrears of rent against tenant-respondents No. 6 to 9. In case the petitioners are co-owners of the property, this question cannot be decided in the said proceeding because question of title and ownership cannot be decided in such proceeding. The said application was rejected-vide its order dated 4.9.2009 and the revision filed by the petitioners has also been dismissed holding therein that the question of title in view of legal pronouncement in the case of J.J. Lal Pvt. Ltd. v. M.R. Murali and Anr. reported in AIR 2000 SC 1061 cannot be decided in such proceeding as it would change the nature of litigation. Adjudication of the title is beyond the scope of the suit. Holding this the revisional court has dismissed the revision.

4. I have considered the submissions made on behalf of the petitioners and perused the record. In case the petitioners are aggrieved by the action of respondents No. 2 and 3 to 5, they can file separate suit to get it decided that they

are the owners and landlords of the property in question. In such proceeding which is based only on the question of arrears of rent and ejectment, the question of title and ownership cannot be decided. The Judge Small Causes Court cannot decide the question of title between the parties."

10. A similar view has been expressed in a short but sterling enunciation of the principles in ***Sharafat Hussain and others Vs. XIth Addl. District Judge, Moradabad, 1992(2) ARC 307*** where it has been held by S.C. Verma, J. :

"2. In a suit for arrears of rent and ejectment filed by one Smt. Paigham bari Begum, the petitioner has sought impleadment as necessary party. Both the Courts have held that in a suit for arrears of rent and ejectment, which is basically a suit between the Landlord and tenant, the plaintiff's impleadment is not necessary and in case he is entitled either as owner or as landlord he may initiate separate proceedings for establishing his title and for retention of his possession, in case he is in possession. I find no reason the interfere with the order of Judge, Small Causes Courts dated 13.01.1990 and the order dated 26.08.1991 by the learned Additional District Judge, Moradabad in rejecting the petitioner's application for impleadment under Order I, Rule 10 of the Code of Civil Procedure. The petition has no merit and is accordingly in limine.

11. It is, thus, apparent that the courts below, in declining the petitioner's prayer to be impleaded in a rent suit, have not committed any error of law that may merit interference by this Court.

12. In the result this petition fails and is accordingly **dismissed.**

(2021)08ILR A155
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2021

BEFORE

THE HON'BLE RAJIV JOSHI, J.

Writ A (Rent Control) No. 2277 of 2021

Krishna Kumar Maheshwari ...Petitioner
Versus
Smt. Asha Gupta ...Respondent

Counsel for the Petitioner:
Sri Ayush Khanna, Sri Atul Dayal

Counsel for the Respondent:
Sri Satya Dheer Singh Jadaun, Sri Arvind Srivastava, Ms. Shreya Gupta

A. Civil Law - UP Urban Building Regulation of Letting, Rent and Eviction) Act, 1972 – Sections 21(1) & 22 – Eviction suit – Word 'Bona fide need' – Meaning – It should receive useful meaning rather struck off and should attach a practical meaning granted by realistic of life – Held, the landlord has clearly established that shop in question is needed by her son to start on-line trading and share business and the need of the landlord is '*bona fide*' and genuine. (Para 21 and 22)

B. UP Urban Building Regulation of Letting, Rent and Eviction) Act, 1972 – Eviction suit – Comparative hardship of landlord and tenant – Landlord was not in possession of any alternate accommodation, the tenement in question is situated in four storeyed building and only ground floor is commercial – Concurrent finding – Held, the tenant has unnecessarily held up the shop in question and therefore the ground of comparative hardship is also in favour of the landlord – High Court found no perversity or

irrationality in the findings recorded by the authorities below. (Para 24, 29 and 41)

C. Eviction suit – Concurrent finding of the Courts below – Judicial review – Scope of interference – Scope of judicial review is very limited and narrow in supervisory jurisdiction of the High Court over subordinate Courts – Held, 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 – High Court found no scope for judicial review. (Para 30 and 41)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Shiv Sarup Gupta Vs Dr. Mahesh Chand Gupta (1999) 6 SCC 222 : 1999 SCFBRC 330

2. Pramod Kumar Vs VI A.D.J., Bijnor & ors., 2000(1) ARC 185

3. Muttu Lal Vs Radhey Lal, AIR 1974 SC 1596

4. Bega Begum Vs Abdul Ahad Khan, AIR 1979 SC 272 : 1986 SCFBRC 346

5. Jagdish Chandra Vs D.J., Kanpur Nagar & ors. 2008 2 ARC 756

6. Hariom Vs A.D.J. & ors. 2009 (2) ARC 802

7. Sarla Ahuja. Vs United India Insurance Company Ltd.,(1996) 5 SCC 353

8. D. N. Banerji Vs P. R. Mukherjee 1953 SC 58

9. Waryam Singh & anr. Vs Amarnath & anr. AIR 1954 SC 215

10. Mohd. Yunus Vs Mohd. Mustaqim & ors. AIR 1984 SC 38

11. Rena Drego Vs Lalchand Soni & ors., (1998) 3 SCC 341,

12. Chandra Bhushan Vs Beni Prasad & ors., (1999) 1 SCC 70

13. Savitrabai Bhausaheb Kevate & ors. Vs Raichand Dhanraj Lunja, (1999) 2 SCC 171

14. Savita Chemical (P) Ltd. Vs Dyes & Chemical Workers' Union & anr.,(1999) 2 SCC 143)

15. Union of India & ors. Vs Himmat Singh Chahar, (1999) 4 SCC 521)

16. Ajaib Singh Vs Sirhind Co-opeative Marketing cum Processing Service Society Ltd., (1999) 6 SCC 82

17. In Indian Overseas Bank Vs Indian Overseas Bank Staff Canteen Workers' Union (2000) 4 SCC 245

18. Abdul Razak (D) through Lrs. & ors.Vs Mangesh Rajaram Wagle & ors. (2010) 2 SCC 432

19. Commandant, 22nd Battalion, CRPF & ors. Vs Surinder Kumar (2011) 10 SCC 244

20. U.O.I. Vs R.K. Sharma (2001) 9 SCC 592

(Delivered by Hon'ble Rajiv Joshi, J.)

1. Heard Sri Atul Dayal, learned Senior Advocate assisted by Sri Ayush Khanna, learned counsel for the petitioner and Ms. Shreya Gupta, learned counsel for the respondents.

2. Aggrieved by the judgment and order dated 4.3.2020 passed by the Additional District Judge Court No.22 Kanpur Nagar dismissing the Rent Appeal No. 96 of 2011 and affirming the order of the Prescribed Authority, Kanpur Nagar dated 31.5.2011 passed in P.A. Case No. 6 of 2010 (Smt . Asha Gutpa Vs. Krishna Kumar Maheshwari), the tenant-petitioner has preferred the present petition under Article 226 of the Constitution.

FACTS

3. Briefly stated the relevant facts as reflected from the record are that the shop in question at premises no. 53/7 (new no. 53/19) Nayaganj, Kanpur, is under the tenancy of the tenant-petitioner on rent of Rs. 1000 per month. The premises in

question is old one and is covered by the provisions of U.P. Urban Building Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the 'Act'). The respondent-landlord filed an application on 11.6.2010, before the prescribed authority under Section 21 (1) of the Act setting-up the need of her son namely, Arpit Gupta, for doing on-line trading/share business from the tenement in question. The case was registered as P.A. Case No. 6 of 2010. It is stated in the release application that the husband of the landlady was running his business in a rented shop at premises no. 51/46 Nayaganj, Kanpur, who was being harassed by his landlord and besides it, her three sons namely Arpit Gupta, Arjit Gupta and Anubhav Gupta, were also in need of the disputed shop, more particularly, her son - Arpit Gupta was having the need for running the shop for on-line trading/share business and therefore, need of the landlord with regard to disputed tenement is *bona fide* and genuine. It is further stated that in the application the tenant-petitioner has unnecessarily held up the disputed shop and is not doing any business in the same.

4. The tenant-petitioner filed a written-statement disputing the need of the landlord by stating that the husband of the landlord-respondent was doing business from shop no. 51/46 along with his youngest son Anubhav Gupta at a very large scale in the name and style of M/s Anubhav Enterprises. Arpit Gupta, is also doing on-line share/trading business from Birhana Road, Kanpur, and Arjit Gupta, was residing with his in-laws at Hatiya and was also doing business. It is further stated by tenant-petitioner that the entire premises up to 4rth Floor was commercialized, the landlord- respondent had let out two shops on the ground floor after vacating the same by the tenant and as such they had the vacated shop in their possession, and the said shop could be used for establishing her son namely Arpit Gupta.

5. Parties in support of their respective cases exchanged the affidavits.

6. After hearing the parties and on the basis of the materials available on record, the prescribed authority vide its order dated 31.5.2011 allowed the release application of the landlord and directed the tenant-petitioner to vacate the tenement within three months.

7. Aggrieved by the order of the prescribed authority, the tenant-petitioner filed an appeal under Section 22 of the Act, registered as Rent Appeal No. 96 of 2011. During the pendency of the appeal before the appellate authority, the tenant-petitioner filed an application for additional evidence under Order 41 Rule 27 C.P.C. bringing on record the report of the Advocate Commissioner dated 10.9.2018 of Injunction Suit No. 1838 of 2018 and also filed another application for additional evidence bringing on record. GST R-No. 9 of financial year 2017-18 to prove that he is carrying business in the name and style of M/s Krishna Kumar & Company from the tenement in question.

8. The appellant authority vide judgment and order dated 4.3.2020, dismissed the appeal filed by the tenant-petitioner and affirmed the judgment and order dated 31.5.2011, passed by the prescribed authority.

9. Both the aforesaid orders passed by the authorities below are impugned in the present writ petition.

PETITIONER'S SUBMISSION

10. Sri Atul Dayal, learned Senior Advocate submits that the finding recorded by both the authorities are perverse in as much as the respondent-landlord has sufficient accommodation to establish her son- Arpit Gupta, and further the husband of landlord was running business from a shop bearing no. 57/48 at Nayaganj, Kanpur and the proceedings against the petitioner were collusive. He further submits that the entire premises is commercial and there are repeated lettings by the landlord.

RESPONDENT'S SUBMISSION

11. Per contra Ms. Shreya Gupta, learned counsel for the landlord submits that the tenant-petitioner has not disputed the need of landlord for establishing her son Arpit Gupta in the tenanted accommodation in question and the matter is being contested by the tenant only on the ground of availability of alternate shops. According to the learned counsel, as a matter of fact, the tenant-petitioner himself has stated that the offered shop is not suitable for business, from which it stands proved that the said shop is also not suitable for her son to carry on his business. She further submits that both the courts below have concurrently held that the need of the landlord for establishing her son Arpit Gupta is genuine, pressing and *bona fide* which cannot be interfered under Article 226 of the Constitution of India.

12. Ms. Shreya Gupta , next submits that the alternate shops were offered to the tenant-petitioner on the third floor of the building in question but the said offer has been refused by the tenant-petitioner and therefore, there is no scope for interference by this Court in the writ jurisdiction. She further submits that the appellate authority returned the finding of fact, that the tenement in question is not being used by the tenant-petitioner for carrying on his business and both the courts below has rightly recorded the findings that respondent-landlord was not in possession of any alternate accommodation. She further submits that the release application was pending since 2010 but during this long period, no efforts were made by the tenant-petitioner to search for alternate accommodation and therefore comparative hardship is also in favour of the respondent-landlord.

13. I have considered the rival submissions so raised by the learned counsel for the parties and perused the record.

Points for Determination

14. On the basis of pleadings by the respective parties, the following points arise for consideration by this Court in the present petition:

(1) Whether the need of the landlord for settling her son is *bona fide* and pressing as per the provisions of Section 21 (1) of the Act?

(2) Whether the question of comparative hardship in regard to the disputed shop favours the landlord or the tenant?

(3) Whether the finding recorded by both the authorities have any scope for judicial review?

Point No.1

15. The first and foremost question which is to be adjudicated in the present case as to whether the shop in question is *bona fide* need of landlord as per the

provisions under Section 21(1) of U.P. Act no.13 of 1972. For this purpose, it is necessary to have a glance to the provisions under Section 21(1)(a) of the U.P. Act no. XIII of 1972, which read as under:-

Section 21(1)(a) of U.P. Act no. XIII of 1972

"21: Proceedings for release of building under occupation of tenant-

(1)The Prescribed Authority may on an application of the landlord in that behalf order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists , namely-

(a) that the building is *bona fide* required either in its existing from or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade, or calling or where the landlord is the trustee of a public charitable trust , for the objects of the trust;"

16. At this stage, it becomes necessary to consider as to what is the meaning of the word "*bona fide* need", while adjudicating and deciding the application for release, moved under Section 21(1)(a) of the U.P. Act No. XIII of 1972.

17. The word '*bona fide*' has been interpreted by His Lordship of the Hon'ble Supreme Court in the case of **Shiv Sarup Gupta V. Dr. Mahesh Chand Gupta (1999) 6 SCC 222 : 1999 SCFBRC 330,** and it has been held :-

"The term *bona fide* or genuinely refers to a state or mind. Requirement is not mere desire. The degree of intensity contemplated by "required *bona fide*" is suggestive of legislative intent that a mere desire which is the outcome of whim or fancy is not taken note of by the rent control legislation. A requirement in the absence of felt need which is an outcome of sincere,honest desire, in contradistinction with a mere pretense or pretext to evict a tenant, on the part of the landlord claiming to occupy the premises for himself or for any member of the family would entitle him to seek ejectment of the tenant. Looked at from this angle, any setting of the facts and circumstances protruding the need of the landlord and its *bona fide*s would be capable of successfully withstanding the test of objective determination by the Court. The judge of facts should place himself in the arm chair of the landlord and then ask the question to himself whether in the given facts substantiated by the landlord the need to occupy the premises can be said to be natural, real, sincere, honest. If the answer be in the positive, the need is *bona fide*. The failure on the part of the landlord to substantiate the pleaded need, or, in a given case, positive material brought on record by the tenant enabling the court drawing an inference that the reality was to the contrary and the landlord was merely attempting at finding out a pretence or pretext for getting rid of the tenant, would be enough to persuade the Court certainly to deny its judicial assistance to the landlord."

18. This Court also in the case of **Pramod Kumar Vs. VI Additional District Judge, Bijnor and others, 2000(1) ARC 185,** has defined '*bona fide* need' on the basis of decisions of the Hon'ble Supreme Court rendered in **Muttu Lal Vs. Radhey Lal, AIR 1974 SC 1596 and Bega Begum Vs. Abdul Ahad Khan,**

AIR 1979 SC 272 : 1986 SCFBRC 346, as under :-

"The word '*bona fide*' means genuinely and sincerely i.e. in good faith in contradiction to mala fide. The requirement of an accommodation is not *bona fide* if it is sought for ulterior purpose but once it is established that the landlord requires the accommodation for the purpose which he alleges there is of ulterior motive to evict the tenant that requirement should be *bona fide*"

19. In the same manner the word '*bona fide*' has been interpreted in the case of **Jagdish Chandra Vs. District 8 Judge, Kanpur Nagar and others 2008 2 ARC 756 and 2009 (2) ARC 802 Hariom Vs. Additional District Judge and others.**

20. Further, the Apex Court in the case of **Sarla Ahuja. Vs. United India Insurance Company Ltd.,(1996) 5 SCC 353,** held as under :-

"The rent controller should not proceed on the assumption that the landlord's requirement is not bona fide. When the landlord shows a prima facie case a presumption that the requirement of the landlord is bona fide is liable to be drawn. It is not for the tenant to dictate terms to the landlord as to how else he can adjust himself without giving possession of the tenanted premises. While deciding the question of bona fides of the requirement of the landlords, it is quite unnecessary to make an endeavour as to how else the landlord could have adjusted himself."

21. Accordingly, The word '*bona fide* need' should receive useful meaning rather struck off and should attach a practical meaning granted by realistic of life.

22. In the present case, the respondent-landlord has clearly established that shop in question is needed by her son to start on-line trading and share business and the need of the landlord is '*bona fide*' and genuine. It is further evident from the bare reading of written statement of the tenant- petitioner that specifically he has not disputed the need of the landlord to establish her son in the shop in dispute and in view of the above set of facts, as per the interpretation of word "*bona fide* need" as given by the Apex Court and also by this Court, the need of the landlord is genuine and '*bona fide*' as held by the courts below.

POINT NO.2

23. Now coming to the question of comparative hardship of the tenant and landlord, it reflects from the record that no effort has been made by the tenant in order to search any other accommodation. Even the appellate authority has returned the finding of fact to the effect that the tenement in question is not being used by the petitioner-tenant for carrying on his business. The finding so returned by the appellate authority is as under: -

"पत्रावली में प्रत्यर्थी की ओर से सूची 84ग से अभिलेख कागज संख्या 85ग/1 व85ग/2 कार्मिशयल टैक्स विभाग उत्तर प्रदेश का प्रपत्र दाखिल है। जिसके अवलोकन से स्पष्ट हो रहा है कि अपीलार्थी द्वारा प्रश्नगत भवन संख्या 53/19 में जो मेसर्स कृष्ण कुमार एण्ड कम्पनी नाम से व्यवसाय कर रहा था दिनॉक 20.06.2017 को अपना व्यवसाय बन्द कर दिया है। कागज संख्या -85ग/5 व 85ग/6 असिस्मेन्ट वर्ष 2016-17 जिसकी समाप्ति दिनॉक 30.04.16 है, कर्मिशयल टैक्स विभाग उत्तर प्रदेश में मेसर्स कृष्ण कुमार एण्ड कम्पनी की ओर से दाखिल प्रपत्र जो यू०पी० बैट रूल्स 2007 के नियम

44(1) में जो विवरण भेजा गया है उसमें वैट गुड्स तथा नाम वैट गुड्स के कालम में शून्य दर्शित हो रहा है। इसी प्रकार कागज संख्या 85/7, 85ग/8 असिस्मेन्ट वर्ष 2016-17 समाप्ति दिनॉक 31 मई 2016, एवं असिस्मेन्ट वर्ष 2016-17, एवं कागज संख्या 85ग/9 85ग/10 असिस्मेन्ट वर्ष 2016-17 वर्ष समाप्ति 30 जून 2016 तथा 85ग/11, 85ग/12 असिस्मेन्ट वर्ष 2016-17 समाप्त दिनॉक 31.07.16 एवं 85ग/13, 85ग/14 असिस्मेन्ट वर्ष 16-17 समाप्ति दिनॉक 31.08.16, 85ग/15 व 85ग/16 समाप्ति दिनॉक 30.09.16, 85ग/17 एवं 85ग/18 समाप्ति दिनॉक 31.10.2016, 85ग/19 व 85ग/20 समाप्त दिनॉक 30.11.16 इसी प्रकार 85ग/21 व 85ग/22 व 85ग/23, 85ग/24 तथा 85ग/25, 85ग/26 जिसकी समाप्ति दिनॉक क्रमशः 31.12.16, 31.01.17 एवं 28.02.2017 है में भी किसी भी प्रकार की व्यवसायिक वस्तुओं का क्रम विक्रय का विवरण नहीं है। उपोरक्त सभी में वैट गुडस व नान वैट गुडस क्रय विक्रय के कालम में शून्य दर्शित है जिससे स्पष्ट है कि प्रश्नगत किरायेदारी वाली दुकान में मेसर्स कृष्ण कुमार एण्ड कम्पनी द्वारा कोई व्यवसाय नहीं चलाया जा रहा है और दिनॉक 20.06.17 को व्यवसाय समाप्त कर लिया गया है।"

24. The appellate court has rightly concluded that the respondent-landlord was not in possession of any alternate accommodation, the tenement in question is situated in four storeyed building and as such only ground floor is commercial and rest of the floor are purely residential.

25. Out of five shops situated on the ground floor of the building, two shops were originally in the tenancy of Rajesh Gupta and one Bhatia respectively, were extremely small admeasuring roughly 2x6 and 2x4 ft. respectively. The shops in the possession of Rajesh Gupta got vacated on 1.12.1999 and was let out to Mangal Chand Gupta in 1999 itself. The other shops in tenancy of Bhatia got vacated in the year 1993 and was let out in the same to one Om Prakash Kesarwani. Hence both the authorities has rightly concluded that these shops are neither available nor sufficient for satisfying the need of landlord. The shop in question on the ground floor which is ought to be released for fulfilling the need of the landlord by filing present release application. The shop situated in the ground floor which tenancy of Nirmal Surti was sought to be released for fulfilling the need of the son of the landlord Arjit Gupta by filing release application no. 5 of 2010, however, the said application was rejected by the prescribed authority on 12.08.2011 and was confirmed by the appellate authority vide judgment dated 28.08.2018.

26. The fifth shop on the floor was in the tenancy of one Lala Ram Chandra, the respondent land filed Release Application No.7 of 2010 under Section 21 (1) (A) of the Act for setting up the need of another son Anubhav Gupta. The said release application was also rejected by the prescribed authority but allowed by the appellate authority and said shop ultimatly came into possession of the landlord in the year 2017, since when it is being used by her son Anubhav and husband of the landlord to carry on two separate business from the same shop on account of lack of sufficient commercial accommodation.

27. On the basis of above facts, both the authorities returned the categorical and concurrent findings of fact to the effect that the rest of the floors of the building were being used either as an advocate's office or Aadat, which was not for commercial purposes. This fact is additionally born out from the description of tenement situated in

the third floor as given in the release application filed against tenant Nandlal.

28. The findings of the court below that none of the above accommodation got vacated except one in the tenancy of Lala Ram Chandra, the release of shop in tenancy of Lal Ram Chandra is also of no consequence in as much as same got released for fulfilling the need of Anubhav Gupta, another son of the landlord who is now using it to carry on his business therefrom and therefore, both the authorities have rightly concluded that alleged alternate accommodation were either insufficient or not available to the landlord for carrying on his business and that tenement in question is bonfidely required by her son namely Arpit Gupta.

29. Since the specific findings has been recorded by the appellate court that the tenant-petitioner has unnecessarily held up the shop in question and therefore, the ground of comparative hardship is also in favour of the landlord and she will suffer irreparably if the shop is not released in her favour.

POINT NO.3

30. Now coming to the question of scope for interference with the concurrent findings recorded by the authorities below, it may be stated at the very outset that in supervisory jurisdiction of this Court over subordinate Courts, the scope of judicial review 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.

31. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power 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 must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes.

32. In **D. N. Banerji Vs. P. R. Mukherjee 1953 SC 58** the Court said:

"Unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under articles 226 and 227 of the Constitution to interfere."

33. A Constitution Bench of Apex Court examined the scope of Article 227 of the Constitution in ***Waryam Singh and another Vs. Amarnath and another AIR 1954 SC 215 and made following observations at p. 571 :***

"This power of superintendence conferred by article 227 is, as pointed out by Harries, C.J. in Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee AIR 1951 Cal. 193, to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors".

34. In **Mohd. Yunus v. Mohd. Mustaqim and Ors. AIR 1984 SC 38** the Court held that this Court has very limited scope under Article 227 of the Constitution and even the errors of law cannot be

corrected in exercise of power of judicial review under Article 227/226 of the Constitution. The power can be used sparingly when it comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction. The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principles of law or where order of the Tribunal, etc. has resulted in grave injustice.

35. It is well settled that power under Article 227/226 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. **(See: Rena Drego Vs. Lalchand Soni & ors., (1998) 3 SCC 341; Chandra Bhushan Vs. Beni Prasad & ors., (1999) 1 SCC 70; Savitrabai Bhausaheb Kevate & ors. Vs. Raichand Dhanraj Lunja, (1999) 2 SCC 171; and Savita Chemical (P) Ltd. Vs. Dyes & Chemical Workers' Union & Anr.,(1999) 2 SCC 143).**

36. Power under Article 226/227 of the Constitution is not in the nature of power of appellate authority enabling re-appreciation of evidence. It should not alter the conclusion reached by the Competent Statutory Authority merely on the ground of insufficiency of evidence. **(See: Union of India & ors. Vs. Himmat Singh Chahar, (1999) 4 SCC 521).**

37. In **Ajaib Singh Vs. Sirhind Co-opeative Marketing cum Processing Service Society Ltd., (1999) 6 SCC 82,** the Court has held that there is no justification for the High Court to substitute its view for the opinion of the Authorities/ Courts below as the same is not permissible in proceedings under Articles 226/227 of the Constitution.

38. In **Indian Overseas Bank Vs. Indian Overseas Bank Staff Canteen Workers' Union (2000) 4 SCC 245,** the Court observed that it is impermissible for the Writ Court to re-appreciate evidence liberally and drawing conclusions on its own on pure questions of fact for the reason that it is not exercising appellate jurisdiction over the awards passed by Tribunal. The findings of fact recorded by the fact finding authority duly constituted for the purpose ordinarily should be considered to have become final. The same cannot be disturbed for the mere reason of having based on materials or evidence not sufficient or credible in the opinion of Writ Court to warrant those findings. At any rate, as long as they are based upon some material which are relevant for the purpose no interference is called for. Even on the ground that there is yet another view which can reasonably and possibly be taken the High Court can not interfere.

39. In **Abdul Razak (D) through Lrs. & others Vs. Mangesh Rajaram Wagle and others (2010) 2 SCC 432,** Court reminded that while exercising jurisdiction under Article 226 or 227, High Courts should not act as if they are exercising an appellate jurisdiction.

40. **In Commandant, 22nd Battalion, CRPF and others Vs. Surinder Kumar (2011) 10 SCC 244, Apex Court referring to its earlier decision in Union of India Vs. R.K. Sharma (2001) 9 SCC 592** observed that only in an extreme case,

where on the face of it there is perversity or irrationality, there can be judicial review under Articles 226 or 227.

41. Upon analysis of the aforesaid decisions, in the opinion of this Court, there being no perversity or irrationality in the findings recorded by the authorities below, there appears to be no scope for judicial review in the facts and circumstances of the present case.

CONCLUSION

42. As a result of aforesaid discussion, this Court is of the considered view that no good ground exists warranting interference with the orders impugned in exercise of the writ jurisdiction.

43. The writ petition accordingly lacks merit and, is dismissed.

44. No order as to costs.

Order Date :- 11.8.2021/Akbar

45. After the judgment has been delivered, learned counsel for the petitioner-tenant made a prayer that some time may be granted to the tenant to vacate the disputed shop.

46. Learned counsel for the respondent-landlord has no objection in case the reasonable time is granted to the tenant-petitioner by this Court. He further states that tenant should have paid the damages at the rate of Rs. 10,000/- (Ten Thousands) per month.

47. Under these circumstances, the tenant is, accordingly, granted time up to 31st December,2021 to hand over the peaceful possession of the disputed shop to the respondent-landlady subject to the tenant for giving an undertaking within two weeks from today before the prescribed authority to the following effect:

1. The tenant shall hand over the peaceful possession of the shop to the landlady on or before 31st December, 2021.

2. The tenant shall pay the damages at the rate of Rs. 10,000/- per month.

3. The tenant shall not induct any other person in the shop.

48. It is made clear that if the tenant fails to give the undertaking withing aforesaid period or fails to comply with any of the undertaking, it will open to the landlady to get the order enforced.

(2021)08ILR A164
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.08.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Ceiling No. 50 of 1996

Satbir Singh & Anr. ...Petitioners
Versus
Addl. Commissioner & Ors. ...Respondents

Counsel for the Petitioners:
H.S. Sahai, Badrul Hasan, Chhote Lal Yadav, Jagannath Prasad Yadav, Manjusha Kapil, Mohd. Hayun Hasan, Mohsin Khan, Qamarul Hasan, U S Sahai, Uma Shankar Sahai

Counsel for the Respondents:
C.S.C.

A. UP Imposition of Ceiling on Land Holdings Act, 1960 – Section 5(1), Explanation of Sections 5(1) & 10(2) – Execution of Will in favour of grandson to save property from the provisions of the Act – Mutation also took place – Impugned order passed declaring the land as ceiling and surplus land – Validity – Held, merely because the land has been mutated in the name of the petitioners on the basis of Will, which could not have been executed to defeat the purpose of the Act, it cannot be said that the land cannot be treated of grandfather – High Court found no illegality or error in the impugned order. (Para 10, 11 and 17)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Writ C No. 47592 of 2008, Rakesh Kumar & ors. Vs St. of U.P. & ors. decided on 02.11.2018

2. Noorullah Vs Additional Commissioner, Meerut Division, Meerut & ors., 2007 (4) AWC 3789

3. Civil Misc. Writ Petition No. 2063 of 2006, Nand Kishore Seth Vs Additional Commissioner Bareilly Mandal & ors. decided on 15.05.2013

4. Indra Pal Mishra @ Raju Vs Special Judge (E.C. Act), Banda & ors., 2005 (3) AWC 2565

5. Udai Raj Vs St. of U.P. & ors., 2003 (3) AWC 1876

6. Gulam Mohd. Khan & ors. Vs 5th A.D.J. & ors., 1979 ALJ 202

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

1. Heard Shri U.S. Sahai, learned counsel for the petitioners and Shri Rajesh Tiwari, learned Additional Chief Standing Counsel for the State.

2. This petition has been field challenging the order dated 24.07.1991 passed by the Prescribed Authority i.e. the opposite party no.2 and order dated 30.05.1996 passed by the Additional Commissioner-1, Lucknow Division, Lucknow i.e. opposite party no.1.

3. The brief facts of the case, for adjudication of the present writ petition, are that a notice under Section 10 (2) of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (here-in-after referred as the Act) was issued to the grand father of the petitioners namely Munsha Singh in 1977 in respect of the land held by him as Bhumidhar. The ceiling area and surplus area were determined. Thereafter a Will was executed by Munsha Singh in favour of his four grand sons including the petitioners. Munsha Singh had died in the year 1980. After his death mutation was made in favour of the petitioners. A notice dated 14.03.1989 under Section 10 (2) of the Act was issued to the Laxman Singh i.e. the father of the petitioners. An ex-parte order was passed by the opposite party no.2 on 23.04.1984. The said order was recalled on an application moved by Laxman Singh. Thereafter an order was passed on 28.05.1985 withdrawing the notice issued under Section 10 (2) of the Act and a direction was issued to the concerned Tehsildar to get the ceiling file of Laxman Singh constructed within fifteen days after making re-enquiry. After enquiry a fresh notice under Section 10 (2) of the Act dated 30.01.1988 was issued to the Laxman Singh and the petitioners. Laxman Singh and the petitioners filed their objections before the opposite party no.2 taking common grounds that the petitioners have got the land on the basis of Will executed by the grand father of the petitioners and their names have been recorded by the order of Tehsildar, Nighasan on 27.11.1981. The opposite party no.2, after affording opportunity of hearing and considering the objection and evidence, passed the order dated 25.07.1991 and

declared the ceiling and surplus land. The order was challenged by the petitioners in appeal before the opposite party no.1. The appeal field by the petitioners has been dismissed by means of the order dated 30.05.1996. Hence the present writ petition has been filed.

4. Submission of learned counsel for the petitioners was that the land in question had come to the petitioners by way of Will from his Grand father Shri Munsha Singh, but it has wrongly been added in the land of the father of the petitioners. The proceedings under the Ceiling Act were instituted against the grand father of the petitioners. It was decided declaring some surplus land. Thereafter Munsha Singh had executed a Will in favour of his four grand sons including the two petitioners after disposal of the case. Therefore it cannot be said that the Will was executed with the intention to save the land from Ceiling Act. After proceedings were decided against Shri Munsha Singh, he was free to execute the Will but the Prescribed Authority as well as the Appellate Authority on the basis of presumption held that the unregistered Will was executed with the intention to save the land from ceiling. While at the relevant point of time the unregistered Will could have been executed. Learned counsel for the petitioners also submitted that initially the notice under Section 10(2) of the Ceiling Act was issued to Laxman Singh father of the petitioners, which was dropped by annexure no.2. Therefore the subsequent notice could not have been issued including the land of the petitioners in the land of Laxman Singh. On the basis of Will, the land in question was recorded in the name of the petitioners. Therefore, if the land of the petitioners was to be included in the land of his father the notice under Section 29 of the Ceiling Act should have been issued.

5. On the basis of above, learned counsel for the petitioners submitted that the impugned orders are liable to be quashed and the writ petition allowed. Learned counsel for the petitioners relied on ***Rakesh Kumar and Others Vs. State of U.P. and Others;*** *Writ C. No.47592 of 2008 decided on 02.11.2018,* ***Noorullah Vs. Additional Commissioner, Meerut Division, Meerut and Others;*** *2007 (4) AWC 3789,* ***Nand Kishore Seth Vs. Additional Commissioner Bareilly Mandal and Others;*** *Civil Misc. Writ Petition No.2063 of 2006 decided on 15.05.2013,* ***Indra Pal Mishra alias Raju Vs. Special Judge (E.C. Act), Banda and Others;*** *2005 (3) AWC 2565 and* ***Udai Raj Vs. State of U.P. and Others;*** *2003 (3) AWC 1876.*

6. Per contra, learned Additional Chief Standing Counsel submitted that the Will was executed by Shri Munsha Singh in favour of his four grand sons leaving his sons without disclosing any reason. It was only with the purpose to save the land from the Ceiling Act. The objections were filed by the petitioners as well as his father which have duly been considered by the Prescribed Authority and the ceiling area and surplus area has rightly been declared. There is no illegality or error in the impugned orders. Therefore, the writ petition is misconceived and lacks merit and it is liable to be dismissed.

7. I have considered submissions of learned counsel for the parties and perused the record.

8. A notice under Section 10 (2) of the Act was issued to the father of the petitioners Laxman Singh but no objection was filed by him therefore an ex-parte order dated 23.04.1984 was passed by the opposite party no.2. On the application

moved by the father of the petitioners, the order was set aside. Thereafter an order was passed on 28.05.1985 withdrawing the notice under Section 10 (2) and the Tehsildar, Nighasan was directed to construct ceiling file of Laxman Singh after re-enquiry. Thereafter, after enquiry a notice under Section 10 (2) of the Act was issued to Laxman Singh and the petitioners, therefore it can not be said that the notice was wrongly issued because while withdrawing the earlier notice the Tehsildar concerned was directed to construct the ceiling file after re-enquiry, as such the matter was not closed and the said order was not challenged. The father of the petitioners had also admitted in his objection that on earlier notice the case was not decided on merit and the notice was withdrawn on 28.05.1985. This Court is of the view that there was no illegality or error in the subsequent notice issued to the father of the petitioners and the petitioners because the matter was not closed and it was in continuation of the said proceedings.

9. In response to the notice issued under Section 10 (2) of the Act the petitioners and their father filed separate objections. A common objection was taken that the land of the petitioners has wrongly been included with the land of Laxman Singh because they were adult and acquired it separately much after 08.06.1973. It was further stated that the grand father of the petitioners namely Munsha Singh was a tenure holder and was subjected to a ceiling case and as a result of which some land was declared surplus. Later on he executed a Will in favour of his grand sons for his ceiling area. After his death the same was mutated in favour of the petitioners including the others by means of the order dated 27.11.1981 passed by the Tehsildar-Nighasan.

10. Admittedly, a proceeding under Section 10 (2) of the Act was taken against the grand father of the petitioners Munsha Singh in the year 1977 and ceiling area and surplus area were determined. Thereafter the grand father of the petitioners had executed a Will in favour of his grand sons surpassing his sons who were legally entitled to inherit the agricultural property. The Will was executed in favour of the grand sons without assigning any reason as to why the natural successors are being ignored and deprived of the property. The alleged unregistered Will appears to have been executed on 27.01.1979. He had stated in the Will that he has become very old and can die any time so he wants to make such arrangement in his lifetime so that his property would remain in his family. It has not been disputed that the father of the petitioners namely Laxman Singh had already some land, therefore it is apparent that the Will was executed by the grand father of the petitioners with a view to save it from the provisions of the Act, whereas no such Will could have been executed to defeat the provisions of the Act. This view is fortified by a judgment of coordinate bench of this Court in the case of **Gulam Mohd. Khan and Others Vs. 5th Additional District Judge and Others; 1979 ALJ 202.** The relevant portion of paragraph- 2 is extracted below:-

"2.----------

----------Lastly, he contended that on the basis of the Will mutation had taken place in favour of the legatees and therefore notices should have been issued to them. In my view these contentions are not tenable. The father of the petitioner died in June, 1975 and it seems that it will not be possible to accept that any tenure holder could have executed any Will on that day which would have the

effect of defeating the Ceiling Law. It seems to me that if Sri Islam's contentions were accepted then it would be possible for any tenure holder to execute such a Will and to claim that the legacies bequeathed by such will should be given effect to, then the easiest thing for any tenure holder would be to defeat the Ceiling Law by executing such Will and defeating the law. I do not think that this is really possible. I have so held in many judgments of mine and in this view of the matter any Will which has been executed after 8th June, 1973, in my opinion, cannot be allowed to defeat the previsions of the ceiling law. Further, I have to observe that the genuineness of the Will was not acceptable to the Prescribed Authority and the appellate court below; I do not think that the said finding of fact can in any manner be interfered with in these proceedings. In this view of the matter the petition fails and is dismissed but there will be no order as to costs."

11. Section 5 (1) of the Act provides that on and from the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, no tenure-holder shall be entitled to hold in the aggregate through out Uttar Pradesh, any land in excess of the ceiling area applicable to him. Explanation of Section 5 (1) provides that in determining the ceiling area applicable to a tenure holder, all land held by him in his own right, whether in his own name, or ostensibly in the name of any other person, shall be taken into account. Therefore, merely because the land has been mutated in the name of the petitioners on the basis of Will, which could not have been executed to defeat the purpose of the Act, it can not be said that the land can not be treated of Laxman Singh.

12. One of the grounds of the learned counsel for the petitioners was that in case the land of the petitioners was included with the land of the father of the petitioners, notice under Section 29 of the Act should have been issued in place of Section 10 (2). For consideration of this argument, the provisions of Section 29 and 30 of the Act are relevant, which are extracted below:-

*"**29. Subsequent declaration of further land as surplus land. -**Where after the date of enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, -*

(a) one land has come to be held by a tenure-holder under a decree or order of any Court, or as a result of succession or transfer, or by prescription in consequence of adverse possession, and such land together with the land already held by him exceeds the ceiling area applicable to him; or

(b) any unirrigated land becomes irrigated land as a result of irrigation from a State irrigation work or any grove-land loses its character as grove-land or any land exempted under this Act ceases to fall under any of the categories exempted],

the ceiling area shall be liable to be redetermined[and accordingly the provisions of this Act, except Section 16, shall mutatis mutandisapply].

***30. Determination of surplus land regarding future acquisition. -** (1) Where any land has become liable to be treated as surplus land[* * *]under Section 29, the tenure-holder shall, within such period as may be prescribed submit, a statement to the Prescribed Authority in the form and in the manner laid down under Section 9 indicating in the statement the plot or plots which he would like to retain as a part of his ceiling area.*

(2) (a) Where the statement submitted under sub-section (1) is accepted

by the Prescribed Authority, it shall proceed to determine the surplus land accordingly.

(b) Where a tenure-holder fails to submit a statement required to be submitted under sub-section (1) or submits an incomplete or incorrect statement, the Prescribed Authority shall proceed in the manner laid down under Section 10.

(c) The provisions of this Act in respect of declaration, acquisition, disposal and settlement of surplus land, shall, mutatis mutandis, apply to surplus land covered by this section."

13. In view of above, under Section 29 the ceiling area is liable to be determined where after the date of enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, one land has come to be held by a tenure-holder under a decree or order of any Court, or as a result of succession or transfer, or by prescription in consequence of adverse possession, and such land together with the land already held by him exceeds the ceiling area applicable to him, the ceiling area shall be liable to be redetermined. Therefore, if a land has come to be held by a tenure holder under Section 29, the Prescribed Authority shall proceed to determine the ceiling area in the manner laid down under Section 10, according to Section 30. Therefore, this Court is of the view that the notice under Section 10 (2) of the Act was rightly issued in accordance with law.

14. This Court, in the case of ***Rakesh Kumar and Others Vs. State of U.P. and others (Supra),*** has held that no finding was recorded by the Prescribed Authority and he had not looked into the objections with regard to the earlier order passed by the Prescribed Authority acting as resjudicata and preventing reopening of issues already settled as such he had not considered the case of the tenure holder properly and the Appellate Authority had also not considered the question raised before it. Therefore, the writ petition was partly allowed and the matter was remanded. It is not applicable in the present case because in the present case the notice issued against the father of the petitioner was only withdrawn and while withdrawing the notice the Tehsildar concerned was directed to re-enquire the matter and prepare the ceiling file of Laxman Singh as such the matter was not closed. It has also been admitted by the father of the petitioners that the case was not decided on merit. Therefore, it is not applicable on the facts and circumstances of the instant case, as discussed above also.

15. The case of ***Noorullah Vs. Additional Commissioner, Meerut Division, Meerut and Others (Supra)*** is also not applicable on the facts and circumstances of the instant case because in this case after conclusion of ceiling proceeding in favour of the petitioners, the petitioners therein had transferred some land and thereafter he had purchased some land. Therefore, it was held that the ceiling proceedings may be initiated but the cut of date would be the date on which he acquired a fresh land.

16. This Court, in the case of ***Nand Kishore Seth Vs. Additional Commissioner Bareilly Mandal and Others (Supra),*** has held that subsequent notice issued under Section 10 (2) of the Act after period of almost 20 years after culmination of earlier proceedings itself is bad however the liberty was granted to proceed in accordance with the provisions of the Act by issuing a fresh notice under

Section 29 / 30 of the Act, if any of the conditions mentioned therein are fulfilled. In the present case the proceedings had not culminated. The notice was only withdrawn with a direction to re-enquire and make a fresh ceiling file of Laxman Singh S/o Munsha Singh. In pursuance thereof after re-enquiry, the notice was issued on the basis of whole land and Luxman Singh and petitioners had submitted reply claiming that the petitioners had got the land through Will so it would not be included in Laxman Singh's holding, as such the reply was submitted knowing fully well. Therefore, merely because Section 29 is not mentioned, can not be a ground for challenge.

17. In view of above and considering the over all facts and circumstances of the case, this Court is of the view that the impugned orders have been passed considering the objections raised by the petitioners and evidence in accordance with law. There is no illegality or error in the impugned orders. The writ petition has been filed on misconceived grounds and it lacks merit.

18. The writ petition is **dismissed**. No order as to costs.

(2021)08ILR A170
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.08.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Consolidation No. 723 of 2015

Rajendra Prasad ...Petitioner
Versus
D.D.C. Sitapur & Ors. ...Respondents

Counsel for the Petitioner:
Subodh Awasthi

Counsel for the Respondents:
C.S.C., Manendra Nath Rai, V.K. Pandey, Yogendra Nath Yadav

A. UP Consolidation of Holdings Act, 1953 – Section 9-A(2) – Consolidation proceeding – Concurrent finding of fact – General rule of non-interference – It's exceptions – Interference can be made where there is a failure to exercise jurisdiction or where there is an exceeding of jurisdiction vested in the courts below or where the findings of facts have been arrived at on misreading of evidence or misinterpretation of law leading to perversity. (Para 17)

B. UP Zamindari Abolition and Land Reform Act, 1950 – Section 176 – Joint Family Property – Sale of undivided and specific part – Validity – Held, a sale or any instrument of transfer that violates the provisions of the U.P.Z.A. & L.R. Act is a void document. A sale deed which is conceived in fraud and delivered in deceit is void and could be ignored by the consolidation authorities – Unless there is a division of the property by metes and bounds under Section 176 of the U.P.Z.A.&L.R. Act a co-sharer is entitled to every inch of the joint holding – If the Vendee from a co-sharer entered into possession of the property the possession would not be in accordance with law. (Para 25 and 32)

C. Transfer of Property Act, 1882 – Joint Family Property – Oral Partition – Permissibility – Not registered, even the property is of value of more than hundred rupees – Validity – Held, the value of the property involved in the partition being more than hundred rupees, oral partition is not permissible. Registration of such partition was also required – If the partition has not been proved by independent and competent witnesses before the court of law, such partition

could not be said to have taken place at all. (Para 36)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Ram Dass Vs Board of Revenue Allahabad, AIR 1967 All 481

2. Raghunath Singh Vs Deputy Director of Consolidation & ors., 2006 (100) RD 794

3. Ajay Kumar Vs Ram Swaroop, a Full Bench decision of the Board of Revenue rendered on 12.01.2009

4. Smt. Dulara Devi Vs Janardan Singh, AIR 1999

5. Krishnandan Vs Deputy Director of Consolidation, 2015 (1) SCC 553

6. Gulzar Singh & ors. Vs Deputy Director of Consolidation, 2009 (12) SCC 590

7. Ram Das Vs Sitabai, 2009 RD (108) 772

8. Krishnanand Vs Deputy Director of Consolidation, 2015 (1) SCC 553

9. Guljar Singh & ors. Vs Deputy Director of Consolidation & ors., 2009 (12) SCC 590

10. Sheonand Vs Director of Consolidation, 2000 (3) SCC 103

11. Shri Ram & ors. Vs Ram Kishen & anr., AIR 2010 Alld 125

12. M.VsS. Manikayala Rao Vs M. Narsimha Swami, AIR 1966 SC 470

13. Dorab Kawasji Warden Vs Coomi Sorab Warden, 1990 (2) SCC 117

14. Smt. Savitri Devi Vs Civil Judge (Senior Division) Gorakhpur, 2003 (51) ALR 369

15. Guzara Vishnu Gosavi Vs Prakash Nana Sahib Kamble, 2009 (10) SCC 654

16. K. Adivi Naidu & ors. Vs E Duruvasulu Naidu, 1995 (6) SCC 150

17. Dulari Devi Vs Janardhan Singh & ors., 1990 (Supp) SCC 216

18. Gorakhnath Dubey Vs Hari Narain Singh, 1974 (1) SCR

19. Nigawwa Vs Byerappa & 3 ors., AIR 1968 SC 797

20. Ram Adhar Singh Vs Ram Roop Singh, 1968 (2) SCR 95

21. Jagarnath Shukla Vs Sita Ram Pandey, 1969 ALJ 768

22. Ram Kripal & anr. Vs Abdul Wahid & anr., 1940 RD 132

23. Ramdas Vs Sita Bai & ors., 2009 (7) SCC 444

24. Siddeshwar Mukherjee Vs Bhubaneswar Prasad Narayan Singh, AIR 1953 SC 487

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

1. I have heard the learned counsel for the petitioner, and Shri Manendra Nath Rai, who appears for the opposite party no.4 and the learned Standing Counsel Shri Atul Kumar Dubey, who appears for the State respondents.

This writ petition has been filed challenging the order dated 28.01.2015 passed by the Consolidation Officer, on an application under section 9A (2) Of the Consolidation of Holdings Act (herein after referred to as "the Act'), and the order dated 12.06.2015 passed by the Settlement Officer Consolidation, and also the order dated 11.09.2015 passed in Revision by the Deputy Director Consolidation.

2. In brief, the case set up by the petitioner Rajendra Prasad is that plot nos.705 and 712 were originally recorded in the name of Shri Lakshmi Narayan son of Chhannu Lal who died during consolidation operations. After the death of original tenure holder the names of his three sons Rajendra Prasad, Vijay Kumar and Sushil Kumar were mutated by the Assistant Consolidation Officer by an order dated 20.10.1996. plot nos. 712 and 705 are

adjacent to each other and both were consolidated as Chak No. 493, and recorded jointly in the names of the three brothers without their share being specified or divided.

3. Sushil Kumar sold of 1/3rd of his share of plot no. 705 and 712 through a sale deed dated 19.12.1996 to Shashikanti Devi, the opposite party no.4. The name of Shashikanti Devi was mutated by the Assistant Consolidation Officer on 26.12.1997. The petitioner's other brother Vijai Kumar also sold off 1/3rd of his undivided share to Smt. Shashikanti Devi on 30.07.1998 and her name was recorded on 15.06.1999 in the revenue record. Smt. Shashikanti continued to cultivate the undivided share of these two plots, (numbered as Chak No. 493 in the consolidation operations), for several years and then moved an application in 2013 under Section 9A (2) for partition on the basis of the sale deeds executed in her favour. The petitioner appeared before the Consolidation Officer and filed an application for spot inspection to be carried out before such partition can be ordered as the boundaries shown in the sale deeds by his two brothers were incorrect. The Consolidation Officer however did not accede to the request of the petitioner and without a spot inspection directed partition of Chak No. 493 on the basis of boundaries shown in the sale deeds. It observed that the sale deeds had been duly proved by the vendor and the Vendee and their witnesses and there was no reason to disbelieve the same. The Consolidation Officer in his order dated 28.01.2015 directed that partition be carried out in such manner that two thirds of south east portion of Chak No.493 remained with Shashikanti Devi and a small portion on the north east along with the western portion of the land was given to the petitioner. In the process of dividing Chak No. 493 in this manner the drain (Nali) and the Chak Road were also directed to be shifted by the Consolidation Officer.

4. The petitioner being aggrieved approached the Settlement Officer Consolidation in Appeal. Petitioner contended in the Appeal that since long Chak No. 493 was being cultivated by the three brothers on the basis of Family Settlement wherein each of the brothers was given 1/3rd in East - West direction so that each of the brothers had access to the Chak Marg on the East. Rajendra Prasad was given the Northern most 1/3rd strip whereas Vijai Kumar was given Southern most strip, and Sushil Kumar was given the strip in between. On the East the share of the petitioner and his each of his two brothers opened on the Chak marg and on the West towards the grove of Kunj Bihari on plot no. 706. It was submitted by the petitioner that if the boundaries given wrongly in the sale deeds were to be respected then the petitioner would be deprived of access to the Chak Marg. It was submitted that although an application for spot inspection was given to the Consolidation Officer he believed the boundaries as shown in the two sale deeds and did not carry out spot inspection. It was also argued that the Consolidation Officer exceeded his jurisdiction in passing the order dated 28.01.2015 directing that the drain and the Chak Marg be shifted. The consolidation operations of the village had been stayed in separate proceedings before the High Court and during such pendency of litigation before the High Court the Consolidation Officer's order directing shifting of drain and Chak Marg could not be carried out. As a result of shifting of Chak road leading to the closing of the

drain, not only the petitioner but other tenure holders would also be affected. Since on the east there was already a Kharanja Marg each of the brothers were entitled to have access to the same. It was also argued that while partitioning the Chak No.493 in this manner the Consolidation Officer had also handed over to opposite party no.4 the Boring of the petitioner, his trees and his plantation of bamboos (Baans Kothi). The sale deeds had shown wrong boundaries shifting the petitioner's share to the Western side thus reducing its value and in pursuance of the order of the Consolidation Officer his share had been determined as an L-shaped plot thus further reducing its value.

5. The Settlement Officer Consolidation observed that after the death of the original tenure holder the three brothers had been recorded as joint tenure holders with undivided share over Chak No.493. Smt. Shashikanti Devi had bought undivided share of two brothers where the boundaries were perhaps shown in a confusing manner and it would have been proper for the Consolidation Officer to have allowed on the spot inspection of the land in question before passing the order impugned. The order dated 28.01.2015 was set aside and the matter was remanded to the Consolidation Officer to consider afresh and pass order after conducting on the spot inspection of the land in question.

6. It has been argued by the learned counsel for the petitioner that the Settlement Officer Consolidation could have himself examined the on spot inspection report dated 28.04.2015 of the Assistant Consolidation Officer which was already on record and should not have remanded the matter to the Consolidation Officer for reconsideration. Therefore, the petitioner filed Revision No. 371 of 2015. On the other hand the opposite party No.4 being aggrieved by the setting aside of the order dated 28.01.2015 and remanding of the matter to the Consolidation Officer approached the Deputy Director Consolidation by filing Revision No.368/2015. Both the Revisions were clubbed together and heard on 11.09.2015. The Revision of the opposite party no.4 was allowed and Revision No. 371 was rejected by the Deputy Director of Consolidation only on the ground that the sale deeds were registered documents and had not been challenged by the petitioner by filing appropriate proceedings in the competent civil court. The boundaries as given in the sale deeds had been verified by competent witnesses of the two sale deeds. The concerned Settlement Officer Consolidation should not have set aside the order passed by the Consolidation Officer and remanded it to him for consideration afresh.

7. In the counter affidavit filed by opposite party no.4, it has been stated that there was already a family settlement partitioning the land in question much before the sale deeds were executed by the two brothers of the petitioner. The registered sale deeds were never challenged by the petitioner in any competent court. On the spot inspection report of the Assistant Consolidation Officer was legally unsound and, therefore, rightly rejected by the Settlement Officer Consolidation who referred the matter to the Consolidation Officer to conduct a fresh on the spot inspection and pass appropriate orders thereafter. It has been also stated in the said counter affidavit that as per the sale deeds which are annexed as Annexure no.1 and 2 to the counter affidavit, it is evident that the Boring and the Bans Kothi and trees were

also sold off by the two brothers of the petitioner to the opposite party no.4. The boundaries were clearly mentioned in the two sale deeds by the vendors who were educated people and the sale deeds were proved by competent witnesses before the Consolidation Officer. It has also been stated in the counter affidavit that measurement and demarcation proceedings were on in the village and the interim order granted initially by this Court on 07.10.2015 for the parties to maintain status quo had lapsed as it was never extended by the Court on various dates of listing.

8. The petitioner has challenged the orders passed by the Consolidation Officer, the Settlement Officer (Consolidation) and the Deputy Director of Consolidation on the ground that they have been passed without any reference being made to the law regarding co-sharers with undivided share having the competence to sell their share of the undivided holdings and deliver the transfer of the same.

9. Learned counsel for the petitioner has placed reliance upon a report submitted to the Settlement Officer (Consolidation) dated 28.04.2015 wherein on spot inspection was carried out and the opposite party no.4 was found in possession of Southern part of the undivided holding of Chak No.493 comprising of old plot nos.705 and 712. He has referred to several judgments of this Court for substantiating the legal proposition that unless shares are divided over joint holdings no transfer of possession can be made. He has also referred to the legal proposition that after formulation of CH-23, if any share is sold without following the Rules of partition; that the sale deed is void, the judgment relied upon by the learned counsel for the petitioner are *Ram Dass Vs. Board of Revenue Allahabad* **AIR 1967 All 481,** *Raghunath Singh Vs. Deputy Director of Consolidation and others* **2006 (100) RD 794,** and *Ajay Kumar Vs. Ram Swaroop,* a Full Bench decision of the Board of Revenue rendered on 12.01.2009.

10. Learned counsel for the petitioner has submitted that the Consolidation Officer relied upon the sale deed made out by the petitioner's two brothers namely Sushil Kumar and Vijay Kumar in favour of the opposite party no.4 wherein wrong boundaries were mentioned. In fact boundaries could not have been mentioned at all as it was an undivided share in the property of all co-sharers where each co-sharer is the joint owner of every inch of the plot of land of the joint holdings. The Settlement Officer (Consolidation) in Appeal had directed an on the spot inspection to be made and the report to be submitted to him. The said report was submitted where clearly this fact had come on record that the Opposite party no.4 was in possession over the Southern part of the land and the petitioner was found in possession of 1/3rd portion on the Northern side and both the petitioner and the opposite party no.4 were found to be in possession of the land adjacent to the Chak Marg which ran on the East. However, the Settlement Officer (Consolidation) did not look into the report at all and although he could have decided the matter being the First Appellate Court on the basis of his findings recorded in the said report, he preferred to remand the matter to the Consolidation Officer to decide afresh, therefore, the petitioner filed a Revision challenging the order of the Settlement Officer (Consolidation). The opposite party no.4 also filed a Revision challenging the entire order on the ground that the

Settlement Officer (Consolidation) had given a wrong findings. Both the Revisions were clubbed together and decided by the Deputy Director of Consolidation. The Deputy Director of Consolidation failed to exercise due diligence and the power of review even of facts that was vested in him and set aside the order of the Settlement Officer (Consolidation) and affirmed the order of the Consolidation Officer only on the ground that no Suit for cancellation of sale deed executed by Sushil Kumar and Vijay Kumar in favour of the opposite party no.4 had filed by the petitioner. Because of the registered sale deed being a valid document possession had to be delivered on the basis of description of boundaries made out in the said sale deed. He has submitted that the learned D.D.C. also failed to take into account that the Consolidation Officer far exceeded his jurisdiction when he directed the Nali on the other side of the Chak Marg to be converted in the Rasta and the Chak marg to be taken as part of the holdings of the opposite party no.4.

11. Shri Manendra Nath Rai, appearing for the opposite party no.4 has argued that it is admitted that the sale deed was never challenged and being a registered sale deed, the partition could have been made of the holding in question by the Consolidation Officer in terms of Section 9-C of the Act, the sale deed unless it is set aside by the Competent Court had to be followed. If the description of the boundaries had been given wrongly and the petitioner was aggrieved he should have challenged the same. He has referred to judgment of the Hon'ble Supreme Court where the reference has been made to void and voidable documents and even if the sale deed has wrongly described, it is a voidable document and unless it is set aside by the Competent Court it had to be followed by the Consolidation Officer. He has also argued that the Settlement Officer (Consolidation) had unnecessarily remanded the matter to the Consolidation Officer as no new issues were to be decided. He had all the evidence filed before him which he could have appreciated and passed appropriate orders. The sale deed in question had been proved by the competent witnesses. He has also argued that the D.D.C. is the final Court with regard to the finding of fact, a concurrent finding of fact by the Consolidation Courts should not be ordinarily interfered with in writ jurisdiction. He has also submitted that the tubewell and Banskothi that was existing on the North Eastern side of the holdings were also bought by the opposite party no.4 as is evident from the sale deeds copies of which have been filed alongwith counter affidavit.

12. Learned counsel for the respondents has placed reliance upon the judgment rendered in **Smt. Dulara Devi Vs. Janardan Singh** reported in AIR 1999, **Krishnandan Vs. Deputy Director of Consolidation** reported in 2015 (1) SCC 553:-**Gulzar Singh and Others Vs. Deputy Director of Consolidation** reported in 2009 (12) SCC 590.

13. Learned counsel for the petitioner in rejoinder has submitted that as is evident from Page-15 of the counter affidavit filed by the opposite party no.4 Vijay Kumar had sold only the southern part of holding as per the family settlement between three brothers and in the sale deed executed by Sushil Kumar wrong boundaries have been mentioned showing Vijay Kumar on his west and Chak marg on his East. Learned counsel for the petitioner has argued that

the Consolidation Officer was competent to look into the validity of the sale deeds in so far as the reference to wrong boundaries had been made therein by carrying out on the spot inspection.

14. Shri P.V. Chaudhary, has rendered his valuable assistance by referring judgment rendered by Hon'ble the Supreme Court in ***Ram Das Vs Sitabai*** reported in 2009 RD (108) 772.

15. I will first deal with the judgments relied upon by the learned counsel for the contesting respondent no.4. In *Krishnanand versus Deputy Director of Consolidation* 2015 (1) SCC 553 the Supreme Court was considering the scope of judicial review under Article 226 of the Constitution of India in a case where concurrent findings recorded by three consolidation authorities, that is, the Consolidation Officer, the Settlement Officer Consolidation and the Deputy Director of Consolidation were set aside by the High Court. Supreme Court observed in paragraph 7 of the report that the High Court had committed an error in re-appreciating the evidence and setting aside findings of fact, which is normally impermissible in exercise of its jurisdiction under Article 226 of the Constitution of India. The Court observed that the three consolidation authorities had come to a certain conclusion regarding the respondent being a trespasser however the High Court in writ petition re-appreciated the entire evidence on record as if it was hearing an Appeal and came to the conclusion that she was not so. The Court observed in paragraph 12 that the High Court has committed an error in reversing the findings of fact recorded by the Authorities below in coming to the conclusion that there was a partition. No doubt the High Court did so in the exercise of jurisdiction under Article 226 of the Constitution but it is settled law that such jurisdiction cannot be exercised for re-appreciating the evidence and reversal of findings of fact unless the Authority which passed the order does not have jurisdiction to render the findings or has acted in excess of its jurisdiction, or the findings resulted in a perversity. The High Court in its order did not say that authorities below had acted in excess of jurisdiction or without jurisdiction or that the findings recorded were vitiated by perversity.

16. In *Guljar Singh and others Vs. Deputy Director of Consolidation and others* **2009 (12) SCC 590,** the Supreme Court was considering a case where in the first round of litigation orders passed by the Consolidation Authorities was set aside by the High Court and certain directions were issued by the High Court to be followed by the D.D.C. while deciding the matter afresh. After remand the D.D.C. allowed the Revision and the shares of the parties were decided in the manner indicated in the High Court's order. The appellant thereafter filed a writ petition challenging the order passed by the D.D.C. The High Court affirmed the order of the D.D.C. The appellant filed a Special Leave Petition before the Supreme Court. The Supreme Court observed that it could only interfere under Article 136 of the Constitution if there was some gross irregularity in the judgement of the High Court or any substantial grounds of law which were of public importance had been raised in such a petition. If these conditions were not satisfied, it would not be open for the Supreme Court to interfere with the concurrent findings of the High Court as well as the D.D.C. in exercise of its discretionary power under Article 136 of the Constitution. The Court observed that

the concurrent findings of fact recorded by the D.D.C. and High Court were on consideration of all materials placed before the Court and after giving proper opportunity of hearing to the parties. The High Court in its order had observed that it was exercising revisional-cum-supervisory power and could not go into the intricate details of facts and decide the questions raised therein. The Supreme Court further observed that in exceptional cases, where orders were based on perversity and arbitrariness, the High Court can interfere even in concurrent findings of fact recorded by the learned Courts below. The High Court had observed that the D.D.C. had decided the dispute after considering all aspects of the matter and the entire materials including the oral and documentary evidence on record. The Supreme Court felt that the High Court had rightly rejected the writ petition. It also observed that in view of the law laid down in *Sheonand versus Director of Consolidation* **2000 (3) SCC 103,** under section 48 the D.D.C. has been conferred with wide powers. He may either *suo moto* on his own motion or on an application of any person, consider the propriety, legality, regularity and correctness of all the proceedings held under the Act and pass appropriate orders. These wide powers have been conferred on the Deputy Director so that the claims of the parties under the Act may be effectively adjudicated upon and determined so as to confer finality to the rights of the parties and the revenue records may be prepared accordingly. Normally, the Deputy Director in exercise of his powers is not expected to disturb the findings of fact recorded concurrently by the Consolidation Officer and the Settlement Officer Consolidation, but where the findings are perverse, in the sense that they are not supported by the evidence brought on record by the parties, or that they are against the weight of evidence, it would be the duty of the Deputy Director to scrutinise the whole case again so as to determine the correctness, the quality, or propriety of the orders passed by the authority subordinate to him. In the case of *Sheonand* (supra) being considered by the Supreme Court, it was observed that while scrutinising the evidence on record, the Deputy Director had noticed that the entries were fictitious and in recording some of the entries in the revenue records in favour of the appellants, statutory provisions including those contained in the U.P. Land Records Manual were not followed. In that situation, the Deputy Director was wholly justified in looking into the legality of the entire proceedings and disposing of the revision in the manner in which he had done. The Supreme Court in *Guljar* (supra) observed that the D.D.C. has a wide range of discretionary powers mandated under the Act by which he could proceed to modify even the basic year entries if found to be wrongly arrived at. Therefore, the contention that the D.D.C. could not have modified the Basic year entries was not correct.

17. It is clear that in both the cases cited by the learned counsel for the respondent no.4, the Supreme Court had carved out exceptions to the general rule of not interfering with concurrent findings of facts recorded by the trial courts and appellate courts, in exercise of extraordinary jurisdiction under Article 136 or Article 226 by the superior Courts. The Supreme Court had observed that interference can be made where there is a failure to exercise jurisdiction or where there is an exceeding of jurisdiction vested in the courts below or where the findings of

facts have been arrived at on misreading of evidence or misinterpretation of law leading to perversity.

18. Now, this Court will consider whether the case at hand falls within the parameters of the exceptions carved out by the Supreme Court to interfere in concurrent findings recorded by the Consolidation Authorities.

19. In *Shri Ram and others versus Ram Kishen and another* **AIR 2010 ALLD 125,** this Court was considering the case of the plaintiff who had filed a suit for cancellation of sale deed and injunction against the transferee from interfering or seeking possession over the house in question. It was argued that the plaintiffs and the defendants nos. 2 to 7 were co-owners of a house situated in a village. The defendants nos. 2 to 7 had executed a sale deed of their share in the house in favour of defendant no.1, Ram Kishen who took possession forcibly. The plaintiffs filed a suit for cancellation of sale deed and for restraining the defendant no.1 from taking possession of the share purchased. The Court considered Section 44 of the Transfer of Property Act wherein an exception has been carved out against a transferee of a share of a dwelling house belonging to an undivided family and it is provided that if he is not a member of the family he would not be entitled to joint possession or part enjoyment of the house. Such a stranger transferee should file a suit for partition before he can be allowed to take possession on the basis of the sale deed.

20. In *M.V.S. Manikayala Rao Versus M. Narsimha Swami* **AIR 1966 Supreme Court 470,** the Supreme Court was deciding the issue relating to purchase of undivided shares of coparceners at an execution sale. It was held that the purchaser is not entitled to possession of what he has purchased. He had only a right to sue for partition and ask for allotment to him of that which on partition might be found to be the share of the coparcener whose share he had purchased. The Supreme Court held that such purchaser of share of a coparcener cannot claim to be put in possession of any definite piece of family property unless a partition has been made of the entire property.

21. In *Dorab Kawasji Warden v Coomi Sorab Warden* **1990 (2) SCC 117,** the Supreme Court relied upon another judgement in *Nil Kamal Bhattacharya Versus Kamakshya Charan Bhattacharya* AIR 1928 Calcutta 539, and judgements of the Madras High Court and Orissa High Court and observed that if a member of the family transferred his share in the dwelling house to a stranger, paragraph 2 of Section 44 of the Transfer of Property Act comes into play and the transferee does not become entitled to joint possession or any joint enjoyment of the half house although he would have the right to enforce the partition of his share if such a transferee is able to get possession of a share without actual partition by metes and bounds, such a possession would be illegal and the co-owners would be entitled to get a decree for eviction or even for injunction where the transferee threatens to get possession by force. Thus an undivided share in a house which was the joint property of several and undivided could not have been transferred. However, these cases do not refer to agricultural land.

22. This court in Smt. Savitri Devi versus Civil Judge (Senior Division) Gorakhpur, **2003 (51) ALR 369,** observed with respect to an agricultural land, that

even if sale deed had been executed and the purchaser had been put into possession of the land sold to him, it could only be said that the vendor had merely sold the undivided share in the property in dispute. Such purchaser could not be put into possession if there had been no partition prior to execution of the sale deed and no partition had taken place subsequent thereto.

23. In *Guzara Vishnu Gosavi versus Prakash Nana Sahib Kamble* **2009 (10) SCC 654,** the Supreme Court after referring to earlier judgements in *Kartar Singh versus Harjinder Singh* 1990 3 SCC 517 and *Ram Das versus Sitabai* 2009 (7) SCC 444, observed that in the absence of partition of a property by metes and bounds, either by a decree of a court or partition suit or by settlement among co-shareholders possession cannot be handed over to Vendee who had purchased joint family property. The Court observed that a purchaser of a coparceners undivided interest in joint family property is not entitled to possession of what he had purchased. He has a right only to sue for partition of the property and ask for allotment of his share in the suit property. It also observed in paragraph 12: -

"there is another aspect of the matter. An agricultural land belonging to the coparcener or co sharers may be in their joint possession. The sale of undivided share by one co-sharer may be unlawful/illegal as various Statutes put an embargo on fragmentation of holdings below the prescribed extent"

It was held that in a given case an undivided share of a coparcener can be subject matter of a sale/transfer, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds either by a decree of court in a partition suit or by settlement among the co-sharers.

24. The Supreme Court in *K. Adivi Naidu and others versus E Duruvasulu Naidu* **1995 (6) SCC 150,** observed in paragraph 5 that *"it is settled law that a coparcener has no right to sell his undivided share in the joint family property and any sale of undivided and specified items does not bind the other coparceners."*

25. Another argument has been made by the learned counsel for the respondent no.4 is that the sale deeds were not questioned and they being validly proved by competent witnesses before the Consolidation Officer, were bound to be respected. Also such sale deeds even if they could not have transferred the undivided share of joint holding of Chak No.493, were only voidable documents that could not be ignored unless set aside by competent court of law. This Court finds from the weight of authorities of the Supreme Court that a sale or any instrument of transfer that violates the provisions of the U.P.Z.A. & L.R. Act is a void document. A sale deed which is conceived in fraud and delivered in deceit is void and could be ignored by the consolidation authorities.

26. In *Dulari Devi versus Janardhan Singh and others* **1990 (Supp) SCC 216,** the Supreme Court was considering a case where the plaintiff appellant, an illiterate lady, wanted to make a gift of her properties in favour of her daughter. The defendant nos.3 and 4 undertook to make arrangements to execute and register the necessary deed. They however practiced the fraud on her. They made her to put her

thumb impression on two documents which she had been told and she honestly believed were the gift deeds in favour of her daughter. She had in fact executed two deeds, one of which was a gift in favour of her daughter and the other a sale deed in favour of the defendants nos.3 & 4. Later when she came to know of the facts, she filed a suit for cancellation of the sale deed. Consolidation proceedings were pending in respect of the area. The suit was decreed by the trial court and that decree was confirmed in Appeal by the first Appellate Court. The High Court however found that the plaintiff was totally deceived as to the character of the document which she had executed and the document was, therefore void and of no effect whatsoever. Accordingly, it held that the suit was barred by reason of Section 49 of the Consolidation of Holdings Act. In the Appeal by Special Leave, it was contended for the appellant that since it was a case of a document having been vitiated by fraud, the transaction was voidable but not void and therefore the bar of Section 49 of the Act was not attracted. The Supreme Court dismissed the Appeal and held that a voidable document is one which remains in force until it is set aside and such a document can be set aside only by a competent civil court. A suit for that purpose would therefore be maintainable. A claim that the transaction is void however is a matter which can be adjudicated upon by the consolidation authorities also.

27. In *Gorakhnath Dubey versus Hari Narain Singh* **1974 (1) SCR** and in *Nigawwa Versus Byerappa and three others* **AIR 1968 SC 797,** the Supreme Court had held that if the document in question evidenced a void transaction, and not a mere voidable transaction, no suit would be maintainable in view of the bar contained in Section 49 of the Act.

28. In *Gorakhnath Dubey* (supra) the Supreme Court had held that the object of the relevant provisions of the Act was to remove from the jurisdiction of any civil court or revenue court all disputes which could be decided by the competent authority under the Act during the consolidation proceedings. Questions relating to the validity of a sale deed or a gift deed and the like had to be examined in proceedings before the statutory authorities. The Court had drawn a distinction between void and voidable documents and said that a voidable document was one which remained in force until set aside and such a document could be set aside only by a competent civil court and a suit for that purpose would therefore be maintainable on the other hand the claim that the transaction was void was a matter which could be adjudicated upon by the consolidation courts. The Court observed:- *"We think that a distinction can be made between cases where document is wholly or partially invalid so that it can be disregarded by any Court or Authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be, to the extent of excess of power, invalid. An adjudication on the effect of such a purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to rights or interest in land which are the subject matter of consolidation proceedings. The existence and quantum of rights claimed or denied will have to be declared by the consolidation authorities which would be deemed to be vested with the jurisdiction, by necessary implication of the statutory powers to adjudicate upon*

such rights and interests in land, to declare such documents effective or ineffective, but, where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation, it could be urged that the Consolidation Authorities have no power to cancel the deed, and, therefore, it must be held to be binding on them so long as it is not cancelled by a court having the power to cancel it. In the case before us, the plaintiff's claim is that the sale of his half share by his uncle was invalid, inoperative and void. Such a claim could be adjudicated upon by consolidation courts."

29. In *Gorakhnath Dubey* (supra), the Supreme Court observed that questions relating to validity of sale deeds, gifts and wills can be gone into in proceedings before the consolidation authorities, because such questions naturally and necessarily arise and have to be decided in the course of adjudication on the rights or interests in land which are the subject matter of consolidation proceedings. A distinction can be made between cases where a document is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be, to the extent of excess of power, invalid. An adjudication on the effect of such purported alienation would be necessarily implied in the decisions of a dispute involving conflicting claims.

30. In *Gorakhnath Dubey* (supra), the Supreme Court explained *Ram Adhar Singh versus Ram Roop Singh* **1968 (2) SCR 95,** and affirmed the decision of this court in *Jagarnath Shukla versus Sita Ram Pandey* **1969 ALJ 768.** The Supreme Court observed that in *Ram Adhar Singh versus Ram Roop Singh,* the question considered and decided by the Court was whether a suit for possession of agricultural land under Section 209 of the U.P. Zamindari and Land Reforms Act would abate when Section 5 of the Act does not mention suits for possession. It was held in the said case that the language of Section 5 of the Act was wide enough to cover suits for possession involving declaration of rights and interests in land which can be the subject matter of decisions in consolidation proceedings. The whole object of this provision of the Act was to remove from the jurisdiction of ordinary civil and revenue courts, for the duration of consolidation operations, all disputes which could be decided in the course of consolidation proceedings before special courts governed by special procedure. Such adjudication by consolidation authorities were considered more suitable, just and efficacious for speedy decisions which had to be taken in order to enable consolidation operations to be finalised within a reasonable time. The Court observed that there was no decision of the Supreme Court directly on the question whether a suit for cancellation of a sale deed which was pending on the date of notification under Section 4 of the Act, abates under Section 5(2) of the Act. It then observed that a decision of a Division Bench of Allahabad High Court in *Jagannath Shukla versus Sitaram Pandey,* was cited before them and that it directly dealt with the question that was before the Supreme Court. The Supreme Court observed that the Allahabad High Court had given a fairly comprehensive discussion of the relevant authorities, the prepondering weight of which was cast in favour of the view that questions relating to validity of sale deeds, gift deeds and wills could be gone into in a

proceeding before the consolidation authorities because such questions naturally and necessarily arose and had to be decided in the course of adjudication of rights or interests in land which are the subject matter of consolidation proceedings. The Court drew a distinction between void and voidable documents. A voidable document was one whose legal effect can only be taken away by setting it aside and for cancellation of such a document The consolidation authorities had no power, therefore it must be held to be binding on them so long as it is not cancelled by a court having the power to cancel it. However, in the case before the Supreme Court in *Gorakhnath Dubey* (supra), the plaintiff"s claim was that the sale of his half share by his uncle was invalid, inoperative, and void as it was joint Hindu family property. Such a claim could be adjudicated upon by the Consolidation Courts.

31. The Full Bench decision of the Board of Revenue in *Ajay Kumar versus Ramswarup and others* (supra) had dealt with three questions that were framed by a single Member of the Board namely A) whether the sale deed is enforceable if the co-tenure holder sells his total share or part of his total share? B) whether the sale deed is partially enforceable to the extent of his share and void to the extent of earmarking of physical demarcation of boundaries and transfer of possession on the earmarked boundaries? C) whether the complete sale deed is non-enforceable because of earmarking of physical demarcation of boundaries and possession on the earmarked boundaries without following the due process of law as provided in Section 176 of the U.P.Z.A.&L.R. Act for formal partition and the decree demarcating the share and exact physical boundaries by the competent court?

After considering judgements of the Allahabad High Court in *Ram Kripal and another versus Abdul Wahid and another* **1940 RD 132,** that, *"a co-sharer in undivided property who by an arrangement with the other co-sharers takes possession of a definite portion of the property is not entitled to claim to a third person as his exclusive property, the portion which she has been transferred by agreement with his co-sharers. The transferee acquires no right by the transfer and is not entitled in respect of the same".*

32. It was observed that unless there is a division of the property by metes and bounds under Section 176 of the U.P.Z.A.&L.R. Act a co-sharer is entitled to every inch of the joint holding. Therefore if the Vendee from a co-sharer entered into possession of the property the possession would not be in accordance with law. It was also observed that if the sale deed clearly mentioned the factual location of the area of land in dispute which has been sold and that too without a formal partition having taking place, it could not be said that the co-tenure holder had an exclusive tenancy rights in the said portion of the whole land and such the sale deed being illegal could not be given effect to. Without formal partition and decree under Section 176 of the U.P.Z.A.& L.R. Act, no co-tenure holder can by way of any oral agreement on partition between co-tenure holders sell any specific portion of the common property. Where such a transfer of a share by a co-shareholder is done, the transferee steps into the shoes of the transferer and exclusive possession of such property cannot be given to the transferee unless the property was formally partitioned between the co-share holders as per the law. Such a transferee would enjoy "unity of title" and "commonality of

possession" with other co-tenure holders but he cannot claim exclusive possession of a particular part of the joint holding.

33. In answering the third issue it was held that the entire sale deed is non-enforceable because of physical demarcation of boundaries and possession on the earmarked boundaries without following the due process of law as provided in Section 176 of the U.P.Z.A.&L.R. Act for formal partition that such sale deeds or transfer instruments whereby the seller had transferred his share in the joint holding and also in the same instrument demarcated the physical boundaries would be legally non-enforceable being violative of the provisions of the Statute that is, violative of Section 176 of the U.P.Z.A.&L.R. Act. In sum and substance, it was held that the sale deeds or transfer instruments where the seller had sold his share of a joint holding and also earmarked the physical demarcation of the boundaries and transferred the possession of the same without following the due process of law as provided in Section 176 of the U.P.Z.A.&L.R. Act for formal partition and decree, demarcating the share and exact physical boundaries by the competent court, would be not enforceable as the same was *void ab initio.*

34. In *Ramdas vs. Sita Bai and others* **2009 (7) SCC 444,** the Supreme Court was considering the case of the appellant who had bought land from a co-tenure holder one Sudam, of a property of which the defendant no.1, his sister, Sitabai was co-sharer. The Property in question was the self acquired property of the deceased father jointly held by his son and daughter after his death. The transfer was made without the consent and knowledge of the defendant/Respondent. The Court considered the legality of such a transfer and held that Sudam could not have sold off more than his share nor he could have delivered possession of the property till its partition. It was held that under the Transfer of Property Act, a purchaser cannot have a better title than what his vendor had. The appellants claim to the possession of the entire land was therefore untenable. Decrees of the lower court to the extent of one half share of the respondent being not binding on her were affirmed. The court considered judgements rendered by it earlier in *M.V.S. Manikyala Rao* (supra) and *Siddeshwar Mukherjee versus Bhubaneswar Prasad Narayan Singh* **AIR 1953 SC 487,** and the Court observed in paragraphs 17 and 18 as follows:-

"17. Without there being any physical formal partition of an undivided landed property, a co-sharer cannot put Vendee in possession although such a co-sharer may have a right to transfer his undivided share. Reliance in this regard may be placed to a decision of this court in M.V.S. Manikayala Rao versus M. Narasimha Swami, Wherein this court stated as follows:-

5. .....Now, it is well settled that the purchaser of a coparcener undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased…."

18. It may be mentioned herein that the aforesaid findings and conclusions were recorded by the Supreme Court by placing reliance upon an earlier judgement of this Court in Siddeshwar Mukherjee

versus Bhubaneswar Prasad Narayan Singh, wherein this court held as under:-

11. .....All that Vendee purchased at the execution sale was the undivided interest of the coparceners in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour…"

35. I have carefully perused the sale deed executed by Vijay Kumar. Vijay Kumar intentionally does not say that he is the co-tenure holder of the land being sold by him. He says that he is the sole tenure holder. He further says that of the two plots of land 705 Minjumla and 712 Minjumla, he is selling off 1/3rd of his entire share on the southern side. He further says that there is a Bans Kothi and a Boring on the said lands the value of which has also been paid by the Vendee. The land is bounded on the East by the field of the Vendee Shiv Kanti Devi. On the West by the field of Ramsewak. On the North by the field of Ajay Kumar and on the South by the field of Khushi Ram. There is no mention of any family settlement leading to partition of the two plots of land amongst the three brothers. In fact there is no mention at all of other co-sharers of the property.

36. In the sale deed of Sushil Kumar although it is mentioned that the vendor is the owner of 1/3rd share of the land in question which he is selling off to the Vendee Shivkanti Devi but there is no mention of any family settlement and there is also no mention of his brothers Rajendra Prasad and Vijai Kumar Being co-shareholders of the property. There is also no mention that by means of family settlement the vendor Sushil Kumar had been given a definite share of the land in question of which he had sole possession and which he could sell to the Vendee. The area sold off has been mentioned as 1/3rd share of the two plots of land ad-measuring 1 acre 26 decimals. The boundaries mentioned in the sale deed say that on the east is the Chak Marg, on the West is the field of Vijai Kumar and the remaining portion of the land being sold, on the north is the field of Ajay Kumar and on the South is the field of Khushiram. There is again no mention of any consent being given by Rajendra Prasad or by Vijai Kumar to the selling of his 1/3rd share by Sushil Kumar.

In the counter affidavit filed by the respondent no.4, it has been stated in paragraph 13 that the sale deeds have been executed on the basis of family settlement of the shares that were given to Vijai Kumar and Sushil Kumar who were educated persons and who had properly described the boundaries of the land that they intended to sell to the respondent no.4. Respondent no.4 in counter affidavit also says that the Bans Kothi and the Boring were mentioned in the sale deed executed by Vijai Kumar and that she had paid for the same therefore no claim on them could be made by the petitioner.

It is settled law that an undivided share in a joint family property cannot be sold off by one of the co-sharers without there being any partition by metes and bounds. Even if there is an assertion that an oral partition took place, the value of the property involved in the partition being more than hundred rupees, such oral partition is not permissible. Registration of such partition was also required. If the partition has not been proved by

independent and competent witnesses before the court of law, such partition could not be said to have taken place at all. The Consolidation Officer in his order says that the sale deeds were proved by the witnesses of the Vendee. The Consolidation Officer also says that the boundaries were verified by by such witnesses. However, he does not say in his order that the share of the Vendee was proved to have been determined by a family partition by such witnesses. This property in question was still a joint property of the petitioner and his brothers and, therefore, if his brothers alienated the same without the consent of the petitioner, such as sale would be void and not a voidable document. Every alienation of joint Hindu family property without the consent of the coparcener makes the sale deed void. Even if such land was not joint Hindu family property, it being a property having joint ownership of the petitioner and his brothers without a regular partition between them any sale of such property would be void.

37. The facts of this case are a glaring example of failure to exercise jurisdiction by the Consolidation Authorities to consider the validity of the sale deeds set up by the brothers of he petitioner of a joint holding which had mentioned definite boundaries demarcating the share of vendors allegedly sold off to the vendee without the family settlement being proved at any stage of the proceedings. Also, the question of fragmentation of Chak No.493 was not considered which would render such sale deeds void in terms of Section 168A of the U.P.Z.A. & L.R. Act. The first sale made in 1996 was made to a stranger who had no contiguously situated land near Chak No.493. It was made before the cut off date of 23.08.2004 leaving only 1.26 acres with the petitioner and 1.26 acres with Vijay Kumar. This aspect of the matter was not looked into at all by the Consolidation Authorities. A misreading of evidence in the form of two sale deeds resulted in a finding being recorded against the petitioner which was perverse to say the least.

38. The impugned orders dated 28.01.2015, 12.06.2015 and 11.09.2015 deserves to be set aside and are set aside.

39. The writ petition is ***allowed***.

40. The matter is remanded to the Deputy Director of Consolidation to consider the report dated 28.04.2015 of the Assistant Consolidation Officer and also the evidence if any to be produced by the parties and to pass fresh order in accordance with law. The entire exercise be completed expeditiously, say, within a period of six months from the date of production of a copy of this order.

(2021)08ILR A185
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.08.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 1473 of 1981

Azadar Hussain Khan & Ors. ...Petitioners
Versus
D.D.C. Faizabad & Ors. ...Respondents

Counsel for the Petitioners:
S.K. Mehrotra, Ishwar Dutt Shukla, Santosh Kumar Mehrotra

Counsel for the Respondents:
C.S.C., Rajeshwar, Rakesh Kumar Nayak

A. UP Consolidation of Holdings Act, 1953 – Sections 9(2) & 11(1) – Administration of Justice – Hierarchy of Courts – Remand of the matter by the Superior court on particular issue – Inferior court decided the other issue also – Legality thereof – Appellate authority, to whom the case was remanded, travelled beyond the term of remand and considered the issues which were neither considered by the superior court nor the matter was remanded to consider the same – Held, the appellate authority considered and decided the case without authority of law – High Court quashed the impugned orders holding it not sustainable in the eyes of law. (Para 16 and 26)

B. Land Record Manual – Paragraphs 89-A, 89-B & 102-B – Ownership – Adverse possession – Claim – Three 'neck' nec vi, nec clam and nec precario – Proof thereof – Party, who is claiming on the basis of adverse possession in some property, is to prove as to the date, time and manner in which he entered into possession and when the possession converted into open, hostile and adverse – A person claiming title by adverse possession has to prove three 'neck' nec vi, nec clam and nec precario. In other words, he must show that his possession is adequate, in continuity, in publicity and in extent. (Para 18 and 22)

C. Court's procedure – No counter Affidavit filed – Allegations made in the writ petition are uncontroverted – Effect – Held, it can be safely presumed that the allegations made in the writ petition are true otherwise it would have been rebutted by the other side. (Para 25)

Writ petition allowed. (E-1)

Cases relied on :-

1. Rama Kant Vs Board of Revenue, U.P. at Allahabad & ors., 2005(23) LCD 1057

2. Radha Raman Samanta Vs Bank of India, 2004 (1) SCC 605

3. Paper Products Ltd. Vs Commissioner of Central Excise, Mumbai, 2007 (7) SCC 352

4. S. Ravindra Singh & anr. Vs 3rd A.D.J., Faizabad & ors., 1994(12) LCD 820

5. Pramod Kumar Chaturvedi Vs St. of U.P. & ors., 2006 (24) LCD 1364

6. Indrapal Singh Vs The Deputy Director of Consolidation Kheri & anr., 2019 (37) LCD 1233

7. Ishwarchand etc. Vs Board of Revenue U.P. at Allahabad & ors., 2019 (142) RD 676

8. Ravinder Kaur Grewal Vs Manjit Kaur, AIR 2019 SC 3827

9. Chandrika (Dead) by LRs Vs Sudama (Dead) through LRs, AIR 2919 SC 2119

10. Deepak Tandon Vs Rajesh Kumar Gupta, AIR ONLINE 2019 SC 72

11. Writ-B No. 98 of 1976, Mohd. Musthfa Vs Deputy Director of Consolidation & ors.,

12. Writ-B No. 1440 of 2019, Ami Chand & anr. Vs Deputy Director of Consolidation & 18 ors.

13. Mohan Lal Vs Anandibai & ors., AIR 1971 SC 2177

14. Mohd. Raza Vs Deputy Director of Consolidation & anr., R.D. 1997 (R.D.) 276

15. Gurumukh Singh & ors. Vs Deputy Director of Consolidation, Nainital & ors., 1997 (80) RD 276

16. Sadhu Saran & anr. Vs Assistant Director of Consolidation, Gorakhpur & ors., 2003 (94) RD 535

17. P.T. Munichikkanna Reddy & ors. Vs Revamma & ors., 2008 (26) LCD 15

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

1. Heard, Shri I.D. Shukla, learned counsel for the petitioners, Shri Rajeshwar, learned counsel for legal heirs of opposite party no.3 i.e. 3/a and 3/b. Notice on behalf of opposite party no.1 and 2 has been accepted by the learned Chief Standing Counsel.

2. This petition has been filed challenging the judgment and order dated 05.03.1979 passed by the Settlement Officer Consolidation under Section 11(1) of the Consolidation of Holdings Act 1953 (here-in-after referred as the Act of 1953) and the judgment and order dated 09.12.1980 passed by the Deputy Director of Consolidation, Faizabad.

3. The facts, in brief, for adjudication of the present controversy are that the plot no.486/1 area 17 biswa and 10 dhur of Khata No.15 situated in village Simai Mohiapur, Pargana and Tehsil Akbarpur, District Faizabad was recorded in the name of Tazdar Khan, father of the petitioners as 'bhumidhar' in the basic year. The land in dispute was initially recorded in the name of one Zahoor Khan, which was subsequently came to be recorded in the name of Smt. Samagira. It was sold by Smt.Samagira by a registered sale deed dated 01.09.1965 to the father of the petitioners. Three objections were filed under Section 9(2) of the Act of 1953. One by Atta Abbas with the allegation that the sale deed executed by Smt. Samagira was not valid. Second objection was filed by Shiv Raj- opposite party no.3 (now dead and substituted by legal heirs) claiming the land in dispute on the basis of adverse possession. The third objection was filed by one Dhanju in respect of plot no.627. The petitioners filed objection to the objections claiming the entire property. The Consolidation Officer held Atta Abbas entitled to half share in land in dispute alongwith Tazdar Khan and also allowed in favour of the opposite party no.3 Shiv Raj and Dhanju by means of order dated 16.01.1972.

4. The order passed by the Consolidation Officer was challenged in four appeals filed by one Atta Abbas and three by Tazdar Khan, the father of the petitioners. The appeals were decided by the Assistant Settlement Officer Consolidation by means of order dated 13.03.1972 by a common judgment. The appeals of Tazdar Khan, father of the petitioners were allowed and the appeal filed by Atta Abbas was dismissed and the name of Tazdar Khan, father of the petitioners was directed to be continued in the revenue records. A revision was filed by Atta Abbas, Dhanju and Shiv Raj i.e. opposite party no.3 bearing revision No.1640 under Section 48 of the Act of 1953 before the Deputy Director of Consolidation, which was decided by the Joint Director of Consolidation by means of order dated 18.03.1976 and the matter was remanded to the Assistant Settlement Officer Consolidation to decide a fresh in regard to the two issues considered and examined by the Joint Director of Consolidation.

5. The learned Settlement Officer Consolidation reconsidered the entire dispute including the present dispute with the opposite party no.3 and allowed the appeal of Tazdar Khan in whose place the petitioners were substituted in appeal on his death with respect to the dispute between them and Atta Abbas and the appeal of Atta Abbas was dismissed. The appeal of Tazdar Khan against the opposite party no.3 and others in regard to the present dispute was also dismissed. The appeal of Tazdar Khan against Dhanju was also allowed. Aggrieved by the aforesaid order a revision was filed by the petitioners and another revision was filed by Atta Abbas. Both the revisions were dismissed by means of order dated 09.12.1980 by the Deputy Director of Consolidation. Hence the instant writ petition has been filed.

6. Learned counsel for the petitioners had submitted that four appeals, one by Atta Abbas and three by Tazdar Khan, father of the petitioners were decided by a common judgment and order dated 13.03.1972. One revision No.1640 under Section 48 of the Act of 1953 was filed by all the three, but the revision was decided only in regard to two issues considered with regard to the revision of Atta Abbas and the matter was remanded to reconsider and decide a fresh in regard to the said two issues. But the Settlement Officer Consolidation reconsidered the entire case, as such he travelled beyond the term of remand which could not have been done. The revision filed by the petitioners has also been dismissed without considering it and the grounds raised by the petitioners. Therefore the orders passed by the court's below are illegal and without authority of law and not sustainable in the eyes of law.

7. He further submitted that the opposite party no.3 had not challenged the order passed in revision no.1640 dated 18.03.1976, therefore the case of the opposite party no.3 could not have been reconsidered, even if the order was quashed, because his case was neither considered in revision nor remanded to decide a fresh. He further submitted that the case of opposite party no.3 was not proved as alleged entry was made in his favour on the basis of adverse possession without following the due procedure and issuance of PA-10 in accordance with law. Therefore, the case of opposite party no.3 was not tenable at all in the eyes of law but without considering it, his objection has been allowed. The grounds raised in the present writ petition by the petitioners are uncontroverted as no counter affidavit has been filed. In view of above the writ petition is liable to be allowed and the impugned orders are liable to be quashed and the names of petitioners are liable to be recorded and continued in the revenue records. In support of his contentions learned counsel for the petitioners has relied on **Rama Kant Versus Board of Revenue, U.P. at Allahabad and others; 2005(23) LCD 1057, Radha Raman Samanta Versus Bank of India; 2004 (1) SCC 605, Paper Products Limited versus Commissioner of Central Excise, Mumbai; 2007 (7) SCC 352, S.Ravindra Singh and another Versus 3rd Addl. District Judge, Faizabad and others; 1994(12) LCD 820, Pramod Kumar Chaturvedi Versus State of U.P. and others; 2006 (24) LCD 1364, Indrapal Singh Versus The Deputy Director of Consolidation Kheri and another; 2019 (37) LCD 1233 and Ishwarchand etc. Versus Board of Revenue U.P. at Allahabad and others; 2019 (142) RD 676.**

8. Per contra, learned counsel for the opposite party no.3 submitted that the petitioners have not come with clean hands. The courts below considered the case of the opposite party no.3 in accordance with law and allowed the objections of opposite party no.3 after remand and the order passed by the Assistant Settlement Officer Consolidation was set aside by the Joint Director of Consolidation with costs. The opposite party no.3 was claiming on the basis of adverse possession which has rightly been considered by the courts below and allowed. Therefore, the concurrent finding recorded by the Court's below in favour of opposite party no.3 cannot be interfered with and set aside by this court. The writ petition has been filed on misconceived and baseless grounds. It is liable to be dismissed with costs. In support of his contentions learned counsel for the

opposite party no.3 has relied on **Ravinder Kaur Grewal Versus Manjit Kaur; AIR 2019 Supreme Court 3827, Chandrika (Dead) by LRs versus Sudama (Dead) through LRs; AIR 2919 Supreme court 2119, Deepak Tandon Versus Rajesh Kumar Gupta; AIRONLINE 2019 SC 72, Mohd. Musthfa Versus Deputy Director of Consolidation and others; Writ-B No.98 of 1976 and Ami Chand And another Versus Deputy Director of Consolidation and 18 others; Writ-B No.1440 of 2019.**

9. I have considered the submissions of learned counsels of the parties and perused the documents and orders placed on record.

10. The land in question was initially recorded in the name of one Jahoor Khan, which was subsequently came to be recorded in the name of Smt. Samagira after litigation. She had got the 'bhumidhari' rights after depositing 10 times. She sold the same by a registered sale deed dated 01.09.1965 to Tazdar Khan i.e. father of the petitioners. Three objections were filed under Section 9(2) of the Act of 1953. The petitioners filed their objections to the objections claiming the entire property. The Consolidation Officer allowed the objection holding Atta Abbas entitled to half share alongwith Tazdar Khan and also in favour of opposite party no.3 Shiv Raj and Dhanju by means of order dated 16.01.1972. The order passed by the Consolidation Officer was challenged in four appeals, out of which one was filed by Atta Abbas and three by Tazdar Khan. The appeals were decided by the Assistant Settlement Officer Consolidation by means of order dated 13.03.1972 by a common judgment. The appeals of Tazdar Khan, father of the petitioners were allowed and the appeal filed by Atta Abbas was dismissed and the name of Tazdar Khan father of the petitioners was directed to continue in the revenue records.

11. A common revision was filed by Atta Abbas, Dhanju and Shiv Raj i.e. opposite party no.3 The revision was considered by the Joint Director of Consolidation and decided by means of judgment and order dated 18.03.1976. The revisional authority after recording the facts of the case of Atta Abbas against Tazdar Khan observed in paragraph 3 that mainly two issues are for consideration. No.1; as to whether giving of half share each to both the parties in the land in dispute by the Consolidation Officer is justified. No.2; as to whether the order passed by the Assistant Settlement Officer Consolidation, for continuation of the name of Tazdar Khan recorded in the basic year treating the sale deed valid in regard to the land in dispute, was appropriate. Thereafter after considering the same it was held that the Assistant Settlement Officer Consolidation has failed to examine certain aspects, therefore he would decide again after calling the relevant files in regard to both the issues. Accordingly allowed the revision and quashed the order passed by the Assistant Settlement Officer Consolidation and remanded the matter. Therefore it is apparent that the Revisional Authority had considered the case of only Atta Abbas against Tazdar Khan and the two issues involved in the said case and thereafter remanded the matter for a fresh consideration. Therefore, the appellate authority was required to re-consider only the said issues. The other issues including the case of opposite party no.3 were neither considered by the revisional authority nor the case was remanded for re-consideration

of the same. Therefore the other issues including the case of opposite party no.3 were neither required to be considered nor could have been considered by the appellate authority.

12. After remand the appellate authority re-considered all the four appeals and dismissed the appeal of Atta Abbas against Tazdar Khan and the appeal of Tazdar Khan against Shiv Raj i.e. opposite party no.3 and others and allowed the appeal of Tazdar Khan and directed that the name of heirs of Tazdar Khan shall continue in accordance with the basic year. The right of Dhanju was rejected. There was no direction in regard to the opposite party no.3 i.e. Shiv Raj but his case was also considered and the appeal against him was dismissed, which could not have been done. The opposite party no.3, if aggrieved against the revisional order, could have challenged the same in appropriate proceedings, but it was not challenged by him.

13. In the case of **Rama Kant Versus Board of Revenue and others (Supra)** this court has held that the defiance to carry out the directions issued by the superior Court or tribunal is in effect denial of justice and is destructive of the basic principles of the administration of justice based on hierarchy of Courts in our country. It has further been held that the order of remand became final between the parties as the same was not challenged. The relevant paragraphs 7 and 8 are extracted below:-

"7. It is not open to an inferior Court or Tribunal to refuse to carry out the directions or to act contrary to directions issued by a superior Court or Tribunal. Such refusal to carry out the directions or to act in defiance of the directions issued by the superior Court or Tribunal is in effect denial of justice and is destructive of the basic principle of the administration of justice based on hierarchy of Courts in our country. If a subordinate Court or Tribunal refuses to carry out the directions given to it by a superior Court or Tribunal in exercise of its appellate power, the result would be chaos in the administration of justice.

8. The order of remand dated 22.11.1979, became final between the parties an same was not challenged. Thus, it was not open to the trial court being an inferior court to reframe fresh issues and to record fresh findings. The only course open to the trial court was to give finding on the two issues reframed by the first appellate court and decide the suit accordingly as directed in the order of remand. The trial court exceeded its jurisdiction by travelling beyond directions contained in the remand order and this vital aspect have been illegally ignored by the court of first appeal as well as second appeal."

14. The Hon'ble Supreme Court, in the case **Radha Raman Samanta Versus Bank of India (Supra),** has held that once issues might and ought to have been raised but had not been done so, it must be taken that the Division Bench had rejected such contentions. Therefore, on remand the learned single judge was bound to address only on one issue upon which the matter had been remanded. The relevant paragraph 12 is extracted below:-

"12. On the earlier occasion when the matter was considered by the Division Bench, the respondent Bank did not raise any issue of alternative remedy or any question relating to non-maintainability of the writ petition. We may also notice that

when such issues might and ought to have been raised but had not been done so, it must be taken that the Division Bench had rejected such contentions and the order of the Division Bench remanding the matter to the learned Single Judge was not carried in appeal and became final. Therefore, the learned Single Judge was bound to address only on one issue upon which the matter had been remanded. Thus, the Division Bench could not have overlooked these facts in the appeal arising from the order of the learned Single Judge on the second occasion after remand and need not have gone into the question as to whether the writ petition could have been entertained at all or not. Therefore, we are of the view that the High Court could not have overlooked these facts and interfered with the order of the learned Single Judge."

15. The Hon'ble Supreme Court, in the case of **Paper Products Limited Versus Commissioner of Central Excise, Mumbai (Supra),** considered the scope of limited remand and the case of **Mohan Lal V. Anandibai and others; AIR 1971 SC 2177**. The relevant paragraph 10 is extracted below:-

"10. A bare reading of para 10 makes the position clear that it only related to the particular plea and no other plea which was covered by para 8. The scope of limited remand has been highlighted by this Court in *Mohan Lalv.Anandibai*[(1971) 1 SCC 813 : AIR 1971 SC 2177] . It was observed at para 9 as follows: (SCC pp. 821-22)

"9. Lastly, counsel urged that now that the suit has been remanded to the trial court for reconsidering the plea of res judicata, the appellant should have been given an opportunity to amend the written statement so as to include pleadings in respect of the fraudulent nature and antedating of the gift deed Exhibit P-3. These questions having been decided by the High Court could not appropriately be made the subject-matter of a fresh trial. Further, as pointed out by the High Court, any suit on such pleas is already time-barred and it would be unfair to the plaintiff-respondents to allow these pleas to be raised by amendment of the written statement at this late stage. In the order, the High Court has stated that the judgments and decrees and findings of both the lower courts were being set aside and the case was being remanded to the trial court for a fresh decision on merits with advertence to the remarks in the judgment of the High Court. It was argued by learned counsel that, in making this order, the High Court has set aside all findings recorded on all issues by the trial court and the first appellate court. This is not a correct interpretation of the order. Obviously, in directing that findings of both courts are set aside, the High Court was referring to the points which the High Court considered and on which the High Court differed from the lower courts. Findings on other issues, which the High Court was not called upon to consider, cannot be deemed to be set aside by this order. Similarly, in permitting amendments, the High Court has given liberty to the present appellant to amend his written statement by setting out all the requisite particulars and details of his plea of res judicata, and has added that the trial court may also consider his prayer for allowing any other amendments. On the face of it, those other amendments, which could be allowed, must relate to this very plea of res judicata. It cannot be interpreted as giving liberty to the appellant to raise new pleas altogether which were not raised at the initial stage. The other amendments have to be those which are consequential to

the amendment in respect of the plea of res judicata."

16. In view of above, once limited issues were considered by the superior court and the matter was remanded to re-consider on the said issues the inferior court cannot travel beyond those issues and consider and decide the other issues and the whole case. If a person, whose issues were not considered, was aggrieved by the term of remand, could have challenged the same. But in the present case the appellate authority, to whom the case was remanded, travelled beyond the term of remand and considered the issues which were neither considered by the superior court nor the matter was remanded to consider the same. Therefore, this court is of the considered view that the appellate authority considered and decided the case of opposite party no.3 without authority of law. This was also not considered by the revisional authority on being challenged. Therefore the orders are not sustainable in the eyes of law.

17. Adverting to the second submission of learned counsel for the petitioners that the case of the opposite party no.3 was also not proved as alleged entry was made in his favour on the basis of the adverse possession without following the due procedure and issuance of PA-10 in accordance with law, this court finds that after remand the appellate authority has mentioned that during Padtal the possession of Shiv Raj was found and only Tazdar Khan has come to deny the possession of Shiv Raj, whereas by the oral evidence the possession of Shiv Raj was proved and the oral evidence cannot be ignored. Tazdar Khan also does not know the area and number of the plot. The possession of Shiv Raj is found from the time of Zahoor. Therefore, in his opinion, the Consolidation Officer has rightly found Shiv Raj as Sirdar. Admittedly the opposite party no.3 was claiming on the basis of adverse possession. The oral evidence of Kaledin, Saidu and Nusrat Jahan filed by the petitioners alongwith writ petition indicates that none of them have admitted the possession of the opposite party no.3, rather Saidu and Nusrat Jahan have specifically denied the possession of opposite party no.3 and the same are uncontroverted.

18. The party who is claiming, on the basis of adverse possession in some property, is to prove as to the date, time and manner in which he entered into possession and when the possession converted into open, hostile and adverse. The claim under Clause 9 on the basis of adverse possession is not tenable at all unless it is proved that the entry was strictly in accordance with the provisions of the Land Record Manual and thereafter the notice was sent to the recorded tenure holder. A joint reading of paragraph 89-A, 89-B and 102-B of the Land Records Manual makes it clear that if any entry is made in PA-10 the same is required to be communicated to the person or persons concerned or their heirs and their signatures are required to be taken on the communication. It was further required to be reviewed by the Revenue Inspector at the time of verification (Padtal) as to whether the signatures of the recipient has been obtained or not. Therefore in case any entry made on the basis of adverse possession the same has to be communicated to the person concerned and the person claiming on the basis of said entry is required to prove that it was in accordance with the Land Records Manual. Therefore it was required to be proved by the opposite party no.3, but he failed to do so.

19. This Court considered this issue in the case of **Mohd. Raza Vs. Deputy Director of Consolidation and Another; R.D. 1997 (R.D.) 276** and held that the entries in the revenue papers not prepared by following the procedure prescribed under the Uttar Pradesh Land Records Manual and PA-10 notice was not served on the main tenant, such entries are of no evidentiary value and would not confer any right.

20. This court, in the case of **Gurumukh Singh and Others Vs. Deputy Director of Consolidation, Nainital and Others; 1997 (80) RD 276**, has also held that the entries will have no evidentiary value if they are not in accordance with the provisions of Land Records Manual and the burden to prove is on the person who is asserting the possession on the basis of adverse possession. In the case of **Sadhu Saran and Another Vs. Assistant Director of Consolidation, Gorakhpur and Others; 2003 (94) RD 535**, this court held that it is well settled in law that the illegal entry does not confer title. The Hon'ble Apex Court, in the case of **P.T. Munichikkanna Reddy and Others Vs. Revamma and Others; 2008 (26) LCD 15**, has held that in case of adverse possession, communication to the owner and his hostility towards the possession is must.

21. This Court, in the case of **Indrapal Singh Versus the Deputy Director of Consolidation, Kheri and another (Supra)** considering the case relied by the petitioners in the case of **Ishwarchand etc. Versus Board of Revenue U.P. at Allahabad (Supra),** has held that the party laying his claim on the basis of adverse possession in some property has to prove as to the date, time and manner in which possession is converted into open, hostile and adverse. Relevant paragraphs 29, 30, 31 and 32 are extracted below:-

"29. A party laying his claim on the basis of adverse possession in some property has to prove as to the date, time and manner in which possession is converted into open, hostile and adverse. In the case of Marwari Kumhar and others vs. Bhagwanpuri Guru Ganeshpuri and another, reported in [MANU/SC/0501/2000 : (2000) 6 SCC 735], Hon'ble Supreme Court has held that in absence of any proof as to the date, time and the manner in which possession gets converted into open, hostile and adverse, the claim for adverse possession can not be upheld.

30. Thus, Court in its latest judgment in the case of Ishwarchand vs. Board of Revenue U.P. at Allahabad and others, reported in [2019 (142) RD 676] has, in paragraph 17 observed as under:

"17. In my considered opinion, this argument cannot be accepted because possession can also be permissive. Till such time, it is proved that the Lekhpal had made the entry under Class 9 strictly in accordance with the provisions of the Land Records Manual and thereafter, a notice was sent to the recorded tenure holder in PA-10, no claim for adverse possession, could have been decreed."

31. Thus, from the aforequoted authorities, it is clear that to succeed in a claim based on adverse possession the parties so pleading must prove that possession was continuous, open, in the notice and knowledge of the other party against which such possession is claimed and hostile. The adverse possession thus, needs to be proved on the basis of evidence and in case of adverse possession being claim in landed property in the State of

Uttar Pradesh, as has been held by this Court in the case of Mata Badal Singh and others (supra) adverse possession must be proved after producing PA-10 and after summoning PA-24.

32. So far as the order passed by the Consolidation Officer in this case on 05.08.1988 is concerned, except for the statement of the petitioner-Indra Pal Singh and one of his witnesses, who have stated that initially Shreepal and thereafter Indra Pal Singh forcibly took possession of the land in question, there was no other relevant documentary evidence available. PA-10 and PA-24 to prove column-9 entry, that too, in the name of Shreepal, have not been filed, neither were they summoned. It is further noticeable that the order dated 05.08.1988 passed by the Consolidation Officer also takes into account a compromise said to have been entered into between Indra Pal Singh and Babu Ram. If the claim is based on adverse possession and the original recorded tenure holder himself stated before the Consolidation Officer by way of compromise that Indra Pal Singh has been in possession, the necessary ingredients of adverse possession cannot be said to be proved. On account of procedural lapse where objection filed by the petitioner and objection filed by the respondent No. 2 were not clubbed together, the claim of respondent No. 2 on the basis of sale deed is being denied. The Consolidation Officer in his order dated 02.05.2012 has taken into account all the aforesaid aspects of the matter, specially the observations made by the Settlement Officer, Consolidation in his order dated 30.03.1991 and has thus allowed the revision petition by setting aside the orders dated 21.11.2001 and 20.08.2003 passed by the Consolidation Officer and Settlement Officer, Consolidation."

22. In the judgment relied by learned counsel for the opposite party no.3, in the case of **Ravinder Kaur Grewal Versus Manjit Kaur (Supra),** also it has been held that the law with regard to perfecting title by adverse possession is well-settled. A person claiming title by adverse possession has to prove three "neck" nec vi, nec clam and nec precario. In other words, he must show that his possession is adequate in continuity in publicity and in extent.

23. The third submission of the learned counsel for the petitioner was that since the opposite party no.3 has not filed any counter affidavit, therefore, the pleas taken in the writ petition are to be taken correct. Once the plea has been taken and no counter affidavit has been filed raising any objection, that has to be taken correct on the face of it, if they does not otherwise seem to be incorrect on the basis of pleadings on record. This court, in the case of **S.Ravindra Singh and another Versus 3rd Addl. District Judge, Faizabad (Supra),** has held that the allegations have to be taken as having been admitted or in any case, the allegations go uncontroverted. This is well settled principle of law that allegations of fact made on affidavit by a party when require to be controverted by affidavit have not been denied and continued have got to be taken to have been admitted to be correct. The relevant paragraph 24 is extracted below:-

"24. A perusal of order-sheet per se shows that after the filing of the objections by the petitioners, the date of evidence was fixed and the parties had filed documentary evidence, no oral evidence was sought to be produced and nor the parties did seek to produce and to adduce any oral evidence. As I have mentioned

earlier the allegations made in paragraph 14 of the counter-affidavit have not been controverted or denied by the petitioners in their rejoinder-affidavit. The allegations have to be taken as having been admitted or in any case, the allegations go uncontroverted. This is well settled principle of law that allegations of fact made on affidavit by a party when require to be controverted by affidavit have not been denied and continued have got to taken to be have been admitted to be correct. In the case of Juggi Lal Kamla Pat v. Ram Janki Gupta and another, reported in MANU/UP/0101/1962 : AIR 1962 Alld 407, it has been laid down by this High Court as under:--

"A statement on oath, whether true or false, has to be met by a counter-affidavit in reply, or by challenging the statement by cross-examining the deponent. If that is not done, it would be presumed that the allegations, if untrue would have been rebutted by the other side."

24. This court, in the case of **Pramod Kumar Chaturvedi Versus State of U.P. and others (Supra),** has held that when the counter affidavit was not filed, it is axiomatic that the respondents no.4 has nothing to say against the allegations and therefore the averments, by reason of remaining uncontroverted have to be treated as correct in view of law laid down by the Apex Court in its decision reported in AIR 1973 SC 627, 1982 SCC (2) 471 and 1987 SCR (4) 73.

25. In view of above since no counter affidavit has been filed by the opposite party no.3, the allegations made in the writ petition are uncontroverted and it can be safely presumed that the allegations made in the writ petition are true otherwise it would have been rebutted by the other side.

26. In view of above and considering the overall facts and circumstances of the case the other judgments relied by learned counsel for the opposite parties are of no assistance to him and are distinguishable. This court is of the considered opinion that the impugned judgment and orders have been passed in illegal manner beyond the term of remand and without authority of law and recording erroneous and perverse findings without application of mind. Therefore, the same are not sustainable in the eyes of law and are liable to be quashed.

27. The writ petition is, accordingly, **allowed**. The judgment and order dated 05.03.1979, passed by the Settlement Officer Consolidation, Faizabad, contained in annexure no.3 to the writ petition and judgment and order dated 09.12.1980, passed by the Deputy Director of Consolidation, contained in Annexure no.4 to the writ petition are hereby quashed. The consequences shall follow accordingly as per law. No order as to costs.

(2021)08ILR A195
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.07.2021

BEFORE

THE HON'BLE JASPREET SINGH, J.

Consolidation No. 4584 of 1987

Dharmraj ...Petitioner
Versus
D.D.C. Faizabad & Ors. ...Respondents

Counsel for the Petitioner:

S.K. Mehrotra

Counsel for the Respondents:
C.S.C., A.S. Chaudhry, Prabhakar Vardhan Chaudha

A. UP Consolidation of Holdings Act, 1953 – Sections 5(1)(c)(ii) & 45(A) – Consolidation process – Transfer of the holding during the course – Requirement of permission of SOC in writing – Amendment Act No. 34 of 1974 came into force w.e.f. 07.12.1974, bringing within its boundaries all transfers whether it related to part or the whole of the holding – Sale-deed executed after the amendment – No permission of SOC was taken – Effect – Held, any deed in contravention of Section 5(1)(c)(ii) shall not be treated to be valid nor can be recognized, despite anything contained in any other law for the time being in force in view of Section 45(A) – This error is apparent on the face of the record and the order passed by the DDC cannot be sustained. (Para 23, 36 and 42)

B. Interpretation of Statute – Doctrine of Precedent – Per-incuriam – Meaning and applicability – It is to relax or dilute the Rule of Stare-decisis – The general and sancrosanct proposition, what is quotable in law is binding, can be avoided and ignored if it is rendered 'Inignoratiun' of a Statue or other 'Binding Authority' – Held, where a decision has been rendered per incuriam, it is robbed of its precedent value. (Para 46 and 49)

Writ petition allowed. (E-1)

Cases relied on :-

1. Ram Rati Vs Gram Samaj, AIR 1974 (Alld.) 106

2. Riasat Khan Vs Dy. Director of Consolidation, Lucknow & ors., 1981 RD 22

3. Smt. Ram Kali Vs Hira Lal & ors.,1986 RD 147

4. Siya Sharan Yadav & ors. Vs D.D.C. & ors., 2014 (125) RD 463

5. Ram Bhawan & ors. Vs Joint Director of Consolidation, Faizabad & anr., 2018 (138) RD 432

6. Smt. Asharfunisa Begum Vs Dy. Director of Consolidation & ors., AIR 1971 (Alld.) 87 (FB)

7. Smt. Ram Rati & ors. Vs Gram Samaj & Ors., AIR 1974 (Alld.) 106 (FB)

8. Shabbir Ahmad Vs Abdul Sattar, (2000) 7 SCC 323

9. Lalta Prasad Vs IX A.D.J. Agra, 1996 (87) RD 544

10. Prema Devi Vs Raja Ram, (2014) 32 LCD 2179

11. Nand Kishore Marwah & ors. Vs Samundri Devi, (1987) 4 SCC 382

12. A.R. Antulay Vs R.S. Nayak & anr., 1988 (2) SCC 602

13. Bhavnagar University Vs Palitana Sugar Mill (P) Ltd. & anr., (2003) 2 SCC 111

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

1. Heard Shri I.D. Shukla, learned counsel for the petitioner and Shri P.V. Chaudhary, learned counsel for the private-respondents as well as learned standing counsel for the State-respondents.

2. The issue involved in the instant writ petition relates to the validity of a sale-deed executed on 17.05.1975 which is said to be hit by the provisions of Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953.

3. The submission of the learned counsel for the petitioner is that the original respondent no.2 Ram Dular, who is now represented by his legal heirs sought his mutation in respect of Chak-456 constituted by the Plot Nos.71, 72, 73, 119, 120, 122, 124 and 125. He applied for his mutation by moving an application under Section 12

of the U.P. Consolidation and Holdings Act, 1953 on the basis of the registered sale-deed dated 17.05.1975 executed by the original tenure-holder namely Sita Ram.

4. The petitioner and the respondents no.2 to 4 also made an application for mutation on the basis that the original tenure-holder Sita Ram died and the petitioner and the respondents no.2 to 4 being his real brothers and the legal heirs have succeeded to his estate and on the basis of the succession and claimed their names to be mutated.

5. It is in this backdrop that the issue arose before the Consolidation Officer whether the sale-deed dated 17.05.1975 relied upon by the respondent no.2 Ram Dular was hit by Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 since no permission from the Settlement Officer of Consolidation (for short, 'SOC') was taken.

6. The respondent no.2 while defending his claim before the Consolidation Officer had submitted that there was no need to take permission from the SOC since Sita Ram had executed a registered sale-deed dated 17.05.1975 in respect of his whole holding and, therefore, the bar contained in Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 did not affect the transfer and he was entitled to succeed.

7. The Consolidation Officer, Akbarpur, District Faizabad by means of the order dated 20.08.1982 rejected the contention of the respondent no.2 and found that the sale-deed dated 17.05.1975 was bad in the eyes of law and accordingly it refused to recognize the same, hence, as a consequence, the names of the petitioner and the respondents no.2 to 4 were mutated as the successors of Sita Ram on the basis succession.

8. The respondent no.2 Ram Dular filed an appeal against the said order which also came to be dismissed by the SOC by means of the order dated 14.06.1983.

9. Being aggrieved against the order of dismissal of his appeal, Ram Dular preferred a revision under Section 48 of the U.P. Consolidation and Holdings Act, 1953 before the Deputy Director of Consolidation, Faizabad (for short, 'DDC, Faizabad'), who by means of the order dated 20.04.1987 allowed the revision and ordered for mutation of the name of respondent no.2 alone on the ground that since Sita Ram had transferred his entire holding in favour of the respondent no.2, hence, no permission as contemplated under Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 was required. This order passed by the DDC, Faizabad dated 20.04.1987 is under challenge in this writ petition.

10. Insofar as the facts are concerned, there is not much dispute between the parties. It is not disputed that the respondent no.2 claimed his rights on the basis of the registered sale-deed dated 17.05.1975 claiming full rights over the Chak-456 situate in Village Akbarpur, Gram Saidpur, District Faizabad whereas the contention of the petitioner is that upon the death of Shri Sita Ram, the petitioner and the respondents no.2 to 4 being the brothers succeeded to the property and the sale-deed was hit by Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953. It is also not disputed by the parties that Sita Ram had not sought any permission from the SOC prior to executing the sale-deed dated 17.05.1975.

11. It will be relevant to mention here that petitioner no.1, respondents no.2 and 4

died during the pendency of the writ petition and were duly substituted by their legal heirs. However, for sake of easy reference, the Court is referring to the original parties as impleaded in this writ petition.

12. In view of the aforesaid, the only issue that require consideration is whether the sale-deed dated 17.05.1975 is valid or not.

13. Addressing the Court on the aforesaid issue, Shri I.D. Shukla, learned counsel for the petitioner has urged that Section 5(1)(c)(ii) contained in U.P. Consolidation and Holdings Act, 1953 categorically provided that no tenure-holder except with the permission in writing of the Settlement Officer Consolidation previously obtained shall transfer by way of sale, gift or exchange his holding or any part of his holding in the consolidation area.

14. It is further submitted that the aforesaid provision was the subject matter of controversy before the Full Bench of this Court in the case of ***Ram Rati vs. Gram Samaj, AIR 1974 (Alld.) 106***. It is further urged that the Full Bench expressed its opinion that expression 'any part of his holding' used in Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 meant only part of the holding and not the whole holding.

15. He further urged that after the decision of the aforesaid Full Bench of Ram Rati (supra), the Legislature amended the aforesaid provision by means of the U.P. Amending Act No.34 of 1974, which came into force w.e.f. 07.12.1974 and Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 was amended and it was made applicable to all transfers whether in respect of the entire holdings or any part thereof. He submits that since the aforesaid sale-deed in question was executed on 17.05.1975 i.e. after Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 was amended which came into effect from 07.12.1974. Thus, the contention that the embargo of Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 was only applicable in respect of part of the holding is incorrect.

16. The said embargo now applied both on the part of the holding as well as the entire holding and since the sale-deed was executed after the amendment came into force, hence, the view taken by the DDC, Faizabad in the impugned order is contrary to the law, hence, the impugned order suffers from an error apparent on the face of the record and is liable to be set aside.

17. Shri I.D. Shukla in support of his submission has relied upon the decision of this Court in the case of (i) ***Riasat Khan vs. Dy. Director of Consolidation, Lucknow & Ors., 1981 RD Page 22;*** (ii) ***Smt. Ram Kali vs. Hira Lal & Ors.,1986 RD Page 147 and*** (iii) ***Siya Sharan Yadav & Ors. vs. D.D.C. & Ors., 2014 (125) RD 463.***

18. Per contra, Shri P.V. Chaudhary, learned counsel for the respondent no.2 submits that the view taken by the DDC, Faizabad was apposite. He submits that the purpose of consolidation is only to provide compact agriculture land holding to the tenure-holder. He has further urged that even otherwise during pendency of the aforesaid proceedings the law has changed and Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 has

been deleted from the statute books. He submits that in light of the U.P. Amending Act No.30 of 1991 which was published in the extraordinary gazette on 19.02.1991, Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 was omitted.

19. He further submitted that it will be relevant to notice the preamble of the amending Act No.30 of 1991. He submits that in order to remove the practical and legal difficulties experienced in implementation of U.P. Z.A. & L.R. Act and U.P. Consolidation and Holdings Act, 1953 and for extending the consolidation scheme in the hill areas, it was considered necessary to amend the aforesaid Acts as well as to do away with the provisions of taking permission of the SOC for transfer of holdings after the commencement of consolidation scheme in order to prevent corruption and ensure quick disposal of cases relating to consolidation.

20. The emphasis made by Shri Chaudhary is that it being the intention of the legislature to remove and delete the aforesaid provision, this subsequent event must be taken note of by the Court while deciding the aforesaid writ petition. The law is it stands today, there is no requirement for any tenure-holder to seek permission from the SOC prior to executing any sale-deed. Since, the sale-deed which was executed in favour of the respondent no.2 has not been declared as void nor has been cancelled by any Court of law till date, hence, the rights of the respondent no.2 stands preserved. Accordingly, in the facts and circumstances, substantial justice has already been done by the DDC, Faizabad which has further been cemented with the deletion of the impugned provision by amending Act No.30 of 1991. Accordingly, in this backdrop, the writ petition deserves to be rejected.

21. Shri Chaudhary in support of his submission has relied upon a decision of this Court in the case of (i) ***Ram Bhawan & Ors. vs. Joint Director of Consolidation, Faizabad & Anr., 2018 (138) RD 432.*** He also relies upon a Full Bench decision of this Court in the case of (ii) ***Smt. Asharfunisa Begum vs. Dy. Director of Consolidation & Ors. AIR 1971 (Alld.) 87 (FB); (iii) Smt. Ram Rati & Ors. vs. Gram Samaj & Ors., AIR 1974 (Alld.) 106 (FB); (iv) Shabbir Ahmad vs. Abdul Sattar, (2000) 7 SCC 323; (v) Lalta Prasad vs. IX A.D.J. Agra, 1996 (87) RD 544; (vi) Prema Devi vs. Raja Ram, (2014) 32 LCD 2179.***

22. In order to appreciate the submissions of the learned counsel for the parties, at the very outset, it will be relevant to notice the provisions of Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 as it stood prior to the amendment and also after the amendment in 1974.

"Section 5(1)(c)(ii) as it existed before its amendment by U.P. Act No.XXXIV of 1974 read thus:-

(c) Notwithstanding anything contained in U.P. Zamindari Abolition and Land Reforms Act, no tenure-holder except with the permission in writing of the Settlement Officer Consolidation previously obtained shall-

(ii) transfer by way of sale, gift or exchange any part of his holding in the consolidation area.

* * * * * * * * * * *

After its amendment *by U.P. Act No.XXXIV of 1974, which amendment Act*

came into force on December 7, 1974, it reads thus:-

(c) Notwithstanding anything contained in Zamindari Abolition and Land Reforms Act, 1950 no tenure-holder except with the permission in writing of the Settlement Officer Consolidation previously obtained shall-

(ii) transfer by way of sale, gift or exchange his holding or any part thereof in the consolidation area."

23. From the perusal of the aforesaid provision, it is clear that prior to the amendment in the year 1974, the language used in Section 5(1)(c)(ii) indicates that the embargo pertained to transfer where it related to any part of the holding of the tenure-holder. This provision was considered by the Full Bench of this Court in the case of ***Smt. Ram Rati & Ors. vs. Gram Samaj & Ors.***, (supra). The Full Bench noticed that the issue had already been decided by an earlier Full Bench of this Court in the case of ***Smt. Asharfunisa Begum*** (supra). The Full Bench noticed that a plain reading of the provisions indicated that the embargo was only in respect to the part of the holding and, therefore, in the opinion of the Full Bench only such transfer was hit by Section 5(1)(c)(ii) which related to the part of holding and in case if any tenure-holder transferred his entire holding, the same would not fall within the mischief of the aforesaid section.

24. It will also be relevant to notice that once the aforesaid interpretation was ascribed by the Full Bench in the case of ***Smt. Asharfunisa Begum*** (supra) this matter was again referred to a Full Bench in the case of ***Smt. Ram Rati & Ors. vs. Gram Samaj & Ors.***, (supra) for the reason that there was some discrepancy regarding the use of the language in Section 5(1)(c)(ii) in Hindi and its English version. Settling that controversy the subsequent Full Bench in the case of ***Smt. Ram Rati & Ors. vs. Gram Samaj & Ors.***, (supra) approved the interpretation ascribed by the earlier Full Bench of this Court in the case of ***Smt. Asharfunisa Begum*** (supra) and held that English version of the Act would prevail over the Hindi version and thus, it would be seen that the issue was authoritatively decided by the Full Bench.

25. Be that as it may, the issue in the present case relates to a sale-deed which was executed on 17.05.1975 i.e. after the amendment in Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953, which became effective from 07.12.1974.

26. As already noticed above, the language prior and after the amendment is very clear, the legislature thought best to include all transfer whether in respect of part of the holding or the entire holding and thus, in order to avoid any misgivings, the amendment was introduced.

27. Once, the amendment was brought on the statute book and was enforced, the sale-deed dated 17.05.1975 cannot be saved from the mischief since admittedly the sale-deed is subsequent to the amendment and once the amendment had taken place, it could not be said that by virtue of the decision of Full Bench in the cases of ***Smt. Asharfunisa Begum*** (supra) and ***Smt. Ram Rati & Ors. vs. Gram Samaj & Ors.***, (supra), the sale-deed in question is saved as both the Full Bench considered the provisions of Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 as it stood prior to amendment in the year 1974.

28. In view of the aforesaid, the reliance placed by Shri Chaudhary on the

two Full Bench decisions in the cases of ***Smt. Asharfunisa Begum*** (supra) and ***Smt. Ram Rati & Ors. vs. Gram Samaj & Ors.***, (supra) do not come to his rescue.

29. The other issue raised by Shri Chaudhary that the provisions of Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 has been deleted from the statute by amending the Act No.30 of 1991 effective from 19.02.1991 and on the date when the writ petition is being decided, the aforesaid change in law must be noticed including the intention of the legislature as expressed in the prefactory notes and statement appended to the Amending Act of 1991 which expresses the intention of the legislature.

30. The aforesaid argument of Shri Chaudhary is also fallacious and does not impress the Court. It will be noticed that the writ petition is not a continuity of the proceedings. An appeal is considered in continuity of the original proceedings. The parties have contested their case before the Consolidation Officer as well as SOC and the DDC, Faizabad and thus, the remedies in terms of the U.P. Consolidation and Holdings Act, 1953 stands exhausted.

31. The writ petition has been preferred under Articles 226/227 of the Constitution of India where the issue before the Court is to see the validity of the order passed by the authority concerned. It is also to be noticed that the law as it exists which give rise to the cause of action crystallizes the rights of the parties. It is well-settled that the rights of the parties will be determined on the basis of the rights available to them on the date of the suit and this Court is fortified in its view in light of the decision of the Apex Court in the case of ***Nand Kishore Marwah & Ors. vs. Samundri Devi, (1987) 4 SCC 382.***

32. Considering the aforesaid aspect, the sale-deed in question was executed on 17.05.1975 after Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 was amended in 1974 and it encompassed within its ambit, all transfers whether in part or whole of the holding, hence, the sale-deed dated 17.05.1975 which is the basis of the claim of the respondent no.2 was squarely hit by the aforesaid provision.

33. Apparently, the order passed by the Consolidation Officer and the SOC takes note of the amended provision of Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 and thus, it cannot be said that there is any fault in the order passed by the two authorities. However, the DDC, Faizabad while passing the impugned order has relied upon the earlier position prior to amendment and basing its decision on obsolete proposition of law set aside the order passed by the Consolidation Officer and the SOC and has validated the sale-deed.

34. The decision relied upon by Shri Chaudhary, if noticed, would reveal that the case of ***Prema Devi*** (supra) does not come to his rescue, as in the said case of Prema Devi, it was a case where the Court was exercising its jurisdiction in an appeal which is a continuation of the proceedings. Hence, the said decision is clearly distinguishable on the facts.

35. From the perusal of the impugned order passed by the DDC, Faizabad dated 20.08.1987 it would indicate that it has

relied upon a decision in the case of ***Smt. Ram Rati & Ors. vs. Gram Samaj & Ors.***, (supra). From the perusal of the decision of ***Smt. Ram Rati & Ors. vs. Gram Samaj & Ors.***, (supra), the redeeming feature which can be noticed from the said decision is that the sale-deed in question was dated 29.05.1968 and that it related to the entire holding of the tenure-holder. The Court placed reliance upon the decision found that the sale-deed to be valid. Apparently, in light of the discussions made above, the reliance placed by the DDC, Faizabad on the decision of ***Smt. Ram Rati & Ors. vs. Gram Samaj & Ors.***, (supra) was misplaced for the reason that it related to the position prior to the amendment in the Act.

36. In the instant case, the sale-deed was executed in the year 1975 whereas the Act was amended in 1974 and the amendment brought within its boundaries all transfers whether it related to part or the whole of the holding, thus, this error is apparent on the face of the record and the order passed by the DDC, Faizabad cannot be sustained.

37. It will also be relevant to notice that since the rights of the parties had crystallized on the date when the cause of action arose i.e. on the date of the execution of the sale-deed which is subsequent to the amendment of the year 1974 and all remedies under the U.P. Consolidation and Holdings Act, 1953 stood exhausted in the year 1987 i.e. when the final authority under the Act i.e. DDC, Faizabad passed the impugned order dated 20.04.1987. The amendment brought in the Act in the year 1991 during pendency of the writ petition cannot be treated to be retrospective so as to grant any benefit to the respondent no.2. Thus, for the aforesaid reasons, this Court does not find that there is any merit in the submissions of the learned counsel for the respondent no.2.

38. Much emphasis was laid by Shri Chaudhary on the decision of this Court in the case of ***Ram Bhawan & Ors.*** (supra) to buttress his submission that even in the case of Ram Bhawan (supra), the sale-deeds in question related to the period post the amendment in the year 1974 and also related to the entire holdings and the Court considering the intention of the legislature as well as relying upon the two Full Bench decision in the cases of ***Smt. Asharfunisa Begum*** (supra) and ***Smt. Ram Rati & Ors. vs. Gram Samaj & Ors.***, (supra) allowed the writ petition.

39. Upon careful reading of the aforesaid decisions, this Court with utmost respect is unable to follow the aforesaid decisions. The aforesaid decisions only takes note of the provision of Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953. However, there is no consideration of Section 45(A) of the U.P. Consolidation and Holdings Act, 1953.

40. It will be relevant to notice Section 45(A) of the U.P. Consolidation and Holdings Act, 1953 and is being reproduced hereunder for ease of reference:-

"Section 45(A). Penalty for contravening provisions of Section 5.-*(1) Any person contravening the provisions of Section 5(c)(i) shall, on conviction by a Court of contempt jurisdiction, be liable to a fine not exceeding rupees one thousand.*

(2) A transfer made in contravention of the provisions of Section 5(c)(ii) shall not be valid or recognized; anything contained in any other law for the

time being in force to the contrary notwithstanding."

41. The aforesaid provision clearly indicates the consequence of an act done in violation of Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953. It specifically provides that a transfer made in contravention of the provisions of Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 shall not be valid or be recognized notwithstanding anything contained in any other law for the time being in force.

42. The use of the language made in the aforesaid section clearly indicates that so far as the consolidation authorities are concerned, any deed which is in contravention of Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 shall not be treated to be valid nor can be recognized, despite anything contained in any other law for the time being in force.

43. The aforesaid sub-section (2) of Section 45(A) of the U.P. Consolidation and Holdings Act, 1953 is a non-obstante clause. Once, the consequence of the aforesaid Act is provided and the same has not been considered by this Court in the case of Ram Bhawan (supra), apparently for the said reason the said decision is rendered per incuriam.

44. It will be relevant to note the meaning of the word 'per incuriam'. In **Black's Law Dictionary, Eighth Edition**, the word **"*per incuriam*"** has been defined as under:-

"per incuriam (per in-kyoor-ee-em), adj. (Of a judicial decision) wrongly decided, usu. because the judge or judges were ill-informed about the applicable law.

There is at least one exception to the rule of stare-decisis. I refer to the judgments rendered per incuriam. A judgment per incuriam is one which has been rendered inadvertently. Two examples come to mind: first, where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies. For all the care with which attorneys and judges may comb the case law, errare humanum est, and sometimes a judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is diction to a previous judgment that should have been considered binding, and in ingnorance of that judgment, with no mention of it, must be deemed rendered per incuriam; thus, it has no authority... the same applies to judgments rendered in ignorance of legislation of which they should have taken into account. For a judgment to be deemed per incuriam, that judgment must show that the legislation was not invoked.' Louis-Philippe Pigeon, Drafting and interpretating Legislation 60 (1988).

As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of law, be of the rarest occurrence." Rupert Cross & J.W. Harris, Precedent in English Law 149 (4th ed. 1991)."

45. In the ***Advanced Law Lexicon*** by ***P. Ramanatha Aiyer's*** (5th edition), it has been defined as under:-

*"**Per incuriam.** (Lat.) (of a judicial decision) wrongly decided, usually because the Judge or Judges were ill-informed about the applicable law.*

Through inadvertence or through want of care. Through carelessness, through inadvertence.

'Per incuriam' means 'through want of care'. A decision of the Court which is mistaken. A decision of the Court is not a binding precedent if given per incuriam, i.e. without the Court's attention having been drawn to the relevant authorities, or statutes.

"As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence." RUPERT CROSS & J.W. HARRIS, President in English law 149 (4th ed. 1991).

In HALSBURY'S Law of England (4th Edn.) Vol.26 at pp. 297-98, para 578, it is stated:

"A decision is given per incuriam when the Court has acted in ignorance of a previous decision of its own or of a Court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (Young v. Bristol Aeroplane Co. Ltd.) (1944) 1 KB 718, at p.729 : (1944) 2 All ER at p.293, 300). In Huddersfield Police Authority v. Watson, 1947 KB 842 Lord GODDARD, CJ. said that a decision was given per incuriam when a case or statute had not been brought to the Court's attention and the Court gave the decision in ignorance or forgetfulness of the existence of the case or statute): or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force. [Young v. Bristol Aeroplane Co. Ltd., (1944) 1 KB 718 at p.729 : (1944) 2 All ER 293, 300 CA[As cited in State of Punjab v. Devans, Modern Brewaries Ltd., (2004) 11 SCC 26 157 para 340]"

Per incuriam. "per incuriam" are those decisions given in ignorance or forgetfulness of some statutory provision or authority binding on the Court concerned, or a statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceed without application of mind or proceed without any reason so that in such a case some part of the decision or some steps in the reasoning on which it is based, is found that account to be demonstrably wrong. [State of Madhya Pradesh v. Narmada Bachao Andolan, (2011) 7 SCC 639, para 67]

46. Actually, the concept of per-incuriam has been developed by the English Courts which is to relax or dilute the Rule of Stare-decisis. The general and sancrosanct proposition, what is quotable in law is binding, can be avoided and ignored if it is rendered 'Inignoratiun' of a Statue or other 'Binding Authority'. The aforesaid

concept has also been adopted by our Constitutional Courts.

47. The Constitution Bench of the Apex Court in the case of ***A.R. Antulay Vs. R.S. Nayak and Another, 1988 (2) SCC 602*** while dealing with the issue of a decision being per-incuriam, in paragraphs 104 and 105 has held as under:-

".....104. To err is human, is the oft-quoted saying. Courts including the apex one are no exception. To own up the mistake when judicial satisfaction is reached does not militatte against its status or authority. Perhaps it would enhance both."

105. It is time to sound a note of caution. This Court under its Rules of Business ordinarily sits in divisions and not as a whole one. Each Bench, whether small or large, exercises the powers vested in the court and decisions rendered by the Benches irrespective of their size are considered as decisions of the court. The practice has developed that a larger Bench is entitled to overrule the decision of a smaller Bench notwithstanding the fact that each of the decisions is that of the court. That principle, however, would not apply in the present situation and since we are sitting as a Bench of Seven we are not entitled to reverse the decision of the Constitution Bench. Overruling when made by a larger Bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without affecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger Bench. In fact, if it is a case of exercise of inherent powers to rectify a mistake it was open even to a Five Judge Bench to do that and it did not require a Bench larger than the Constitution Bench for that purpose."

48. In the aforesaid case of **A.R. Antulay** (Supra), in a dissenting opinion by one of Hon'ble Judge of the Apex Court, though on the issue of per-incuriam, it is in consonance with the view expressed in the majority judgement, and worthy of mention and recorded in paragraphs 182 and 183 of the said report is being reproduced hereinafter:-

".....182. It is asserted that the impugned directions issued by the Five-Judge Bench was per incuriam as it ignored the statute and the earlier Chadha case [AIR 1966 SC 1418 : (1966) 2 SCR 678 : 1966 Cri LJ 1071] .

183. But the point is that the circumstance that a decision is reached per incuriam, merely serves to denude the decision of its precedent value. Such a decision would not be binding as a judicial precedent. A co-ordinate Bench can disagree with it and decline to follow it. A larger Bench can overrule such decision. When a previous decision is so overruled it does not happen -- nor has the overruling Bench any jurisdiction so to do -- that the finality of the operative order, inter partes, in the previous decision is overturned. In this context the word ''decision' means only the reason for the previous order and not the operative order in the previous decision, binding inter partes. Even if a previous decision is overruled by a larger Bench, the efficacy and binding nature, of the adjudication expressed in the operative order remains undisturbed inter partes. Even if the earlier decision of the Five-Judge Bench is per incuriam the operative part of the order cannot be interfered within the manner now sought to be done. That apart the Five-Judge Bench gave its reason. The reason, in our opinion, may or may not be sufficient. There is advertence to Section 7(1) of the 1952 Act and to the

exclusive jurisdiction created thereunder. There is also reference to Section 407 of the Criminal Procedure Code. Can such a decision be characterised as one reached per incuriam? Indeed, Ranganath Misra, J. says this on the point : (para 105)

"Overruling when made by a larger Bench of an earlier decision of a smaller one is intended to take away the precedent value of the decision without effecting the binding effect of the decision in the particular case. Antulay, therefore, is not entitled to take advantage of the matter being before a larger Bench."

49. Thus, it would be seen that where a decision has been rendered per incuriam, it is robbed of its precedent value and thus, this Court is unable to follow the aforesaid decision as it does not take note of the provisions of Section 45(A) of the U.P. Consolidation and Holdings Act, 1953 and for the foregoing reasons, the said decision of Ram Bhawan (supra) does not come to the rescue of the respondent no.2.

50. Lastly, decision of ***Lalta Prasad*** (supra) is also distinguishable on facts inasmuch as in the said case though the provisions of Section 45(A) of the U.P. Consolidation and Holdings Act, 1953 has been considered, but it has been held that invalidity of the transfer in absence of prior permission as envisaged under Section 5(1)(c)(ii) of the U.P. Consolidation and Holdings Act, 1953 does not per se makes the transfer transaction void or legally ineffective as the said invalidity is curable which can be cured before the finalization of the provisional consolidation scheme.

51. In the case of Lalta Prasad (supra) the permission was granted on 05.10.1977 and the permission provided that the sale-deed should be executed within thirty days, however, the sale-deeds in question were executed on 23.02.1978 i.e. after the time period provided in the said permission. Thus, apparently, the facts of the aforesaid case are quite different inasmuch as in that case there was a permission which was taken prior to the transfer, but in the instant case at hand, there is no permission at all, hence, the said decision also does not help the respondent no.2.

52. It is settled law that with slight change in the facts there is huge difference in the precedent value of a decision. This Court is fortified in its view in light of the decision of the Apex Court in the case of ***Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. & Anr., (2003) 2 SCC 111.*** The relevant paragraph of the aforesaid report is quoted hereinafter:-

"59. A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [See Ram Rakhi v. Union of India [AIR 2002 Del 458 (FB)], Delhi Admn. (NCT of Delhi) v. Manohar Lal [(2002) 7 SCC 222 : 2002 SCC (Cri) 1670 : AIR 2002 SC 3088], Haryana Financial Corpn. v. Jagdamba Oil Mills[(2002) 3 SCC 496 : JT (2002) 1 SC 482] and Nalini Mahajan (Dr) v. Director of Income Tax (Investigation) [(2002) 257 ITR 123 (Del)] .]"

53. Thus, for all the reasons above, this Court finds that the impugned order dated 20.04.1987 passed by the DDC, Faizabad is apparently erroneous and is in ignorance of the provisions of law and the said order cannot be sustained.

54. The writ petition succeeds. The impugned order dated 20.04.1987 passed

by DDC, Faizabad in Revision No.2599/1118/449/574 is quashed and the order dated 20.08.1982 passed by the Consolidation Officer is maintained. However, in the facts and circumstances, there shall be no order as to costs.

(2021)08ILR A207
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.08.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

Consolidation No. 11980 of 2020

Kodai ...Petitioner
Versus
Addl. Commissioner (Consolidation) Lko. & Ors. ...Respondents

Counsel for the Petitioner:
Santosh Kumar Mehrotra, Ishwar Dutt Shukla, Priyam Mehrotra

Counsel for the Respondent:
Tej Singh, Hari Prakash Yadav, Mohan Singh, Uma Kant

A. UP Consolidation of Holdings Act, 1953 – Sections 9-A & 11(1) – UP CH Rules, 1954 – Rule 65(1-A) – Transfer of the appeal – Allegation made against the presiding officer – Objection to its maintainability – Transfer application was allowed in a completely casual and routine manner – No application of mind to the objections raised by the petitioner – Validity – Held, transfer of a case from one court to another is a very serious matter as it casts a doubt on the integrity of a presiding officer – An order allowing the transfer application in a routine manner cannot be condoned. (Para 7, 9 and 12)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Kedar Vs Additional Commissioner, U.P., Lucknow & ors., 2003 (94) Revenue Decision 430

2. Ram Prakash Vs D.J., Balli & 16 ors., 2015 (1) ARC 103

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard learned counsel for petitioner, learned State Counsel for opposite party No.1 and learned counsel for opposite parties 3 and 4. Mr. Mohan Singh learned counsel has put in appearance on behalf of opposite party No. 9. Notices to opposite party No. 2 stand dispensed with. It is admitted between the parties that the property in question has been subsequently purchased by the opposite party no.4 from the opposite parties 5 to 8 and as such the said opposite parties 5 to 8 are merely proforma opposite parties with regard to present petition. The opposite parties 3 and 4 being the primary litigating opposite parties, as such notices although issued earlier to opposite parties 5 to 8 though not served are not being taken into cognizance and the matter is being finally decided with the consent of learned counsel for parties.

2. Petition has been filed against order dated 18th February, 2020 passed by Additional Commissioner, Consolidation, Lucknow whereby the appeal No.21 of 2019 (Kodai versus Shyam Charan and others) under Section 11(1) of the U.P. Consolidation of Holdings Act has been transferred from the court of Settlement Officer, Consolidation, Ambedkar Nagar to the court of Settlement Officer, Consolidation, Ayodhya.

3. Learned counsel for petitioner submits that the father of petitioner was recorded over the suit premises but during consolidation proceedings, his right and title over the suit premises ended on the

basis of a fraudulent compromise without any notice or information to the father of petitioner. The aforesaid case under section 9-A of the Act of 1953 was decided in terms of the said fraudulent compromise by means of the order dated 25th July, 1991. It is submitted that when the father of petitioner came to know about the aforesaid fraudulent compromise, he filed a delayed appeal on 25th October, 2007. It is submitted that during pendency of the aforesaid proceedings, it was revealed that the suit premises had been purchased by the opposite party No.4 by means of a registered sale deed. It is submitted that during pendency of the aforesaid proceedings, the opposite party No.3 who was the manager of the institution (arrayed as opposite party No.4 in the present writ petition) filed an application for transfer of the appeal under Rule 65 of the U.P. Consolation of Holdings Rules, which has been allowed by means of the impugned order.

4. Learned counsel for petitioner has assailed the impugned order on the basis that the Consolidation Commissioner, Lucknow did not have any jurisdiction to transfer the case in terms of Rule 65 (1-A) of the aforesaid Rules. It is submitted that during objections filed by the petitioner to the transfer application, a preliminary objection regarding maintainability of the transfer application before the Consolidation Commissioner had been taken. It is submitted that further objection had been taken that false averments had been made in the transfer application merely to get the matter transferred from the court of the Settlement Officer, Consolidation Ambedkar Nagar since it was an old matter and was not being adjourned. Learned counsel for petitioner submits that the impugned order has not dealt with the objections taken by the petitioner to the transfer application although the submissions against the transfer application have been indicated in the impugned order itself. As such it is submitted that the order impugned has been passed without any application of mind and without adverting to the preliminary objection raised by the petitioner. It has also been submitted that transfer of a case has serious bearing not only to the litigation but also to the reputation of the presiding officer and therefore should not have been passed in such a casual manner.

5. Learned counsel appearing on behalf of the opposite parties 3 and 4 has refuted the submissions advanced by learned counsel for petitioner with the submission that the Consolidation Commissioner has full power and jurisdiction under Rule 65 of the aforesaid Rules to direct transfer of the pending appeal. It is also submitted that a perusal of the impugned order will make it apparent that the submissions advanced by petitioner regarding maintainability of the transfer application and the averments made therein have been dealt with by the concerned authority. It is also submitted that the impugned order has been passed in order to maintain the purity of the proceedings and in order to accord fairness in action with regard to final decision in the appeal. Learned counsel has submitted that the impugned order records the fact that the transfer applicant has serious apprehension with regard to imparting of a fair order in the appeal.

6. Having considered the material on record and submissions advanced by learned counsel for parties, it is apparent that the transfer application has been filed before the Consolidation Commissioner by

the opposite party No.3 although the transfer application does not indicate that it has been filed in the capacity of the manager of the institution i.e. opposite party No.4. The petitioner has thereafter filed a short counter affidavit indicating preliminary objection regarding maintainability of the transfer application and had subsequently filed his objections to the transfer application itself in which a plea has been taken that the allegations made against the presiding officer are completely false and uncalled for. A perusal of the impugned order makes it evident that although a preliminary objection and the objection on facts of the transfer application have been noticed by the Consolidation Commissioner but without adverting to the same, the impugned order has been passed transferring the appeal only on the ground of apprehension on the part of the transfer applicant/opposite party No.3.

7. Since the Consolidation Commissioner has not recorded any finding with regard to the preliminary objection about maintainability of the transfer application in terms of the Rule 65 of the Rules, it would not be appropriate for this Court to deal with the said issue and the aforesaid question is therefore left open.

8. The matter pertaining to transfer of case from one court to another merely on the basis of allegations made in the transfer application without verifying the allegations made against the presiding officer can not be permitted in such a casual manner. In case transfer of cases is allowed in such a manner, there can never be any finality attached to any litigation since upon any inconvenient question being asked by the court regarding the litigation, any party to dispute would seek transfer of the case and for not having to answer such inconvenient questions. It is quite correct that seeking transfer of any case from one court to another while casting aspersion on the integrity and character of the presiding officer can not be taken lightly and has to be considered in a serious manner. As such any such aspersion on the integrity and character of the presiding officer while seeking transfer from his court has to be treated with utmost seriousness and concern by the authority hearing the transfer application. The transfer application at the behest of any of the parties to the lis can be done only after the apprehensions and allegations indicated in the transfer application are verified by the authority or the court hearing the transfer application. It is not to be allowed in a routine manner.

9. So far as the transfer of the case in terms of the averments made in the transfer application is concerned, this Court in the case of **Kedar versus Additional Commissioner, U.P., Lucknow and others reported in 2003 (94) Revenue Decision 430** has clearly stipulated that transfer of a case from one court to another is a very serious matter as it casts a doubt on the integrity of a presiding officer. It has been held that the court must be very conscious in dealing with these matters and unless there are various attending circumstances even if there is no direct proof with regard to allegations, no transfer should be allowed.

10. This court in the case of **Ram Prakash versus District Judge Balli and 16 others reported in 2015 (1) ARC 103** has also held in the following manner:-

" 7. Mere suspicion by the party that he will not get justice would not justify

transfer. There must be a reasonable apprehension to that effect. A judicial order made by a Judge legitimately cannot be made foundation for a transfer of case. Mere presumption of possible apprehension should not and ought not be the basis of transfer of any case from one case to another. It is only in very special circumstances, when such grounds are taken, the Court must find reasons exist to transfer a case, not otherwise. ***(Rajkot Cancer Society vs. Municipal Corporation, Rajkot, AIR 1988 Gujarat 63; Pasupala Fakruddin and Anr. vs. Jamia Masque and Anr., AIR 2003 AP 448; and, Nandini Chatterjee vs. Arup Hari Chatterjee, AIR 2001 Culcutta 26)***

8. Where a transfer is sought making allegations regarding integrity or influence etc. in respect of the Presiding Officer of the Court, this Court has to be very careful before passing any order of transfer.

9. In the matters where reckless false allegations are attempted to be made to seek some favourable order, either in a transfer application, or otherwise, the approach of Court must be strict and cautious to find out whether the allegations are bona fide, and, if treated to be true on their face, in the entirety of circumstances, can be believed to be correct, by any person of ordinary prudence in those circumstances. If the allegations are apparently false, strict approach is the call of the day so as to maintain not only discipline in the courts of law but also to protect judicial officers and maintain their self esteem, confidence and above all the majesty of institution of justice.

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13. If there is a deliberate attempt to scandalize a judicial Officer of subordinate Court, it is bound to shake confidence of the litigating public in the system and has to be tackled strictly. The damage is caused not only to the reputation of the concerned Judge, but, also to the fair name of judiciary. Veiled threats, abrasive behaviour, use of disrespectful language, and, at times, blatant condemnatory attacks, like the present one, are often designedly employed with a view to tame a Judge into submission to secure a desired order. The foundation of our system is based on the independence and impartiality of the men having responsibility to impart justice i.e. Judicial Officers. If their confidence, impartiality and reputation is shaken, it is bound to affect the very independence of judiciary. Any person, if allowed to make disparaging and derogatory remarks against a Judicial Officer, with impunity, is bound to result in breaking down the majesty of justice."

11. Although the aforesaid judgment was in terms of Section 24 of the Code of Civil Procedure 1908 but the principles pertaining to transfer of case would be squarely applicable to the present case as well.

12. Upon applicability of the aforesaid judgments, it is evident from the perusal of the impugned order that the transfer of appeal has been allowed by means of the impugned order in completely casual and routine manner without any application of mind to the objections raised by the petitioner. As has been dealt herein above, such an order allowing the transfer application in a routine manner can not be condoned. It is also seen from the record that aspersions have been cast against the integrity and character of the presiding officer hearing the appeal. However the same has not been substantiated by the

transfer applicant/opposite party No.4 in any manner. Allowing the transfer application merely on such a averments is being frowned upon. The impugned order does not even indicate that the averments made in the transfer application have been prima facie proved by the transfer application.

13. In view of aforesaid judgments, it is quite clear that the impugned order is clearly unsustainable and therefore a writ in the nature of Certiorari is issued quashing the impugned order dated 18th February, 2020 passed in transfer application No. 725 of 2019 under Section 65(2) of the Consolidation of Holdings Act passed by the Consolidation Commissioner, U.P., Lucknow.

14. In view of aforesaid, the writ succeeds and is allowed. Parties shall bear their own cost.

(2021)08ILR A211
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.08.2021

BEFORE

THE HON'BLE MANISH MATHUR, J.

Consolidation No. 17525 of 2021

Subhas Singh & Ors. ...Petitioners
Versus
D.D.C., Ambedkarnagar & Ors.
...Respondents

Counsel for the Petitioners:
Yogesh Singh

Counsel for the Respondents:
C.S.C., Mohan Singh

A. UP Consolidation of Holdings Act, 1953 – Section 9-A – UP CH Rules, 1954 – Rule 109 – Execution of the order of Settlement Officer of Consolidation proceeded – Interim order against this proceeding granted, but subsequently it was not extended on the ground that the matter is ripe for final hearing – No cogent reason – Validity – Held, discontinuing an interim order granted earlier cannot be done merely because it was exparte or that the case is ripe for final hearing – Obviously interim order must have been granted earlier to preserve the nature of disputed property, therefore there should be some cogent reason recorded for vacation or non extension of same – Impugned Order not extending the interim order quashed. (Para 6, 7 and 10)

Writ Petition allowed. (E-1)

(Delivered by Hon'ble Manish Mathur, J.)

1. Heard learned counsel for petitioners, learned State Counsel for opposite party No.1 and Mr. Mohan Singh learned counsel for opposite party No.16. In view of order being passed, notices to opposite parties 2 to 15 stand dispensed with.

2. Petitioners have challenged the order dated 9th March, 2021 passed in revision No. 629/1027 whereby the interim order granted earlier has not been extended. It is submitted that private opposite parties had filed petition under section 9(A) of the Consolidation of Holdings Act which was allowed and against which the petitioners had filed an appeal before the Settlement Officer, Consolidation which was also dismissed vide order dated 11th February, 2021 which was challenged by the petitioners in revision before the Deputy Director of Consolidation. It is submitted that initially vide order dated 2nd March, 2021, interim orders were passed in revision staying proceedings pending in

terms of Rule 109 of the Rules framed under the Act. The next date fixed was 6th March, 2021 but the matter was actually heard on 9th March, 2021 but the interim order granted earlier was not extended.

3. Learned counsel for petitioner submits that a perusal of the impugned order will indicate that absolutely no reasons have been recorded for not extending the interim order which even otherwise would have net result of vacating the interim order granted earlier. It is also submitted that once the proceedings under section 9-A of the Act have yet not concluded and revision against the orders passed by the Consolidation Officer and the Settlement Officer, Consolidation is pending consideration before the Deputy Director of Consolidation in revision, there was no occasion for the non extension of the interim order.

4. Learned counsel appearing on behalf of the opposite parties on the other hand has submitted that a perusal of the impugned order will make it apparent that the matter has been fixed for the next date to be heard on merits and therefore there was no occasion to entertain any application for extension of interim relief particularly since the matter is now ripe for being decided finally.

5. Considering the submissions advanced by learned counsel for parties and material on record and particularly upon perusal of the impugned order, it is apparent that earlier at the time of filing of revision, the revisional court had passed an interim order dated 2nd March, 2021 staying the proceedings pending under Rule 109 of the Rules framed under the Act. The next date fixed was 6th March, 2021 on which date the matter could not be heard and was actually thereafter heard on 9th March, 2021 when the impugned order has been passed. The impugned order merely states that the matter is ripe for final hearing and therefore there is no occasion to hear the application for interim relief.

6. It is apparent that the Deputy Director of Consolidation has not at all adverted to the fact that earlier at the time of entertaining the revision, an interim order had been passed staying the proceedings pending under Rule 109 of the Rules framed under the Act. It is also apparent that the interim order granted earlier has not been extended merely on the ground that the matter is ripe for final hearing. In the considered opinion of this Court, it was incumbent upon the Deputy Director of Consolidation to have recorded a clear finding as to how continuation of the interim order granted earlier would be detrimental to opposite party particularly when the effect of non extension of interim order would be automatic vacation of interim order granted earlier. Discontinuing an interim order granted earlier can not be merely because it was exparte or that the case is ripe for final hearing.

7. Obviously interim order must have been granted earlier to preserve the nature of disputed property, therefore there should be some cogent reason recorded for vacation or non extension of same.

8. It is also a relevant factor that the proceedings under Rule 109 of the Rules framed under the Act were in the nature of execution pertaining to the order passed by the Consolidation Officer. Once the order passed by the Consolidation officer himself was under challenge before the revisional court and the revisional court was seized of the matter, it was but natural to have stayed

the operation of consequential proceedings pending under Rule 109 of the Rules framed under the Act. The Deputy Director of Consolidation has not at all considered the consequences of non extension of interim order granted earlier in the revision. Even otherwise from the perusal of the impugned order it is apparent that the Deputy Director of Consolidation has not at all applied his mind to the matter pertaining to extension of interim order.

9. Upon applicability of the aforesaid facts in the present circumstances, it is apparent that no cogent reasons whatsoever have been indicated by the Deputy Director of Consolidation for not extending the interim order granted earlier. As such the order is clearly vitiated.

10. Consequently a writ in the nature of Certiorari is issued quashing the impugned order dated 9th March, 2021 passed by the Deputy Director of Consolidation in revision No. 629/1027 (Subhash Singh and others versus Abu Talha and others). A further writ in the nature of Mandamus is issued extending the benefit of the interim order dated 2nd March, 2021 passed earlier in revisional proceedings till the final decision in the revision.

11. With the aforesaid observations and directions, the writ petition stands allowed at the admission stage itself.

(2021)08ILR A213
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.08.2021

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Criminal Appeal No. 1774 of 2012
and
Criminal Appeal No. 1778 of 2012

Satya Prakash & Anr. ...Appellants (In Jail)
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Rakesh Pathak, R.P. Misra, Ravi Dutt Misra, U.K. Pandey, Vishnu Dev Shukla

Counsel for the Respondent:
Govt. Advocate, Diwakar Singh, Ram Saran Awasthi

Criminal Law - Code of Criminal Procedure, 1973- Section 389- Section 439- Filing of Successive Bail Applications- Under section 439 of the Code, successive bail applications would be permissible to be moved even after rejection of the earlier bail application for the reason that situation during the course of investigation and trial keep on changing depending on the discovery/exploration of evidence or adducing the evidence - Moving successive bail applications, where earlier application has been rejected on merits in pending appeal, under section 389 of the Code would not be permissible for the reason that in case successive bail applications are heard, such hearing may amount to review of the earlier order whereby the prayer for bail moved by the same appellant stands rejected on merits. Such review in criminal proceedings is not legally permissible - The order passed disposing of an application for bail is an interlocutory order, in the opinion of the Court under certain circumstances the successive bail applications in the pending appeal can be considered, however, the scope of entertaining successive bail applications in the pending appeal is extremely narrow.

Successive bail applications, u/s 439 of the Cr.Pc can be filed on the ground of subsequent facts and change in circumstances, however once a bail application u/s 389 of the Code is rejected

on merits then consideration of a second bail application would amount to review of the previous order which is impermissible but the Court can consider the successive bail applications in Appeal on certain grounds.

Criminal Law - Code of Criminal Procedure, 1973- Section 389- Bail on basis of prolonged detention- Prolonged detention in itself cannot be the sole ground of seeking bail by the convicts in pending appeal. For seeking bail even in criminal appeal the appellant needs to establish a *prima facie* case in his favour to demonstrate that there exists a reasonable prospect of his acquittal in the appeal showing serious infirmity in the judgment of conviction. In considering the prayer for bail in a case involving a serious offence like murder punishable under section 302 of I.P.C., the Court should consider all the relevant factors such as nature of accusation, the manner in which crime is said to have been committed, the gravity of offence and desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder.

For granting bail in a pending appeal, the Court has to consider all relevant facts and period of detention is not the sole ground for grant of bail.

The learned trial court has recorded a finding that P.W.1- Pradeep Kumar, P.W.2-Laxmi Narain and P.W.3-Smt. Premwati have described the incident in vivid details without any material contradictions- A finding has been returned by the learned trial court that the postmortem report does not belie the medical examination report which was conducted on the person of the deceased before he was referred for treatment to the Medical College, Lucknow.

The eyewitness account is credible and trustworthy and the same is corroborated with the medical evidence, hence no ground for grant of bail is made out.

(Para 12, 13, 14, 15, 17, 19, 22)

Criminal Appeals rejected.(E-2)

Case Law/Judgements relied upon:-

1. Girand Singh Vs St. of U.P.,2010 (2) ACR 1362

2. Sidhartha Vashisht @ Manu Sharma Vs State (NCT of Delhi), (2008) 5 SCC 230

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Heard Shri R. P. Misra, learned counsel for the appellants, Shri Chandra Shekhar Pandey, learned Additional Government Advocate representing the State and the learned counsel for the Complainant.

2. Perused the record.

3. These bail applications have been placed before me as per the order passed by Hon'ble the Chief Justice on 12.03.2019 in view of difference of opinion between two Hon'ble Judges expressed in the order of the Division Bench, dated 01.03.2017.

4. Criminal Miscellaneous Application No.3582 (B) of 2015 has been filed by appellant-Anil in Criminal Appeal No.1774 of 2012 whereas Criminal Misc. Application No.2539 (B) of 2015 has been filed on behalf of appellant-Sunil Kumar in Criminal Appeal No.1778 of 2012. Both these appeals have been filed against the judgment and order of conviction and sentencing dated 01.12.2012 passed by the Additional Sessions Judge, Court No.1, Barabanki in Sessions Trial No.93/2007 which had arisen out of Case Crime No.271 of 2006, under sections 302/34, 323/34, 504 and 506 of I.P.C., Police Station-Asandra, District-Barabanki. All the three appellants, namely, Satya Prakash and Anil (Criminal Appeal No.1774 of 2012) and Sunil Kumar (Criminal Appeal No.1778 of

2012) have been convicted for the offences under section 302/34 of I.P.C. and section 323/34 of I.P.C. Appellants have accordingly been sentenced to undergo life imprisonment with a fine of Rs.20,000/- with default clause whereby it has been directed that in case of non-payment of fine they shall undergo six months further imprisonment for offence under section 302/34 of I.P.C. Similarly for the offence under section 323/34 of I.P.C. the appellants have been sentenced with a fine of Rs.1000/- with default clause, that is to say, in case they fail to pay the fine they shall undergo further imprisonment for a period of one month.

5. These are the second bail applications moved on behalf of the appellants, namely, Anil and Sunil Kumar. The first bail application moved by these appellants along with appellant Satya Prakash was rejected by a Division Bench of this Court vide order dated 06.08.2013. The said order dated 06.08.2013 is quoted hereunder:

"Court No. - 25

Criminal Misc. Application No.112467 of 2012

In re:

Case :- CRIMINAL APPEAL No. - 1774 of 2012

Appellant :- Satya Prakash & Another

Respondent :- State Of U.P.

Counsel for Appellant :- Rakesh Pathak,Ravi Dutt Misra,U.K. Pandey

Counsel for Respondent :- Govt. Advocate,Diwakar Singh

AND

Criminal Misc. Application No.112656 of 2012

In re:

Case :- CRIMINAL APPEAL No. - 1778 of 2012

Appellant :- Sunil Kumar

Respondent :- State Of U.P.

Counsel for Appellant :- Rakesh Pathak,Ravo Ditt Misra,U.K. Pandey

Counsel for Respondent :- Govt. Advocate,Diwakar Singh

Hon'ble Abdul Mateen,J.

Hon'ble Ashwani Kumar Singh,J.

Since both the aforesaid applications arise out of the appeals, which have been filed against one and same judgment and order, therefore, they are being heard together and decided by this common order.

Satya Prakash and Anil (appellants of Appeal No.1774 of 2012) and Sunil Kumar (appellant of Appeal No.1778 of 2012) are convicts of Sessions Trial No. 93 of 2007. They have been convicted under Sections 302/34 and 323/34 IPC and sentenced for maximum term of life imprisonment vide judgment and order dated 01.12.2012 passed by learned Additional Sessions Judge, Court No.1, Barabanki.

After hearing learned counsel for the appellants as well as learned Additional Government Advocate and going through judgment and record of lower court, including FIR, post-mortem report of deceased and statement of witnesses, including two injured, we do not find any valid and good ground to release the appellants on bail.

Accordingly, prayer for bail of both the appellants is refused and the applications are rejected.

Order Date :- 6.8.2013

Chauhan/- "

6. An objection at the very outset of hearing of these applications has been raised that once the first bail application moved by the appellants was rejected by a Division Bench of this Court vide order dated 06.08.2013 on merits, successive bail applications in the pending appeals would not be maintainable. The basis of the said objection is that the grounds which have now been taken for grant of bail were available to the appellants when the first bail application was heard and as such no case is made out to release them while hearing the second bail application. It has thus been argued by the learned Additional Government Advocate as also by the learned counsel representing the complainant that fresh arguments in second bail application should not be permitted to be made on the facts that were available to the appellants while the first bail application was heard and rejected.

7. Replying to the aforesaid objection, learned counsel representing the appellants, Shri R. P. Misra has vehemently argued that any order passed by a Court while disposing of an application for grant of bail is only an interlocutory order and as such with the change in the circumstances the successive bail applications would be maintainable and accordingly the present second bail applications moved on behalf of the appellants are also to be heard on merits.

8. Before adverting to the aforementioned issue, I deem it appropriate to examine the difference between the powers conferred on this Court to grant bail to an accused under section 439 of Code of Criminal Procedure (hereinafter referred to as "the Code') and the powers conferred upon the appellate court for suspension of sentence in pending appeal and for releasing the appellant on bail conferred under section 389 of the Code.

9. Section 439 of the Code is reproduced hereunder for ready reference:

"439. Special powers of High Court or Court of Session regarding bail.-

(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub- section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

[Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860), give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.]

[(1-A) The presence of the informant or any person authorised by him shall be obligatory at the time of

hearing of the application for bail to the person under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860).]

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

10. Section 389 of the Code is also extracted herein below for ready reference:

"389. Suspension of sentence pending the appeal; release of appellant on bail:-

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond:

[Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.]

(2). The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub- section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

11. A bare perusal of the aforequoted provisions show that certain powers are available to the High Court and the Court of Sessions under Section 439 regarding bail, according to which, the High Court or the Court of Sessions has the power to direct that any person accused of an offence, who is in custody, may be released on bail and while ordering for releasing of an accused on bail such conditions may also be imposed which are considered necessary. Section 389 falls in Chapter XXIX of the Code, which contains provisions for appeals. Section 389 of the Code empowers the appellate Court to suspend the execution of sentence or the order appealed against on an appeal filed by a convicted person, though this provision also mandates the appellate court

to record reasons in writing for doing so. It also empowers the appellate court to release a convicted person on bail if he is in confinement. What is noticeable, if the powers conferred on this Court under sections 439 and 389 of the Code are compared, is that section 389 is available to a convicted person on his filing appeal against the order of conviction/sentence whereas section 439 of the Code is available to a person who is accused, that is to say, he is facing trial or in respect of whom some investigation is being conducted and during the course of trial or investigation he is arrested or detained in custody.

12. It is needless to say that during the course of investigation or trial, as the investigation or trial proceeds, the circumstances keep on changing on discovery of evidence during the course of investigation and adducing of evidence during the course of trial. Accordingly, I find it safe to conclude that under section 439 of the Code, successive bail applications would be permissible to be moved even after rejection of the earlier bail application for the reason that situation during the course of investigation and trial keep on changing depending on the discovery/exploration of evidence or adducing the evidence.

13. However, so far as the power conferred on the appellate court under section 489 of the Code is concerned, it is available to the appellate court only on an appeal which may be filed by a convicted person. If a judgment and order of conviction and sentencing passed by a trial court is challenged before the higher Court, that is, appellate court, a very significant change takes place so far as the presumption of innocence of an accused or the doctrine of "innocent unless proved guilty" is concerned. Before the appellate court the presumption of innocence is not available. The person approaching the appellate court challenges the judgment and order of conviction and sentencing whereby after conclusion of trial court the appellant has already been held to be guilty. During the pendency of appeal, ordinarily, the circumstances do not change for the reason that the evidence and other circumstances which are available at the time of filing of the appeal against the judgment and order of conviction and sentencing remain the same throughout the pendency of appeal. Accordingly, moving successive bail applications, where earlier application has been rejected on merits in pending appeal, under section 389 of the Code would not be permissible for the reason that in case successive bail applications are heard, such hearing may amount to review of the earlier order whereby the prayer for bail moved by the same appellant stands rejected on merits. Such review in criminal proceedings is not legally permissible.

14. However, having observed as above, it is not that subsequent bail application would not be permissible to be heard in pending appeal in any circumstance. There may be situations, which may call upon the appellate court to hear subsequent bail application even after rejection of the earlier application for bail on merit. Some of such circumstances are (i) when the bail is sought on the ground of serious ailment, (ii) on the ground of very very advanced age, (iii) on the ground of some mental or physical infirmity suffered by the appellant during his incarceration, (iv) long incarceration (v) on the ground that substantial period of imprisonment has already been undergone by the appellant-convict and (vi) on the ground of long

incarceration where there is no likelihood of the appeal being heard finally in near future. These are some of the circumstances where successive prayers for bail can be entertained by the appellate court. The circumstances given here are not exhaustive; rather these are illustrative.

15. For the aforesaid reasons as also for the reason that the order passed disposing of an application for bail is an interlocutory order, in the opinion of the Court under certain circumstances the successive bail applications in the pending appeal can be considered, however, the scope of entertaining successive bail applications in the pending appeal is extremely narrow. At this juncture, a Division bench of this Court in the case of ***Girand Singh vs. State of U.P.***, reported in **[2010 (2) ACR 1362]** needs to be referred to. Paras 6 to 13 of the aforesaid judgment in the case of ***Girand Singh (supra)*** are relevant, which are extracted herein below:

"6. Sri Karuna Nand Bajpai, learned Additional Government Advocate, has rebutted the arguments raised by the learned Counsel for the appellant accused and submitted that it is not permissible under law to allow second bail application on any ground, which is not fresh or new. The grounds, which existed at the time of the rejection of the first bail application can not be treated to be fresh grounds at all. According to him, when the Court on a former occasion has already considered the bail matter on merits and has found no prima face case in favour of the accused, there is no question now to reconsider the point of bail on the same ground for that will simply amount to "review or recall of the first order". Criminal Procedure Code does not give any such power to the Criminal Courts.

7. According to him, second bail application can be entertained or allowed only in case the factual situation or the position of law changes in such a manner that it may invalidate the former order of rejection or may justify the grant of bail in the light of the change of factual or legal situation. He submits that a new ground on merits does not mean an argument raised by a new Counsel or an argument by same Counsel on a subsequent occasion, which could not be argued on earlier occasion. When the Court goes through the record and hears both the parties and passes a judgment on merit, it is deemed to have gone through all the relevant aspects of the case. Otherwise, there can not be any discipline, check or end in moving fresh bail application every second day on the ground that one or the other point could not be argued. It is stated by him that the bail orders by their very nature are not supposed to be very lengthy and it is not always possible for the Courts to write in bail orders all what they have seen in the record and considered even though the Counsel might have argued and referred to it. Therefore, a speaking reasoned order is the only requirement of law which has been done in the present case earlier. The Court on consideration found no case in favour of the appellant and rejected the prayer for bail on merits. The learned AGA has placed further reliance upon judgment of the Division Bench reported in Satya Pal vs. State of U.P. [1999 Cr.L.J 3709]. In this case the following question was referred by a learned Single Judge to be decided by a larger Bench:

"Whether a fresh argument in a second bail application for an accused should be allowed to be advanced on those very facts that were available to the

accused while the first bail application was moved and rejected?"

8. This above question of law was referred to the Division Bench for the view taken in the case of Gama vs. State of U.P. [1978 Cr.L.J. 242], was thus:--

"Even though it may be second or third bail application, but unless it is apparent from a reading of the first bail order that the point urged in the subsequent bail applications was also considered and rejected, it can not be said that the point urged in the second or third bail application would be deemed to have been considered in the first bail application just by implication."

9. On the reference, the Division Bench after hearing and considering all the relevant laws on this point, overruled the view taken by the learned Single Judge in Gama vs. State of U.P. (supra) holding that--

"Fresh arguments in the second bail application for an accused can not be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected."

10. The learned AGA, then submitted that, all the arguments advanced on behalf of the appellant regarding reconsideration of the merits of the case will be completely impermissible in the light of the above mentioned view of Division Bench in Satya Pal's case.

11. We find force in the argument of learned AGA and do not find any justification to rehear and reconsider the arguments on second bail application on same facts once again even when they have already been heard and rejected on the former occasion by this Court.

12. We also get fortified in our view by another case cited by the learned A.G.A, State of Mahrashtra vs. Captain Buddhilota Subha Rao [AIR 1989 SC 2292]. In this case the High Court of Maharashtra had allowed the second bail application after the first bail application had already been rejected. The Hon'ble Apex Court set aside the order of granting second bail and observed that--

"Once that application was rejected there was no question of granting a similar prayer. That is virtually overruling the earlier decision without there being a change in the fact-situation. And, when we speak of change, we mean a substantial one which has a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence."

Again it has been observed that--

"It will also result in consistency. In this view that we take we are fortified by the observations of this Court in paragraph 5 of the judgment in Shahzad Hasan Khan vs. Ishtiaq Hasan Khan [(1987) 2 SCC 684: AIR 1987 SC 1613] . For the above reasons we are of the view that there was no justification for passing the impugned order in the absence of a substantial change in the fact-situation."

13. Learned Counsel for the appellant has tried to distinguish Satya Pal's case (supra) on the ground that the same did not consider the scope of second bail application during the pendency of appeal after conviction. According to him, Satya Pal's case is an authority only in the matters relating to under trial. We see no force in this argument. It is true that in Satya Pal's case the question and scope of second bail was not specifically decided by the Court but this is because of the accepted practice of this Court which confines the Courts only to adjudicate and answer the questions of law, which have been directly referred to them.

Hypothetical questions are not entertained by the Court which sit specifically to decide some referred question of law. But the reasoning and rationale given and adopted in Satya Pal's case will directly apply to the second bail applications of convicted accused also and there is no justification to adopt a different approach for convicted accused-appellant. In fact, the scope of moving second bail application is much more for under trials as during the process of the trial one bail application may be rejected at one stage but after its rejection if some evidence is recorded, which is of such a nature that it demolishes the grounds on the basis of which the first bail application was rejected then the accused can have a right to be released on bail. This scope gets extremely constricted after the trial is over and the accused is convicted. There is no scope of change in the nature of evidence after conviction. But this constriction of scope to get the second bail on new grounds after conviction can not become a justification to reinvent merits in the arguments which had already been rejected on the former occasion as merit-less."

16. In the case of ***Girand Singh (supra)*** the Division Bench referred to a judgment of this Court in the case of ***Satya Pal vs. State of U.P.*** reported in ***[1999 Cr.L.J. 3709]*** and opined that though the said judgment in the case of ***Satya Pal (supra)*** relates to the scope of second bail application in the matters relating to under trials, however, the reasoning and rationale given and adopted in the case of ***Satya Pal (supra)*** will directly apply to the second bail application of a convict in pending appeal.

17. In view of the discussions made above, indefeasible inference which can be drawn is that though successive bail applications in pending criminal appeal would be maintainable in certain circumstances, however, the scope of such successive bail applications is extremely constricted. The other inference which can safely be drawn is that the presumption of "innocence unless proved guilty" gets lost while hearing a prayer for grant of bail in an appeal filed by a person convicted for an offence by the trial court.

18. Shri R. P. Misra, learned counsel appearing for the appellants has submitted that the appellants are in jail since 01.12.2012 and hearing of the appeal is not possible in near future, as such they are entitled to be released on bail. He has further submitted that right to speedy justice would include speedy hearing of appeal against the judgment and order of conviction and sentencing, which is a fundamental right emanating from Article 21 of the Constitution of India and since the appellants have already been subjected to long incarceration for a period of about 9 years and 6 months and there is no chance of the appeal being heard in near future, they ought to be released on bail.

19. No doubt, speedy justice, which includes early hearing of an appeal against the judgment and order of conviction, is a very valuable right enshrined under Article 21 of the Constitution of India, however, prolonged detention in itself cannot be the sole ground of seeking bail by the convicts in pending appeal. For seeking bail even in criminal appeal the appellant needs to establish a *prima facie* case in his favour to demonstrate that there exists a reasonable prospect of his acquittal in the appeal showing serious infirmity in the judgment of conviction.

20. In these appeals, the first bail application moved by the appellants was already rejected by a Division Bench of this Court on 06.08.2013 wherein opinion was expressed by the Division Bench that on going through the judgment and record of the learned trial court and other material including the post-mortem report, statement of witnesses which included two injured witnesses, no valid and good ground was found to release the appellants on bail. Thus, the prayer for bail was rejected on merits. In view of rejection of prayer for bail by the Division Bench on 06.08.2013, what remains to be seen by this Court in the second bail application is as to whether incarceration of the appellants for a period of 9 years and 6 months itself, entitles them to be released on bail. This, in fact, is the main ground urged by the learned counsel appearing for the appellants while pressing these second bail applications. It is true that detention of the appellants for a period of 9 years and 6 months is a long period, however, as observed above, long incarceration in itself can not be a ground for entitling the appellants to be released on bail.

21. The appellants having been convicted by the learned trial court cannot be considered to be innocent and further it is also to be noticed that they have been convicted and sentenced for imprisonment for life. Dealing with the scope of the power of suspension of sentence and release of appellant on bail in pending appeal under section 389 of the Code, Hon'ble Supreme Court in the case of ***Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi),*** reported in ***[(2008) 5 SCC 230]*** has observed that if a person has been convicted, he cannot be said to be an "innocent person" unless the final decision of acquittal is recorded by the superior Court in his favour. It has also been observed that the appellate court shall proceed on the basis that a person filing the appeal against the judgment and order of conviction and sentencing is guilty. Hon'ble Apex Court has also observed that it is no doubt true that even thereafter, it is open to the appellate Court to suspend the sentence in a given case by recording reasons. But it is equally well settled that in considering the prayer for bail in a case involving a serious offence like murder punishable under section 302 of I.P.C., the Court should consider all the relevant factors such as nature of accusation, the manner in which crime is said to have been committed, the gravity of offence and desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder.

22. In the instant case, it is noticeable that the learned trial court has recorded a finding that P.W.1- Pradeep Kumar, P.W.2-Laxmi Narain and P.W.3-Smt. Premwati have described the incident in vivid details without any material contradictions and further that these prosecution witnesses have successfully stood the test during their cross-examination. The learned trial court has also repealled the ground taken by the defence relating to alleged contradiction in the post-mortem report and the medical examination report. The Court has found existence of adequate evidence to prove that on account of surgical intervention on the injuries of the deceased Ram Bahadur the difference in the size of the injuries described in the medical report and the post-mortem report is not material for the reason that the deceased Ram Bahadur was given stitches on his wound. In this view a finding has been returned by the learned trial court that the postmortem report does not belie the medical examination report

which was conducted on the person of the deceased before he was referred for treatment to the Medical College, Lucknow.

23. On overall consideration of the entire facts and circumstances of the case as also in the light of the discussion made herein above, I do not find it a case fit for granting bail the appellants, Anil, S/o Satya Prakash and Sunil Kumar, S/o Satya Prakash. The prayer for bail is, thus, **rejected.**

24. However, hearing of the appeals is expedited. Office is, thus, directed to prepare the paper book within four weeks.

25. **List the appeals for hearing in the week commencing 13th September, 2021.**

(2021)08ILR A223
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2021

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Criminal Appeal No. 2823 of 2015

Sarvjeet @ Shashi Kapoor
...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rishi Kant Rai, Sri Neeraj Kumar Pandey, Sri Shyamu Shukla, Sri Vinod Kumar Rai

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

Evidence Law - Indian Evidence Act-1872- Section 3- On careful examination of evidence of P.W.-2 Premsheela and P.W.-3 victim, it is held that their evidence is reliable and trustworthy. Evidence of P.W.-2 Premsheela and P.W.-3 victim cannot be discarded merely on the ground that they are related to each other and interested witnesses-Prosecution case cannot be doubted on the ground of non examination of independent witnesses-There is corroboration of oral evidence of P.W.-3 victim with medical evidence.

It is settled law that where the evidence of the witnesses is credible and trustworthy and is corroborated by the medical evidence, then the case of the prosecution cannot be doubted merely on the ground that the witnesses are related and no independent witnesses have been examined.

From the evidence on file, it is established beyond reasonable doubt that appellant Sarvjeet @ Shashi Kapoor committed rape with a girl aged about 7 to 8 years by putting cloth in her mouth. Perpetrator of such a heinous and gruesome crime deserves no leniency. Taking lenient view with such an offender would be mis-carriage of justice.

The Court cannot adopt a lenient view on the question of sentence where the offence is grave and heinous in nature. (Para 12, 13, 14, 15, 16, 17)

Criminal Appeal rejected. (E-2)

Judgements/ Case law relied upon:-

1. Dahari & ors. Vs St. of U.P. AIR (2012) 10 SCC 256

2. Bhagwan Jagannath Markad Vs St. of Maha., (2016) 10 SCC 537

3. Sadhu Saran Singh Vs St. of U.P. & ors. (2016) 4 SCC 357

4. Mukesh Vs St. for NCT of Dehli & ors. AIR 2017 SC 2161

5. Bhagwan Jagannath Markad Vs St. of Maha., (2016) 10 SCC 537

6. Babu Ram Vs St. of U.P., 2002 (2) JIC 649 (SC)

7. Thaman Kumar Vs St. of U.T. of Chandi. 2003 (3) SCR 1190

(Delivered by Hon'ble Anil Kumar Ojha, J.)

Heard Sri Shyamu Shukla, learned counsel for the appellant, Sri Rupak Chaubey, learned A.G.A. for the State and perused the records.

2. Challenge in this criminal appeal is the judgment and order dated 19.6.2015 passed by Additional Sessions Judge, Court No. 5, Ghazipur in Special Criminal Case No.32 of 2014 (State Vs. Sarvjeet @ Shashi Kapoor) arising out of Case Crime No. 213 of 2014 under Sections 376, 323 I.P.C. and ¾ P.O.C.S.O. Act, P.S.- Bhawarkol, District- Ghazipur, whereby the learned Additional Sessions Judge, Court No. 5, Ghazipur has convicted appellant Sarvjeet @ Shashi Kapoor under Section 376 I.P.C read with Section 4 P.O.C.S.O. Act and sentenced him 10 years imprisonment and Rs. 10,000/- fine; under Section 323 I.P.C., one year imprisonment. In case of default in payment of fine, six months additional imprisonment has been awarded.

Above sentences have been ordered to run concurrently.

3. Tersely put the prosecution case is that complainant Shailendra Ram lodged an F.I.R. on 3.5.2014 at 11:15 hours at P.S.- Bhawarkol, District- Ghazipur stating therein that on 2.5.2014 at about 7:00 hours in the evening when complainant had gone out for labour work and his wife had gone to answer the nature's call, appellant Sarvjeet@Shashi Kapoor was committing rape with the complainant's daughter aged about 7/8 years by putting cloth in her mouth. At that time, the mother of victim entered the house and saw that he was committing rape with her daughter. Then victim started crying. Hearing the noise, witnesses Mahendra Ram S/o Ram Tahal and Shyam Lal Ram S/o Devanram reached at the spot. Appellant Sarvjeet @ Shashi Kapoor S/o Bhikhari Ram escaped from the spot by pushing the wife of complainant. Complainant's wife fell down and sustained injury on her head.

Complainant Shailendra Ram submitted a written report in the police station Bhawarkol, District- Ghazipur.

4. A case was registered against the appellant Sarvjeet @ Shashi Kapoor in Case Crime No. 213 of 2014 under Sections 376, 323 I.P.C. and ¾ P.O.C.S.O. Act, P.S.- Bhawarkol, District- Ghazipur.

5. The Investigation Officer took the one peace of lower (Paijama) of the victim, which the victim had worn at the time of incident and prepared recovery memo Ext. Ka-2. The Investigating Officer took one underwear, one pant and one shirt of the appellant and prepared recovery memo Ext. Ka-9. Statement of the victim under Section 164 Cr.P.C. was recorded by Judicial Magistrate, Ghazipur on 8.5.2014. Injured Premsheela was got medically examined and injury report Ext. Ka-7 was prepared. Medical examination of the injured was done. Victim was also medically examined and injury report Ext. Ka-4 was prepared.

Investigating Officer recorded the statement of victim and other witnesses under Section 161 Cr.P.C. and after completion of investigation, submitted charge sheet against appellant Sarvjeet @

Shashi Kapoor in Case Crime No. 213 of 2014 under Section 376, 323 I.P.C. and ¾ P.O.C.S.O. Act.

Learned lower court took cognizance in the matter on 11.6.2014. The Additional Sessions Judge, Court No.5, Ghazipur charged the appellant under Section 376, 323 I.P.C. and ¾ P.O.C.S.O. Act.

Appellant denied the charges and claimed trial.

6. Prosecution was directed to adduce evidence in support of the prosecution case. Statements of P.W.-1 Shailendra Ram, P.W.-2 Premsheela victim's mother, P.W.-3 victim, P.W.-4 Dr. Vinita, P.W.-5 Dr. Umesh Kumar, P.W.-6 Sub-Inspector Ram Singh, P.W.-7 Head Constable Anirudh Rai, P.W.-8 Constable Nawasi Abeeda Khatoon, P.W.-9 Mansa Yadav X-ray technician,were recorded.

Prosecution concluded the evidence.

Thereafter, statement of appellant Sarvjeet @ Shashi Kapoor under Section 313 Cr.P.C. was recorded. Appellant denied the evidence and said that he has been falsely implicated owing to the enmity. He further submitted that police has submitted forged report.

After hearing the prosecution and defence, learned Additional Sessions Judge, Court No. 5, Ghazipur convicted and sentence the appellant Sarvjeet @ Shashi Kapoor on 19.6.2015 as stated above in the aforesaid case crime.

7. Learned counsel for the appellant submitted that witnesses named in the first information report Mahendra Ram S/o Ram Tahal and Shyam Lal Ram S/o Devanram have not been examined. There is no independent witness of the alleged incident. P.W.-1 Shailendra Ram, P.W.-2 Premsheela and P.W.-3 victim, are interested and partisan witnesses. There is contradiction between medical and oral evidence with regard to injury of victim's mother Premsheela. Delay in lodging the F.I.R. has not been explained. Prosecution has not been able to establish its case beyond reasonable doubt. Appellant has been falsely implicated in the present case owing to the village factionalism and political rivalry. Appellant is entitled to benefit of doubt. Appellant be acquitted of charges under Sections 376, 323 I.P.C. and ¾ P.O.C.S.O. Act. Learned counsel for the appellant further submitted that appellant is in jail since 04.05.2014 his detention is more than 7 years. He lastly submitted that lenient view should be taken while awarding sentence. Appellant should be released from jail considering him undergone.

8. Per contra, learned A.G.A. countered the above arguments and submitted that there is no contradiction between medical and oral evidence. The evidence of victim is reliable and consistent. Evidence of witnesses P.W.-1 Shailendra Ram and P.W.-2 Premsheela are natural and trustworthy. Any fact can be proved by a solitary evidence. There was no need to examine the witnesses named in the F.I.R. The prosecution has fully established its case beyond reasonable doubt. Appeal has no merits and should be dismissed.

9. Incident is said to have taken place on 2.5.2014 at about 7 hours in the evening. The distance of police station from the place of occurrence is 13 kilometres north east. The F.I.R. of the incident was lodged on 3.5.2014 at 11:50 hours. Thus, F.I.R. of the incident was lodged nearly after 16

hours delay of the incident at the police station Bhawarkol which is 13 Kilometres away from the place of occurrence. The complainant belongs to the village background and labour class.

In the facts and circumstances, the veracity of the F.I.R. cannot be doubted. Accordingly, it is held that F.I.R. is genuine.

10. P.W.-1 Shailendra Ram, informant of the case, has lodged the F.I.R. of the incident at police station Bhawarkol. P.W.-1 Shailendra Ram has proved Ext. Ka-1. P.W.-1 Shailendra Ram is not the eye-witness.

11. P.W.-2 Premsheela is the eye-witness of alleged incident. She has supported the prosecution case. She has categorically stated in her examination-in-chief that while she was coming back to her house after answering the nature's call, she witnessed that the appellant Sarvjeet @ Shashi Kapoor was committing rape with her daughter. She started crying and tried to catch him. But, appellant fled by pushing her. She fell down and sustained injuries on her head. Defence cross-examined this witness extensively but there is no material contradiction in her statement.

Coming back to ones own house after answering the nature's call in the evening, is the natural and probable conduct of the witness. On careful consideration, it is held that evidence of P.W.-2 is natural and probable.

12. P.W.-3 is the star witness of this case. P.W.-3 is the victim. She has stated in her evidence/examination-in-chief, at page 6 & 7 of the paper book that the appellant Sarvjeet @ Shashi Kapoor belongs to her village and had committed wrongful act with her. Time was 7:00 in the evening. At that time, her mother and father were not in the house. She was alone in the house, at the time of committing wrongful act, Sarvjeet @ Shashi Kapoor put cloth in her mouth due to which, she could not cry. When her mother arrived in the house, appellant Sarvjeet @ Shashi Kapoor was committing wrongful act with her. When her mother cried and tried to catch him, he pushed her mother and fled from there. Her mother fell down due to push given by Sarvjeet @ Shashi Kapoor. In the incident, her mother sustained injury on her head. Defense cross-examined this witness at length. But could not shake the credibility of the evidence.

It is pertinent to note that victim is a child witness. Her age at the time of incident was 7 to 8 years. Evidence of P.W.-3 is probable and credible.

13. Learned counsel for the appellant submitted that P.W.-1 Shailendra Ram, P.W.-2 Premsheela and P.W.-3 victim all the three witnesses are related to each other. P.W.-1 Shailendra Ram is father of victim whereas P.W.-2 is the mother of victim.

Learned counsel for the appellant submitted that all the above three witnesses are interested and partisan witnesses. Relying on their testimony, it would be unsafe to convict the appellant.

The above contention of learned counsel for the appellant is not legally sustainable.

In **Dahari and others Vs. State of U.P. AIR (2012) 10 SCC 256**, the Hon. Apex Court has held as follows:

"It is settled legal proposition that the evidence of closely related

witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon."

In **Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537**, the Hon. Apex Court has held as follows:

"We may also refer to the judgment of this Court in Masalti versus State of U.P. [26] to the effect that the evidence of interested partisan witnesses though required to be carefully weighted, the same could not be discredited mechanically. When a crowd of unlawful assembly commits an offence, it is often not possible to accurately describe the part played by each of the assailants. Though the appreciation of evidence in such cases may be a difficult task, the court has to perform its duty of sifting the evidence carefully."

So far as facts of the present case are concerned, the evidence of P.W.-2 Premsheela and evidence of P.W.-3 victim is trustworthy and reliable.

On careful examination of evidence of P.W.-2 Premsheela and P.W.-3 victim, it is held that their evidence is reliable and trustworthy. Evidence of P.W.-2 Premsheela and P.W.-3 victim cannot be discarded merely on the ground that they are related to each other and interested witnesses.

Accordingly, the contention of learned counsel for the appellant is rejected.

14. Learned counsel for the appellant submitted that witnesses Mahendra Ram & Shyam Lal who have been named in the F.I.R., have not been examined by the prosecution. Moreover, there is no independent witness to corroborate the prosecution story.

I do not agree with the above contention of learned counsel for the appellant.

Non examination of eye-witnesses cannot be ground to reject the testimony of victim and witnesses.

The Hon. Apex has held that prosecution case cannot be doubted on the ground of non examination of independent witnesses.

In **Sadhu Saran Singh Vs. State of U.P. & Ors. (2016) 4 SCC 357**, the Hon. Apex Court has held as follows:

"As far as the non-examination of any other independent witness is concerned, there is no doubt that the prosecution has not been able to produce any independent witness. But, the prosecution case cannot be doubted on this ground alone. In these days, civilized people are generally insensitive to come forward to give any statement in respect of any criminal offence. Unless it is inevitable, people normally keep away from the Court as they feel it distressing and stressful. Though this kind of human behaviour is indeed unfortunate, but it is a normal phenomena. We cannot ignore this handicap of the investigating agency in discharging their duty. We cannot derail the entire case on the mere ground of absence of independent witness as long as the evidence of the eyewitness, though interested, is trustworthy."

In ***Mukesh Vs. State for NCT of Dehli & Ors. AIR 2017 SC 2161, Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537, Babu Ram Vs. State of U.P., 2002 (2) JIC 649 (SC) ,*** may also be cited on the above point.

15. Learned counsel for the appellant submitted that there is contradiction between medical and oral evidence. So appellant is entitled to benefit of doubt.

I do not agree with the above contention of learned counsel for the appellant.

In **Thaman Kumar Vs. State of Union Territory of Chandigarh 2003 (3) SCR 1190,** the Hon. Apex Court has held as follows:

"The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular person. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye-witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightway be drawn.

The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony."

So far as facts of the present case are concerned, there is no contradiction between oral and medical evidence because Dr. Umesh Kumar P.W.-5 in his statement has stated that injury of injured Premsheela may be caused due to fall on the ground. P.W.-2 Premsheela has deposed before the Court that appellant Sarvjeet @ Shashi Kapoor pushed her and fled from there. Due to which, she fell on the ground.

P.W.-5 Umesh Kumar conducted the medico-legal examination of P.W.-2 Premsheela and found following injuries on her person:-

(i) A Reddish Blue contusion, 3cm X 1cm, own left side of skull, 7 cm above left-ear.

P.W.-5 Dr. Umesh Kumar has given opinion that injury was simple in nature, caused by hard & blunt object. This injury maybe caused due to fall on the ground.

Thus, there is no contradiction or inconsistency between medical and oral evidence rather medical evidence corroborates the oral evidence of P.W.-2 Premsheela.

16. Learned counsel for the appellant drew attention of the Court towards the medico-legal report of the victim Ext. Ka-6, wherein it is written that there is no sign of recent vaginal intercourse as slide is

negative for spermatozoa. Hence, rape with the victim is not proved.

I am unable to agree with the above contention of learned counsel for the appellant because at page 12 of the paper book in the examination report of victim, it is written that hymen was torn at 6:00 O'clock, swollen red colour. At page 16 of the paper book, it has been mentioned that, according to physical examination radiological report of the radiologist, the victim is about 7 years. There is sign of vaginal penetration because hymen is torn.

P.W.-4 Dr. Vinita Jaiswal has proved the medical examination report of the victim. She has given evidence that there is sign of vaginal penetration because hymen was torn. P.W.-3 victim has tendered evidence that appellant Sarvjeet @ Shashi Kapoor committed rape with her.

From the above analysis, it is clear that there is corroboration of oral evidence of P.W.-3 victim with medical evidence. There is no contradiction between oral evidence of P.W.3 victim and P.W.-4 Dr. Vinita Jaiswal.

Accordingly, the contention of learned counsel for the appellant with regard to contradiction between oral and medical evidence is rejected.

17. Learned counsel for the appellant lastly submitted that appellant is detained since 4.5.2014 and is languishing in jail since more than 7 years. Keeping in view his detention period, lenient view should be taken. Appellant should be released from jail considering him undergone.

From the evidence on file, it is established beyond reasonable doubt that appellant Sarvjeet @ Shashi Kapoor committed rape with a girl aged about 7 to 8 years by putting cloth in her mouth. Perpetrator of such a heinous and gruesome crime deserves no leniency. Taking lenient view with such an offender would be mis-carriage of justice.

Learned Additional Sessions Judge, Court No.5, Ghazipur has awarded appellant Sarvjeet @ Shashi Kapoor 10 years rigorous imprisonment and Rs. 10,000/- fine which appears to be appropriate punishment.

The upshot of the above discussion is that prosecution has established its case beyond reasonable doubt against appellant Sarvjeet @ Shashi Kapoor by cogent, credible and trustworthy evidence.

Appeal lacks merit and is liable to be dismissed.

Appeal is, accordingly, **dismissed.**

Judgment be certified to the lower court for compliance.

(2021)08ILR A229
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.08.2021

BEFORE

THE HON'BLE AJAI TYAGI, J.

Criminal Appeal No. 3872 of 2015

Rahul Rajbhar ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Shiv Dayal Tiwari, Sri Deepak Kumar Srivastava, Sri Ganesh Shanker Srivastava, Sri Sabhapati Tiwar, Sri Santosh Kumar Pandey, Sri Saurabh Tripathi, Smt. Usha Srivastava

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

Evidence Law - Indian Evidence Act, 1872- Section 8- Motive- It is a case of direct evidence as P.W.-1 Km. Pooja and P.W.-2 Km. Rinki are the eye witnesses of the incident; in case of direct evidence, motive has no relevancy. Motive is important in case of circumstantial evidence. Although in this case, P.W.-1 Km. Pooja has stated about the motive behind the crime that she was molested by accused-appellant on several occasions before the present occurrence and every time she stopped him. In my opinion since prosecution has produced P.W.-1 Km. Pooja and P.W.-2 Km. Rinki as eye witnesses of the occurrence, motive has no importance in this case.

In a case of direct evidence, motive loses its relevance.

Investigation- latches of Investigating Officer- If there are procedural latches of prosecution or Investigating Officer, its benefits cannot be given to the accused as held by Hon'ble *Apex Court* in Ram Bali Vs. State of U.P. 2004 Vol. 47 ACC 453. It is also held in *Paras Yadav Vs. State of Bihar, 1999 (2) SCC 126*, it was held that if the lapse or omission is committed by the investigating agency or because of negligence there had been defective investigation, the prosecution evidence is required to be examined *de hors* such omissions to find out whether the said evidence is reliable or not and to what extent, such lapse affected the object of finding out the truth. The contaminated conduct of the officials alone should not stand on the way of evaluating the courts in finding out the truth, if the materials on record are credible and truthful, otherwise the designed mischief at the instance of biased or interested investigator would be perpetuated and justice would be denied to the complainant party and in the process to the community at large.

Settled law that the accused cannot be accorded advantage of a defective investigation. In case of latches and omissions by the investigating officer, the Court has to evaluate the evidence excluding the omissions of the investigating officer to find out as to whether the rest of the evidence of the prosecution is reliable or not.

Indian Evidence Act, 1872- Section 3- Injured Witnesses- Testimony of- Injuries Corroborated with medical evidence- P.W.-1 Km. Pooja and P.W.-2 Km. Rinki have fully supported the prosecution case in their respective statements and their statements were fully corroborated by medical evidence as discussed above, and prosecution has succeeded to prove its case against the accused beyond reasonable doubt.

It is settled law that the testimony of an injured witness is accorded greater credibility since his injuries, when duly corroborated with the medical evidence, establish his presence on the spot at the time of commission of the offence. (Para 10, 13, 14, 15, 21, 22, 23, 24)

Criminal Appeal rejected. (E-2)

Judgements/ Case law relied upon:-

1. Ram Bali Vs St. of U.P. 2004 Vol. 47 ACC 453.

2. Paras Yadav Vs St. of Bih., 1999 (2) SCC 126

3.Balwan & ors. Vs St. of Har., Criminal Appeal No.1842 of 2014

(Delivered by Hon'ble Ajai Tyagi, J.)

1. Heard learned counsel for the appellant and learned A.G.A. for the respondent.

2. This criminal appeal has been preferred against the impugned judgment and order dated 28.8.2015 passed by Additional Sessions Judge, Court No.5 Basti in S.T. No.63 of 2014 (State Vs. Rahul Rajbhar) arising out of Case Crime No.511 of 2013, under Sections 326-A I.P.C., Police Station Munderwa, District Basti convicting and sentencing the appellant for ten years rigorous

imprisonment and Rs.20,000/- as fine under Section 326-A I.P.C. and further six months imprisonment in case of default of fine.

3. Relevant facts of this case are that on 10.05.2013 complainant Kanhaiya Lal son of Shivdas lodged an FIR in Police Station Munderwa, District Basti with the averments that on 10.05.2013 at about 4:30 AM his daughter Km. Pooja aged about 16 years was going to ease herself out with her mother Belmati and sister Km. Rinki; when she reached on the road in front of the village, accused Rahul Rajbhar who was sitting on the road, poured acid from a box upon his daughter Pooja, as a result of which, she sustained serious injuries on her face and other parts of the body. On account of raising alarm by his wife and daughter, accused fled away from the spot; many people of village had seen the occurrence.

4. Accused-appellant was charged and tried by learned trial court under Section 326-A I.P.C. and he was convicted and sentenced for that offence.

5. Learned counsel for the appellant has submitted that accused is innocent and he has falsely been implicated in the present case with delayed FIR. Injuries to the victim were of simple in nature and case was not proved by prosecution evidence; while on the other hand learned A.G.A. submitted that in this case P.W.-1 Pooja is the star witness; she has supported the prosecution case; her statement before the learned trial court is corroborated with medical evidence which is well proved by the doctor who conducted the medical examination of the victim. Km. Pooja remained admitted for 14 days in hospital and accused has been rightly convicted by the learned trial court.

6. In detailed arguments learned counsel for the appellant first of all argued that in this case there is a delay in lodging the FIR. It is submitted that as per the prosecution case, occurrence has taken place at about 4:30 AM while FIR was lodged at 6:00 PM. Statement of the victim under Section 161 Cr.P.C. was recorded by Investigating Officer after 12 days of occurrence but perusal of the record shows that occurrence is said to have taken place at about 4:30 AM on 10.05.2013 and First Information Report was lodged at 6:40 AM that is near about after two hours of the occurrence. The argument of learned counsel for the appellant that FIR was lodged at 6:00 PM is against the record. Perusal of Chick F.I.R. Exb. KA-4 also shows that it was lodged at 6:40 AM; P.W.-6 constable Jang Bahadur Bharti also said in his statement that F.I.R. was lodged at 6:40. Moreover, there is an entry in general diary, Exb. Ka-5 of registration of case at 6:40 and giving *Majrubi Chhithi* to Km. Pooja for medical examination; medical examination report at the back of the *Majrubi Chhithi* Exb. KA-2 shows the time of medical examination as 10:55 AM. Hence, argument of learned counsel for the appellant that F.I.R. was lodged at 6 PM is totally against the record. Hence, it is obvious that there was no delay in lodging the FIR.

7. Learned counsel for the appellant further submitted that P.W.-1 Km. Pooja has said in her cross examination that her sister Rinki and she are not from the same mother but are step-sisters. Smt. Belmati who was said to be with the victim at the time of said occurrence, is her step-mother who used to rebuke the victim whenever any mistake was committed by her. On 10.05.2013 at 8 O' clock in the night, victim's parents thrashed victim and her

step-sister due to their going out from home.

8. Learned counsel for the appellant has submitted that due to being step-mother, Smt. Belmati used to beat her and due to that Km. Pooja was burnt by her step-mother and accused has been falsely implicated in this case for settling the scores.

9. Learned counsel for the appellant further argued that there was no motive for the accused to throw acid on Km. Pooja, although it is said by P.W.-1 Km. Pooja in her statement that before the said occurrence, appellant Rahul Rajbhar tried to molest her many times after which, she stopped him and told that she will complain about this to her father. On account of that, accused committed offence of throwing acid upon her. Learned counsel for the appellant has submitted that above statement is given by P.W.-1 Km. Pooja but there is nothing on record to show that any F.I.R. or complaint for molestation has been filed by Km. Pooja or her father, hence, motive told by P.W.-1, Km. Pooja in her statement fails and it is proved that accused-appellant had no motive to commit the crime.

10. It is a case of direct evidence as P.W.-1 Km. Pooja and P.W.-2 Km. Rinki are the eye witnesses of the incident; in case of direct evidence, motive has no relevancy. Motive is important. In case of circumstantial evidence. Although in this case, P.W.-1 Km. Pooja has stated about the motive behind the crime that she was molested by accused-appellant on several occasions before the present occurrence and every time she stopped him. In my opinion since prosecution has produced P.W.-1 Km. Pooja and P.W.-2 Km. Rinki as eye witnesses of the occurrence, motive has no importance in this case. Moreover, it was not necessary for Km. Pooja/victim or by her father to lodge F.I.R. against the accused for molestation of earlier occasions. It was enough if Km. Pooja complained to her father about molestation as stated by her in her statement, hence the argument of learned counsel for the appellant regarding motive is not tenable.

11. It was also argued by learned counsel for the appellant that as per the First Information Report many people of the village gathered at the place of occurrence, if it was so then how the accused fled away from the scene as he would have been caught by the people but the same does not hold good ground because F.I.R. clearly states that people of the village came on the spot after listening to the noise made by the victim and her sister and mother. It was also submitted by learned counsel for the appellant that prosecution could not fix and prove the place of occurrence; P.W.-1 Km. Pooja could not tell the boundaries of the place of occurrence, hence on this ground alone, the prosecution case fails.

12. Perusal of cross examination of P.W.-1 Km. Pooja reveals that regarding place of occurrence she just said that she does not know the name of the house owners in the north. Apart from it she had stated that in south, there is a house of Munnu Chaudhari and in east and west there is a road. Knowing the names of owners of the house nearby the place of occurrence, in my opinion, is not necessary because they have settled there by coming from distant places. Moreover, the Investigating Officer, P.W.-7 proved the site plan Exb. KA-6; hence, place of occurrence is very well established by the prosecution.

13. It was submitted by learned counsel for the applicant that according to the prosecution case, accused poured the acid from the box but no such box was produced before the learned trial court by the prosecution. In my opinion, if above said box is not produced by the prosecution, it does not in any way weakens the prosecution case because if there are procedural latches of prosecution or Investigating Officer, its benefits cannot be given to the accused as held by Hon'ble *Apex Court* in **Ram Bali Vs. State of U.P. 2004 Vol. 47 ACC 453.** It is also held in ***Paras Yadav Vs. State of Bihar, 1999 (2) SCC 126,*** it was held that if the lapse or omission is committed by the investigating agency or because of negligence there had been defective investigation, the prosecution evidence is required to be examined *de hors* such omissions to find out whether the said evidence is reliable or not and to what extent, such lapse affected the object of finding out the truth. The contaminated conduct of the officials alone should not stand on the way of evaluating the courts in finding out the truth, if the materials on record are credible and truthful, otherwise the designed mischief at the instance of biased or interested investigator would be perpetuated and justice would be denied to the complainant party and in the process to the community at large.

14. As was observed in Ram Bihari Yadav v. State of Bihar and others, J.T. (1998) 3 SC if primacy is given to such designed or negligent investigation to the omission or lapse by per-functionary investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcing agency but also in the administration of justice.

15. Hence, if there is any shortcoming on the part of prosecution that the tin box containing acid at the time of occurrence was not produced before the learned trial court, it alone does not weaken the prosecution case because evidence of witnesses of fact is otherwise reliable on the point of throwing the acid by the appellant-accused on Km. Pooja and Km. Rinki.

16. Regarding the injuries sustained by Km. Pooja and Km. Rinki, learned counsel for the appellant argued that injuries to the victim are superficial and simple in nature; hence, the offence may fall maximum in the ambit of Section 323 I.P.C.

17. Learned counsel for the appellant referred the injuries of Km. Rinki (sister of Km. Pooja) and argued that P.W.-5, Dr. Ramji Soni who conducted the medical examination of Km. Rinki also said that injuries to her were superficial and simple in nature. It is also said by doctor that such type of injuries may also come with hydroelectric acid, sulfuric acid, nitric acid etc. but he could not tell as to what type of acid was found on the body of the victim and also it cannot be said that by above acid there could be disfigurement or disability; doctor also did not mention the degree of the injuries but learned counsel for the appellant did not refer to the injuries of main victim Km. Pooja. For ready reference Section 326-A I.P.C. is being reproduced as under:-

"Section 326-A. Whoever causes permanent or partial damage or deformity to, or bums or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the

knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine;

***Provided** that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim;*

***Provided further** that any fine imposed under this section shall be paid to the victim."*

18. I carefully perused the injury reports of Km. Pooja and Km. Rinki. Medical examination of Km. Pooja was conducted by P.W.-4, Dr. Vinay Kumar Srivastava. In medical report prepared by the said doctor Exb. KA-2, following injuries were found on the body of Km. Pooja:-

Superficial to deep seated corrosive burn spread in patches over whole face both side and both side of forehead, front and left side of neck, upper chest both side, left arm, left forearm, right arm front, right forearm front, right lower thigh front, front of left lower thigh, left upper leg and left knee.

19. In this report, it is opined by the doctor that injuries were superficial to deep seated corrosive burn involving the area as described above, covering about 33 per cent of total body surface area. Doctor has opined that these injuries were grievous in nature duration of which was about fresh.

20. In his statement as P.W.-4, Dr. Vinay Kumar Srivastava has well proved the above injury report as Exb. KA-2 and corroborated these medical report with the statement made before the trial court. Hence, this case falls within the ambit of Section 326-A of I.P.C. Medical examination of Km. Rinki was conducted by P.W.-5 Dr. Ramji Soni who prepared her medical report which is proved by him as Exb. KA-3 in which five injuries are recorded in Exb. KA-3 which were mainly on her shoulder and arms; her above injuries were simple in nature; in fact Km. Rinki sustained burn injuries at the time when acid was thrown mainly on Km. Pooja and since Km. Rinki was with her at that time, hence she also got sprinkles of acid on her body.

21. In this case, P.W.-1 Km Pooja is main injured witness and star witness of prosecution as she has stated that on 10.05.2013 at about 4:30 AM in the morning she was going to ease herself out with her sister and her mother and when she reached on the road, the accused who was already there, threw acid from a box in his hand on her due to which she sustained serious burn injuries. In her cross-examination there was nothing which could weaken the statement made by her; in fact in cross-examination, two different suggestions were given to Km. Pooja; one suggestion is given that her mother threw the acid on her body taken out from the battery before her father and second suggestion was given that at the time of occurrence it was night and nobody identified the accused. So these are contradictory suggestions, so prosecution has failed to put his defence properly.

22. P.W.-2 Km. Rinki was also cross-examined at length but there were no discrepancy in her statement which could adversely affect the prosecution case. One suggestion given to P.W.-2 Km. Rinki is that being step-mother, Smt. Belmati used to beat Km. Pooja due to which she herself poured inflammable substance upon her.

The prosecution has failed to put its defence case. Eye witnesses P.W.-1, Km Pooja is the main injured in this case and her testimony carries much weight.

23. In ***Balwan and others Vs. State of Haryana***, passed in Criminal Appeal No.1842 of 2014 *Hon'ble Apex Court* held that "normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain protect the real culprit. It is trite law that evidence of injured witness, being a stamped witness, is accorded a special status in law. This is as a consequence of the fact that injuries to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness would not want to let actual assailant go unpunished."

24. P.W.-1 Km. Pooja and P.W.-2 Km. Rinki have fully supported the prosecution case in their respective statements and their statements were fully corroborated by medical evidence as discussed above, and prosecution has succeeded to prove its case against the accused beyond reasonable doubt.

25. No other point was raised from the side of accused-appellant.

26. Hence, in my opinion, prosecution version is consistent and the conviction and sentence recorded by the learned trial court below is correct and it has rightly convicted the accused-appellant which does not call for any interference, as a result, the appeal is liable to be dismissed.

27. The appeal is accordingly, **dismissed.**

(2021)08ILR A235
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2021

BEFORE

THE HON'BLE MOHD. ASLAM, J.

Crl. Misc. Ist Bail Application No. 3179 of 2021

Khushabe Ali ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Harish Kumar Yadav, Sri Keshari Nath Tripathi

Counsel for the Opposite Party:
A.G.A., Sri Pawan Kumar Shukla

A. Criminal Law - Code of Criminal Procedure, 1973-Section 439 - Indian Penal Code, 1860-Sections 498-A, 323, 504, 506, 354 - Dowry Prohibition Act, 1961-Section ¾-application-grant of bail-applicant and co-accused demanded dowry coupled with torture and beating her badly and subjected to unnatural intercourse by all accused—but in her statement u/s 164 Cr.P.C., victim confined herself regarding the demand of dowry and harassment and offence of sodomy was committed by her husband-no injury was found on the body of victim-no criminal history of the accused. (Para 1 to 12)

The application is allowed. (E-5)

(Delivered by Hon'ble Mohd. Aslam, J.)

1. Heard Sri Keshari Nath Tripathi, learned counsel for the applicant, learned A.G.A for the State and informant counsel, Pawan Kumar Shukla and perused the record.

2. It has been argued by learned counsel for the applicant that applicant is

innocent and he has been falsely implicated in the present case. It is further contended by learned counsel for the applicant that the F.I.R. was lodged on 08.09.2020, in Case Crime No. 337 of 2020, under Sections 498-A, 323, 504, 506, 354 I.P.C and read with Section 3/4 Dowry Prohibition Act, Police Station - Bhojpur, District – Moradabad.

3. It is contended by the learned counsel for the applicant that the F.I.R was lodged on 08.09.2020, in Case Crime No. 337 of 2020, under Sections 498-A, 323, 504, 506, 354 I.P.C and read with Section 3/4 Dowry Prohibition Act, Police Station - Bhojpur, District - Moradabad. After lapse of more than three months of the alleged incident, it was alleged that the accused/applicant and co-accused had demanded dowry coupled with torture and beating her badly resulting in breach of her modesty and it further alleged that the accused-applicant, while demanding dowry from her, she was also subjected to unnatural intercourse, as such, the victim has fully supported the version of the F.I.R The statement if victim under Section 161 Cr.P.C was recorded in which, she has stated before the Investigating Officer as to what was revealed by her counsel. It is further contended that the statement of the victim recorded under Section 164 Cr.P.C. wherein, the victim did not utter anything about the unnatural intercourse being done by accused except the intercourse done by the accused-applicant. It is contended that it is purely a family dispute, and the F.I.R of the alleged incident was lodged belatedly and no explanation thereof was given for the delay. It is further contended that as per amendment of Section 375 I.P.C the definition of ***'rape'*** includes so many things also. It is contended that as per Explanation - 2 Appended to the Section aforesaid revealed about the sexual intercourse with his own wife and the wife shall not be under fifteen years of age is no ***"rape"***. It is further argued keeping in view of the above facts and circumstances of the case offence punishable under Section 315 I.P.C, is not made out. It contended that Section 315 of I.P.C was amended and was substituted by ***Criminal Law Amendment Act No. 13 of 2013*** and the present case has taken place in the year 2020, therefore this case squarely covered by the aforesaid act. It is further alleged that there is no criminal history of the accused and has prayed that the accused-applicant be enlarged on bail. It has been lastly argued that she is languishing in jail since **17.11.2020**, having no criminal history and that in case he is released on bail, he will not misuse the liberty of bail and will cooperate in trial.

4. Learned A.G.A. has opposed the prayer for bail and has contended that in F.I.R. the allegations of demand of dowry, harassment and breaching of modesty of the victim has been alleged and it is further alleged that brother-in-law and brother of the accused-applicant also used to breach the modest of the victim and committed unnatural offence upon the victim several times.

5. Learned A.G.A has not disputed the statement recorded under Section 164 Cr.P.C of the victim and the victim has not deposed that brother-in-law of the accused and brother of the accused committed sodomy on her.

6. I have perused the facts and material available on record and has found that it is matter of family dispute and initially in the F.I.R. the victim has alleged that applicant-accused with co-accused brother-in-law and brother has demanded

dowry and has committed sodomy and modesty upon her, but in the statement recorded under Section 164 Cr.P.C, the victim has confined herself regarding the demand of dowry and breach of modesty and harassment and has also confined the act of sodomy and has stated that offence of sodomy was committed by her husband.

7. Section 375 Cr.P.C was substituted by Criminal Law Amendment Act 13 of 2013, where the ***'rape'*** is defined as follows :-

8. The relevant portion of the said Section is reproduced as below :

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

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

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

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

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

under the circumstances falling under any of the following seven descriptions:-

***First.** --- Against her will.*

***Secondly.** --- Without her consent.*

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

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

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

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

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

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

***Explanation 2.** Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*

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

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

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

[a] Substituted by the Criminal Law (Amendment) Act (No. 13 of 2013], S. 9 (3-2-2013)".

9. Exception 2, speaks that the sexual intercourse, with his own wife, the wife not being under fifteen years of age and from the perusal of Section 375-A, it includes unnatural offence also.

10. Keeping in view of all over the facts and circumstances of the case as well as the definition of ***"rape'*** as defined under Section 375, wherein the act of rape has been defined and is subjected to Exception no. 2 of the said act. No injury was found on the body of victim. I find that it to be a fit case for grant of bail to accused/ husband.

11. Considering the entire facts and circumstances of the case, submissions of learned counsel for the parties, nature of evidence and all attending facts and circumstances of the case, without expressing any opinion on merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

12. Let the applicant - **Khushabe Ali** involved in Case Crime No. 337 of 2020, under Sections 498-A, 323, 504, 506, 377 I.P.C & Section 3/4 of Dowry Prohibition Act, 1961, Police Station - Bhojpur, District - Moradabad, be released on bail on furnishing each a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions:-

1. The applicant shall not tamper with the evidence during the trial.

2. The applicant shall not pressurize / intimidate the prosecution witness.

3. The applicant shall appear before the trial court on the date fixed, unless personal presence is exempted.

4. The applicant shall not commit an offence similar to the offence of which she is accused, or suspected, of the commission of which she is suspected.

5. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the Court or to any police officer or tamper with the evidence.

13. In case of breach of any of the above condition, the prosecution shall be at liberty to seek cancellation of bail in accordance with law.

14. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by learned counsel for the applicant along with a self attested identity proof of the said persons (preferably *Aadhar* Card) mentioning the mobile number (s) to which the said *Aadhar* Card is linked before the concerned Court/ Authority/ Official.

15. The concerned Court/ Authority/ Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)08ILR A238
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2021

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE SHEKHAR KUMAR YADAV, J.

Crl. Misc. Writ Petition No. 728 of 2021

Pramod Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri V.P. Srivastava, Sri Ashish Mishra, Sri Arun Kumar Mishra

Counsel for the Respondents:
A.G.A.

Case of false implication cannot be accepted in Writ jurisdiction-can only be decided after due investigation-no ground for quashing the FIR.

W.P. dismissed. (E-7)

List of Cases cited:

1. Ashok Dixit Vs St. of U.P. & anr., 1987, U.P.Crl. R.

2. Romesh Thappar Vs St. of Madras, 1950 SC 124

3. The Superintendent Central Prison Vs Dr. Lohia,1960 Cri. L.J. 1002

4. Ram Manohar Lohia Vs St. of Bihar 1966 CrLJ 608

5. Amiya Kumar Karmakar Vs The St.of W.B. (1972) 2 Supreme Court Cases 672.

6. Ram Ranjan Chatterjee Vs The St. of W.B.(1975) 4 Supreme Court Cases 143.

(Delivered by Hon'ble Anjani Kumar Mishra, J.
&
Hon'ble Shekhar Kumar Yadav, J.)

1. Heard Shri Arun Kumar Mishra, learned counsel for the petitioner and learned AGA for the State.

2. By means of this writ petition, petitioner seeks quashing of the first information report dated 07.11.2020 giving rise to Case Crime No.728 of 2020, under Section 3(1) of the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, Police Station Robertsganj, District Sonebhadra.

3. The order dated 04.11.2020, passed by the second respondent, District Magistrate, Sonebhadra granting approval to the Gang Chart, Annexure-5 to the writ petition is also sought to be quashed.

4. We have heard Shri Arun Kumar Mishra, learned counsel for the petitioner and learned AGA for the State.

5. We have also heard Shri V.P. Srivastava, learned Senior Advocate on behalf of the petitioner, who had offered to assisted the Court in the instant matter.

6. The submission of learned counsel for the petitioner is that the first information report has been lodged on the basis of two criminal cases registered against the petitioner; First, being Case Crime No.387 of 2020 under Sections 307, 504, 506 Indian Penal Code, Police Station Robertsganj, District Sonebhadra. The first information report in this case, which is a cross case was lodged on 24.05.2020, the other case in this regard being case Crime No.386 of 2020. These cases arose from a private dispute regarding an electricity connection and the petitioner was one of the injured in the cross case.

7. The second case on the basis whereof, the impugned first information report has been registered, in Case Crime No.543 of 2020 under Sections 307 and 323 of Indian Penal Code, Police Station Robertsganj, District Sonebhadra. This first information report in this regard was lodged on 17.08.2020. As regards this case, the submission is that the incident took place on account of the private property dispute. Admittedly, there is enmity between the parties and it is a case of no injury.

8. Counsel for the petitioner has also reiterated that he has been granted bail in both the criminal cases lodged against him.

9. On the basis of the aforementioned, it is submitted that the facts alleged in the first information report do not make out any violence, threat or show of violence, intimidation, coercion etc. which would amount to disturbing public order. No temporal, pecuniary, material or other advantage having been procured by the petitioner, is alleged in the criminal cases lodged against him. Therefore, the requirements of Section 2(b) & 2(b) (viii) of the Act are not made out.

10. Sub-section (viii) referred to by counsel for the petitioner reads as follows -

" Preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful business, profession, trade or employment or any other lawful activity connected therewith, or".

11. It is next contended that recovery of a pistol and empty cartridges is from the co-accused in Case Crime No.386 of 2020, which was registered on the basis of an FIR lodged by one Arti Patel. From the allegations made in the FIR, it appears that the petitioner was intervening in a dispute between the first informant and the other accused, pertaining to an electricity connection.

12. Learned counsel for the petitioner has also relied upon the findings returned in the order granting bail to him in Case Crime No.387 of 2020 to canvas that the writ petition deserves to be allowed.

13. He has further submitted that the impugned FIR under the Gangsters Act is a case of false implication. In any case, the material satisfaction, allegedly recorded by the District Magistrate, while approving the Gang Chart is, without any basis.

14. Elaborating on the arguments advanced by learned counsel for the petitioner, Shri V.P. Srivastava, learned Senior Advocate has contended that for invocation of the provisions of the Act. Section 2(b) of the Act, which defines a Gang, is crucial.

15. He has submitted that there has to be violence, or threat or show violence, or intimidation, or coercion with the object of disturbing public order or for gaining any undue temporal, pecuniary, material or other advantage for himself or any other person.

16. The submission on the basis of the aforenoted Section 2(b) is that the criminal cases against the petitioner are not such, which would fall within the scope of the term "disturbing public order". They might be criminal acts but then every criminal Act cannot be construed as disturbing public order. Since, the public order was not disturbed in the two cases against the petitioner. Gangsters Act has wrongly been invoked. The impugned first information report deserves to be quashed. In support of his contention, he has relied upon the following decisions -

1. Ashok Dixit Vs. State of U.P. another, 1987, U.P.Crl. R.

In paragraph 40 of this judgement, the following portion of a judgement of the Apex Court has been extracted*". . . . public order' is an expression of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted. Although Section 9 (1A) refers to "securing the public safety" and "the maintenance of public order" as distinct purposes, it must be taken that "public safety" is used as a part of the wider concept of public order."*

2.Romesh Thappar Vs. State of Madras, 1950 SC 124

This judgement dealt with the powers conferred by Section 9(1) A of the Madras Maintenance of the Public Order Act 1949. In this judgement, it has been observed- *".....But it was urged that the expression "public safety" in the impugned Act, which is a statute relating to law and order, means the security of the Province, and, therefore,' 'the security of the State" with the meaning of article 19 (2)as "the State" has been defined in article 12 as including, among other things, the Government and the Legislature of each of the erstwhile Provinces. Much reli- ance was placed in support of this view on Rex v. Wormwood Scrubbs Prison(1) where it was held that the phrase "for securing the public safety and the' defence of. the realm" in section 1 of the Defence of the Realm (Consolidation) Act, 1914, was not limited to securing the country against a foreign foe but included also protection against internal disorder such as a rebellion. The decision is not of much assistance to the respondents as the context in (1) L.R. [1920] 2 K.B. 805. which the words "public safety" occurred in that Act showed unmistakably that the security of the State was the aim in view. Our attention has not been drawn to any definition of the expression "public safety," nor does it appear that the words have acquired any technical signification as words of art".*

The judgement finally goes on to hold as follows - *In other words, clause (2) of article 19 having allowed the imposition of restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent.*

3. The Superintendent Central Prison Vs. Dr. Lohia,1960 Cri. L.J. 1002

The Supreme Court decision in the Superintendent, Central Prison and another Vs. Dr. Ram Manohar Lohia was with regard to the term "public order" contained in Section 3 of the U.P. Special Power Act, 1932 while in *Ram Manohar Lohia Vs. State of Bihar*. The said term was considered in the light of Rule 30(1)(b) of the Defence of India Rules, 1962. In paragraph 14, the Apex Court observed as follows -

" By Section 3 of the U.P. Special Powers Act 1932 any instigation by word or visible representation not to pay or defer payment of any exaction or even contractual dues to Government, authority or a land-owner is made an offence. Even innocuous speeches are prohibited by threat of punishment. It was held that there is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under this section and that it is void"

The judgement finally went on to hold in paragraph 18 as follows -

*" **The foregoing discussion yields the following results: (1)** " Public order " is synonymous with public safety and tranquillity : it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State; (2) there must be proximate and reasonable nexus between the speech and the public order; (3) S. 3, as it now stands, does not establish in most of the cases comprehended by it any such nexus; (4) there is a conflict of decision on the question of severability in the context of an offending provision the language whereof is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislation; one view is that it cannot be split up if there is possibility of its being applied for purposes not sanctioned by the Constitution and the other view is that such a provision is valid if it is severable in its application to an object which is clearly demarcated from other object or objects falling outside the limits of constitutionally permissible legislation; and (5) the provisions of the section are so inextricably mixed up that it is not possible to apply the doctrine of severability so as to enable us to affirm the validity of a part of it and reject the rest".*

4. Ram Manohar Lohia Vs. State of Bihar 1966 CrLJ 608. By this judgement, a Habeas Corpus Petition filed by Ram Manohar Lohia was allowed on the ground that the expression "public order" used in the Defence of India Rules, 1962 is clearly distinguishable from the term "law and order" and that detention for maintenance of public order is permissible only with regard to disturbances with special word the public order. The order impugned in this case purported to have been made under R. 30(1) (b) of the Defence of India Rules, 1962.

5. Amiya Kumar Karmakar Vs. The State of West Bengal (1972) 2 Supreme Court Cases 672.

The Apex Court in this case has also drawn a distinction between "law and order" and "public order" while dealing with the provisions of Section 3(1) and read with Section 3(2) of the Maintenance of Internal Security Act, 26 of 1971(MISA). In paragraph 7 of the judgement, it has been observed as follows -

" Viewed from this angle it is difficult to regard such an act as a mere infraction of law and Order, for, such an act committed with such an intent and object and in such circumstances is one which strikes at the normal, Orderly life of the community in that locality. Its impact and potentiality thus affect public Order in the sense that it was aimed at bringing about dis Order and chaos upsetting the even tempo of life in that locality. It is, therefore, not possible to agree with the proposition that it affected the problem of law and Order only and was for that reason extraneous or irrelevant to the objects specified in Section 3 of the Act, in relation to which only a valid Order of detention there under could be made".

6. Ram Ranjan Chatterjee Vs. The State of West Bengal (1975) 4 Supreme Court Cases 143.

Similar is the position in this case, where again the order of detention under Section 3 of the Maintenance of Internal Security Act was under challenge. Paragraph 9 of the said judgement, reads as follows -

*"**As observed by Hidayatullah, J.** (as he then was) in Dr. Ram Manohar - Lohia v. State of Bihar & Ors. one has to imagine three concentric circles, in order to understand the meaning and import of the above expressions. 'Law and order' represents the largest circle within which is the next circle representing "public order" and the smallest circle represents "security of State". It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of State. It is in view of the above distinction, the Act defines the expressions "acting in any manner prejudicial to the security of the State" and "acting in any manner prejudicial to the maintenance of public order" separately. An order of detention made either on the basis that the detaining authority is satisfied that the person against whom the order is being made is acting in any manner prejudicial to the security of the State or on the basis that he is satisfied that such person is acting in any manner prejudicial to the maintenance of public order but which is attempted to be supported by placing reliance on both the bases in the grounds furnished to the detenu has to be held to be an illegal one vide decisions of this Court in Bhupal Chandra Ghosh v. Arif Ali & Ors.(2) and Satya Brata Ghose v. Arif Ali & Ors(3).*

The order of detention is, therefore, liable to be quashed and the detenu is entitled to be set at liberty. The petition is accordingly allowed".

From the arguments as also from the judgements cited, it is clear that the emphasis of Shri V.P. Srivastava, learned Senior Advocate is on the words *"with object of disturbing public order"* used in Section 2(b) of the Act, which defines a Gang. The said provision is extracted herein below -

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence or threat or show of violence, or intimidation, or coercion, or otherwise, with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage of himself of any other person, indulge in anti-social activities".

Upon a bare reading of the provision quoted above, we are unable to accept the contention made on behalf of the petitioner that to constitute a Gang, the member of the Gang should be operating only with the object of disturbing public order. The definition no doubt includes within its ambit acts of violence or threat, or show of violence, carried out with the object of disturbing public order. However, this is just the first part of the definition. The second part, which starts with the word *'or of gaining any as of undue temporal, pecuniary, material or other advantage of himself of any other person, indulge in anti social activities.*

17. We are of the considered opinion that the definition of a Gang is therefore, clearly in two parts and both are mutually exclusive. Each one of the two parts by itself would be enough to bring a case within the ambit of the term Gang.

18. To clarify further Section 2(b) in our opinion, provides that a group of person, singly or collectively would constitute a gang in either or the two conditions below-

(i) by violence, or thereat or show of violence or intimidation or coercion, or otherwise try to disturb public order,

OR

(ii) by violence or threat or show of violence or intimidation or coercion or

otherwise try to obtain undue temporal, pecuniary, material or other advantage for himself or any other person.

19. The words " indulge in anti-social activities refer to the various illustrations/ conditions specified thereafter as (i) to (xxv).

20. Under the circumstances, the contention that the impugned first information report deserves to be quashed as it does not fall within the purview of the definition of a 'Gang' in Section 2(b) of the Act, cannot be accepted and is hereby, repelled.

21. The contention of counsel for the petitioner that recovery of the fire arms and empty cartridges from the accused in Case Crime No.286 of 2020 would necessarily show that the said case against the petitioner is one of the false implication, cannot be accepted at this stage. The issue can be decided only after due investigation. In any case, the allegations are that the petitioner interfered in a private dispute between the two parties, with which, he prima facie had no connection. It is, therefore, clearly a case of coercion, intimidation and use of force against a person, who is alleged to have refused to provide electricity to his neighbour, who is stated to be a friend of the petitioner.

22. In any case, the existence of two criminal cases against the petitioner is not in dispute and therefore, in our considered opinion, no ground exists for quashing the impugned FIR.

23. Accordingly and for the reasons given above, the writ petition fails and is dismissed.

(2021)08ILR A244
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Writ Petition No. 814 of 2021

Ranveer Singh @ Ranbir Singh ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Shiv Sagar Singh, Sri Manish Gupta

Counsel for the Respondents:
A.G.A., Sri Sanjay Kumar Yadav, Sri Gyan Prakash

Sanction order granted prosecution u/s 19 of Prevention of Corruption Act, 1988-FIR lodged without departmental enquiry-chrges framed against the Petitioner-no reason to interfere in sanction order.

W.P. dismissed.(E-7)

List of Cases cited:-

1. C.B.I. Vs Ashok Kumar Aggrawal, reported in (2014) 14 SCC 295

2. Capt. M. Paul Anthony Vs Bharat Gold Mines Ltd. & anr., reported in (1999) 3 SCC 679

3. State Bank of Hyderabad & anr. Vs P. Kata Rao , JT 2008 (4) SC 577

(Delivered by Hon'ble Munishwar Nath Bhandari, J.
&
Hon'ble Shamim Ahmed, J.)

1. Heard Sri Shiv Sagar Singh and Sri Manish Gupta, learned counsel for the petitioner and Sri Gyan Prakash learned Senior Counsel assisted by Sri Sanjay Kumar Yadav as well as Smt. Manju Thakur, learned Additional Government Advocate for the respondents.

2. By this writ petition, a challenge has been made to the order dated 28th January, 2020, sanction for prosecution under Section 19 of Prevention of Corruption Act, 1988(in short "the Act of 1988").

3. Learned counsel submits that while the petitioner was working under Yamuna Expressway Industrial Development Authority, an order was issued by the Authority on 4th June, 2018. Direction was given to initiate departmental inquiry against the petitioner and others and at the same time for registration of F.I.R. The F.I.R. was lodged without a departmental inquiry. The petitioner was not named in the F.I.R. After the investigation, charge sheet was submitted against the petitioner also. The court took cognizance of the offence without sanction for prosecution and accordingly cognizance order was quashed by the High Court on a petition filed by the petitioner.

4. The sanction for prosecution was given thereupon. The court took cognizance of offence. The charges have also been framed by the Trial Court. It is submitted that order to sanction prosecution does not reveal application of mind of the competent authority which is otherwise a pre-condition in view of the judgment of Apex Court in the case of **CBI vs. Ashok Kumar Aggrawal, reported in (2014) 14 SCC 295**. The non application of mind is coming out from bare perusal of the impugned order. It does not disclose or give reference of the FIR. The case is accordingly covered by the judgment in the case of **Ashok Kumar Aggarwal** (supra).

5. It is also that the FIR could have been lodged only after conclusion of the departmental inquiry and not prior to it as per the Government Order dated 24.05.2012. A direction has been given that F.I.R. against an employee or officer can be lodged after compliance of the order dated 19.7.2005. It is after conclusion of the departmental inquiry and if any offence is made out. The government order dated 10.11.2012 has not been complied before grant of sanction for prosecution, thus the impugned order deserves to be set aside.

6. We have considered the submission made by the learned counsel for the petitioner and perused the record.

7. The order dated 28.01.2020 has been challenged mainly on two grounds; one by referring to the order dated 24.5.2012. It is submitted that impugned order has not been passed in strict compliance to the aforesaid order. A perusal of the order dated 24.05.2012 shows that as and when lapse or illegality/irregularity is found in action of the government officer then after holding a departmental inquiry, if criminality is found, the FIR can be registered. We do not find letter to have sanctity of law. Neither Cr.P.C. nor the Act of 1988 mandates departmental inquiry before registration of the F.I.R. If crime has been committed, it is not mandatory to hold and depends on the departmental inquiry before lodging F.I.R. The Apex Court has permitted simultaneous proceeding of departmental inquiry and the criminal case. A reference to the judgment of the Apex Court in the

case of **Capt. M. Paul Anthony vs. Bharat Gold Mines Ltd. and another, reported in (1999) 3 SCC 679** and **State Bank of Hyderabad & another Vs. P. Kata Rao** reported in **JT 2008 (4) SC 577** are relevant. The administrative order cannot override the statutory provision. The Cr.P.C provides for registration of F.I.R. on the commission of offence and is not made subject to departmental enquiry. Accordingly, challenge to order dated 28.01.2020 on the strength of administrative order dated 24.05.2012 cannot be accepted. The last paragraph of the order is quoted herenunder for ready reference:

"4- इसके अतिरिक्त श्री रणवीर सिंह, तत्कालीन तहसीलदार सम्प्रति तहसीलदार, खैर (अलीगढ़), श्री चमन सिंह, तत्कालीन नायब तहसीलदार सम्प्रति तहसीलदार, यमुना एक्सप्रेसवे औद्योगिक विकास प्राधिकरण तथा श्री पंकज कुमार, लेखपाल/सम्प्रति जनपद बिजनौर को निलम्बित करते हुए इनके विरूद्ध विभागीय कार्यवाही प्रारम्भ करने का कष्ट करें, ताकि इनसे प्राधिकरण को हुई हानि की वसूली की जा सके। साथ-साथ इनके विरूद्ध प्रथम सूचना रिपोर्ट दर्ज कराने की अनुमति भी प्रदान करने का कष्ट करें।"

8. The perusal of the para quoted above does not direct registration of the F.I.R. after conclusion of Departmental action. In this case, an F.I.R. was lodged and pursuant to it, investigation was conducted. The charge sheet has already been submitted finding evidence against the petitioner. The cognizance of the offence was taken after sanction for prosecution. The charges have also been framed against the petitioner.

9. The other argument of the petitioner is in reference to the judgment in the case of **Ashok Kumar Aggarwal**(supra). It is urged that the impugned order has been passed without application of mind. To analyse the argument, we have gone through the impugned order and find that it discloses offence committed by the petitioner while working as Tehsildar. Two FIRs have been lodged involving an amount of Rs.85.49 crores. The allegations against the petitioner have been narrated in the impugned order. It was passed after the investigation and the report submitted on 31.5.2018 at Annexure No.2 to the writ petition. Any discussion about the offence may cause prejudice to either of the parties in the trial thus we are not going much on the facts when trial has already commenced.

10. It is true that a reference of the F.I.R. has not been given by the authorities in the order but only for that reason, the sanction for prosecution would not vitiate even when offence under Section 13(1)(c), 13(1)(d) and 13(2) of the Act of 1988 is found. The name of the petitioner came during the course of investigation and looked into by the competent authorities while passing the order. Accordingly charge sheet was filed followed by the order of cognizance of the offence after the sanction for prosecution. The charges have already been framed against the petitioner. Thus in view of the aforesaid, there remains no reason to interfere in the order of sanction for prosecution now.

11. In view of the discussion made above and taking note of the subsequent development after passing of the order of sanction for prosecution dated 28.01.2020, we do not find any ground to quash it. The charges have already been framed by the court against the petitioner. In view of the

above, the petitioner can take any other ground for challenge to the order in the trial.

12.The writ petition, accordingly, fails and is **dismissed**.

(2021)08ILR A247
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2021

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE SHEKHAR KUMAR YADAV, J.

Crl. Misc. Writ Petition No. 1625 of 2021

Mohit Kumar Goyal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri V.P. Srivastava, Sri Prashant Vyas, Sri Abhishek Tandon, Sri Renu Singh

Counsel for the Respondents:
A.G.A., Sri Prem Shankar Kushwaha

Petitioner challenged total 11 FIRs-alleged representative of the company mmet the informant and placed purchased orders -but payment never materialised-bare perusal of the FIR - specific allegations against the Petitioner-ingredients of cognizable offences are clearly disclosed- FIR cannot be quashed.

W.P. dismissed. (E-7)

List of Cases cited:

1.T.T. Antony Vs St. of Kerala & Ors., 2001 (2) SCC 1048

2. Jagjit Singh Vs St. of Har.& ors., 2004 (13) SCC 294,

3. Babubhai Vs St. of Guj. & ors., 2010 SCC (12) 254,

4. Amitbhai Anilchandra Shah Vs C.B.I. & anr., 2013 SCC (6) 348,

5. Amish Devgan Vs U.O.I. & ors., Writ Petition (Criminal) No. 160 of 2020, decided on 7 December, 2020.

(Delivered by Hon'ble Anjani Kumar Mishra, J.
&
Hon'ble Shekhar Kumar Yadav, J.)

1. Heard Shri V.P. Srivastava, learned Senior Advocate assisted by Shri Prashant Vyas and Shri Abhishek Tandon, Advocates for the petitioner and learned A.G.A. for the State.

2. Sole petitioner seeks quashing of 11 FIRs detailed below:-

Case Crime No. 0650 of 2020, under Sections 406, 420 & 506 I.P.C., Police Station- Noida Sector-58, District- Gautam Budh Nagar (dated 24.12.2020), Case Crime No. 0021 of 2021, under Sections 406, 420 & 504, 120-B & 34 I.P.C., Police Station- Sector-58 Noida, District- Gautam Budh Nagar (dated 19.01.2021), Case Crime No. 0022 of 2021, under Sections 406, 420, 467, 468, 471 120-B, 34 I.P.C., Police Station- Sector-58 Noida, District- Gautam Budh Nagar (dated 19.01.2021), Case Crime No. 0023 of 2021, under Sections 406, 420, 467, 468, 471 120-B, 34 I.P.C., Police Station- Sector-58 Noida, District- Gautam Budh Nagar (dated 20.01.2021), Case Crime No. 0024 of 2021, under Sections 323, 406, 420, 467, 468, 471 120-B & 34 I.P.C., Police Station- Noida Sector-58 Noida, District- Gautam Budh Nagar (dated 20.01.2021), Case Crime No. 0025 of 2021, under Sections 406, 420, 467, 468, 471 120-B, 34 & 506

I.P.C., Police Station- Sector-58 Noida, District- Gautam Budh Nagar (dated 20.01.2021), Case Crime No. 0026 of 2021, under Sections 406, 420, 467, 468, 471 120-B, 34 I.P.C., Police Station- Sector-58 Noida, District- Gautam Budh Nagar (dated 20.01.2021), Case Crime No. 0027 of 2021, under Sections 406, 420, 504, 506, 120-B, 34 I.P.C., Police Station- Sector-58 Noida, District- Gautam Budh Nagar (dated 20.01.2021), Case Crime No. 0030 of 2021, under Sections 420, 406, Police Station- Sector-58 Noida, District- Gautam Budh Nagar (dated 22.01.2021), Case Crime No. 228 of 2020, under Sections 323, 406, 420, 467, 468, 471 120-B & 34 I.P.C., Police Station- Noida Sector-58, District- Gautam Budh Nagar (dated 27.05.2020), Case Crime No. 0450 of 2020, under Sections 420, 406 I.P.C., Police Station- Phase-III, District- Gautam Budh Nagar (dated 07.07.2020).

3. The second prayer made in the writ petition is that the petitioner be released from unlawful detention with regard to the 11 FIRs noted above.

4. The allegations in the afore-noted 11 FIRs are similar. The first informants therein have complained that representatives of a company namely, M/s Dubai Dry Fruits and Spices Hub met the first informants and placed purchased orders for supply of various edibles. Payments were not made, despite the items having been supplied.

5. On payments being pressed for, the first informants are alleged to have been intimidated and the actual payments never materialised. The office of the company has been locked. It is also the allegation in the FIRs that false companies were created and using the some modus operandi, a huge amount of money has been misappropriated. The entire exercise is on the planning of several persons including the petitioner.

6. It has been submitted by Shri V.P. Srivastava, learned Senior Advocate that the petitioner is Director of one M/s Family of Dry Fruits India Private Limited, a duly incorporated company having its office at U-25/A, DLF Phase-3, Near Pink Town, House Market, Sector-24, Gurugram (Haryana), which is engaged in the business of buying essential commodities including rice, pulses, dry fruits, makhana etc.

7. He has submitted that two companies named in the FIR are M/s Dubai Dry Fruits and Spices and M/s Ayurvedic Commodities Company. The petitioner has no connection with the afore-noted two companies and that he has wrongly and illegally been roped in only with a view to harass him.

8. In the writ petition, it has also been reiterated time and again that the petitioner had no business dealings with any of the first informants and is not even aware of their identity. It is also alleged that no offence has been committed by the petitioner. He is not a beneficiary of the transactions complained of in the FIR and that the impugned FIRs do not disclose commission of any cognizable offence by the petitioner.

9. Apart from the above, the main contention of Shri V.P. Srivastava, learned Senior Advocate is that in respect of the same set of facts separate and repeated FIRs cannot be lodged. Since 11 FIRs containing the same allegations have been lodged against the petitioner, the same are

sheer abuse of the process of the court and, therefore, the same deserve to be quashed.

10. In support of his contention, he has placed and has taken the court through various paragraphs of the following judgments:-

1. T.T. Antony Vs. State of Kerala & Ors., 2001 (2) SCC 1048, specially paragraph 27,

2. Jagjit Singh Vs. State of Haryana & Ors., 2004 (13) SCC 294, specially paragraph 16 to 19,

3. Babubhai Vs. State of Gujarat & Ors., 2010 SCC (12) 254, specially paragraphs 15, 16, 21, 23, 24 & 25,

4. Amitbhai Anilchandra Shah Vs. CBI & Anr., 2013 SCC (6) 348, specially paragraph 36.

5. The judgments in Writ Petition (Criminal) No. 160 of 2020, Amish Devgan Vs. Union of India And Others decided on 7 December, 2020.

11. It has been reiterated that a second or repeated first information reports cannot be lodged regarding the same occurrence.

12. Learned AGA on the other hand submitted that each of the impugned FIR's pertains to a different transaction and is a separate case. The submission of learned counsel for the petitioner to the contrary is factually incorrect, although he does not dispute the legal position laid down in T.T. Antony (supra).

13. We have considered the submissions made by learned counsel for the partied and perused the record.

14. Insofar as the submission that the petitioner is not named in several of the impugned FIRs, the same does not improve his inasmuch as a person not named in an FIR, cannot be said to be aggrieved, thereby, and, therefore, cannot challenge it.

15. Insofar as the FIRs, wherein the petitioner is admittedly named are concerned, a bare perusal, thereof, shows that there are specific allegations against the petitioner also. The averments in the petition that the petitioner has no nexus or connection with the companies namely M/s Dubai Dry Fruits and Spices and M/s Ayurvedic Commodities Company, is the petitioner defence, as is the allegation that the petitioner had no inkling or knowledge of the alleged business transactions between the representatives/officials of the aforesaid Companies and the first informants. The afore-noted allegations are something to be examined during investigation. The same are factual issues, which cannot be decided by the writ court.

16. It would be relevant to note that from the allegations in the impugned FIRs, which are open to challenge by the petitioner, the ingredients of cognizable offences are clearly disclosed. The FIR therefore, cannot be quashed.

17. The only point which requires for consideration now is the submission of Shri V.P. Srivastava that numerous FIRs have been lodged pertaining to the same set of facts and, therefore, the lodging of separate FIR is malicious and is abuse of the process of the court and hit by the ratio of the decision of the Apex Court in T.T. Antony (supra) as also the other judgments cited by him.

18. The judgments cited on behalf of petitioner basically flow and follow the judgment of the Apex Court in the case of T.T. Antony (supra), wherein it has been observed as follows:-

"From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus there can be no second F.I.R. and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the station house diary, the officer in charge of a Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Cr.P.C."

19. In the context of the arguments, we have carefully examined the allegations in the impugned FIRs. These FIRs have been lodged by separate persons making similar allegations of cheating fraud, criminal intimidation etc. against the accused, therein. However, it cannot be held that all the FIRs pertained to or arise out of one and the same transaction. The transactions may, at best, be similar or that cheating criminal intimidation etc. were resorted to but each FIR pertains to a separate set of facts and separate and distinct transactions.

20. Under the circumstances, therefore, we have unable to agree that the impugned FIRs pertain to the same incident. The incidents can at best said to be similar but the facts alleged in the impugned FIRs do not flow from a single transaction or a single incident.

21. For this reason, the submission made by Shri V.P. Srivastava cannot be accepted and, therefore, the impugned orders cannot be quashed on the submissions made.

22. Although, not specifically argued, however it has also been averred in the writ petition that the facts alleged in the impugned FIRs are basically commercial transactions, which give rise to civil liabilities. Therefore, the impugned FIRs are malicious and abuse of the process of the court.

23. This case on the petitioners may or may not have been substance. However, this is an aspect which the writ court while dealing with a writ petition, seeking quashing of the FIR, is not required to enter into. The writ court is only required to examine as to whether the allegation in the FIRs, which are under challenge, disclose commission of a cognizable offence or not. Once the allegations disclose or constitute a cognizable offence, the writ court has no occasion to interfere.

24. In view of the above, and since the submissions made on behalf of the petitioner have been repelled, herein above, the writ petition is found to be without merit and is dismissed.

(2021)08ILR A251
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Writ Petition No. 4691 of 2021

Iserveu Technologies Pvt. Ltd.
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ujjwal Satsangi

Counsel for the Respondents:
A.G.A., Sri Satish Chaturvedi

Jurisdiction of Writ Court is quite limited for quashing the F.I.R. -it cannot marshal and record finding on the questions of fact-it is in domain of the investigating officer-Court not inclined to quash the F.I.R.

W.P. dismissed. (E-7)

List of Cases cited:

1. St.of Har. Vs 2 Bhajanlal, AIR 1992 SC 604

2. Sta.of Telangana Vs Habib Abdullah Jeelani & ors.; (2017)2 SCC 779,

3. Criminal Appeal No.742 of 2020 (Arising out of SLP (Crl) No.5598 of 2020 (Arnab Manoranjan Goswami Vs St. of Mah. & ors.)

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

1. Heard Sri Ujjawal Satsangi, learned counsel for the petitioner, Sri Satish Chaturvedi, learned counsel for the respondent no. 4 through video conferencing, learned A.G.A. for the State and perused the record.

2. This writ petition has been filed by the petitioner seeking following relief :

"(i) Issue an appropriate writ, order or direction calling for the record and quashing the impugned case crime/FIR No. 0009/2020 dated 07.01.2020, under Section 66D of IT (Amendment) Act, 2008, P.S. Kidwai Nagar, District- Kanpur Nagar.

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondents not to arrest the management or employees of the petitioner company in pursuance of the impugned case crime/FIR No. 0009/2020 dated 07.01.2020, under Section 66D of IT (Amendment) Act, 2008, P.S. Kidwai Nagar, District Kanpur Nagar.

(iii) Issue a writ, order or direction in the nature of mandamus directing the respondents not to seize the Bank Account of the petitioner i.e. A/c No. 36190836357 at State Bank of India, Branch KIIT Square, Bhubaneshwar.

(iv) To issue any other writ or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(v) To award the costs in favour of the petitioner."

3. Learned counsel for the petitioner submits that the petitioner's company is a Financial Technology Startup, recognized under the Companies Act, 2013, Department of Promotion of Industry and Internal Trade. The work of the company is to promoting digital financial transaction and works in relation with nationalized and private sector banks to provide mobile banking penetration in the rural area of the country. Evidently, the

petitioner's company facilitate the online transaction of money and provide ability to the customers to have digital financial presence. In the event of the entire process, the petitioner's company do not keep any amount and transfer the entire deposited amount in hands of the customers for their utilization. The case of the prosecution is that the respondent no. 4 received a call for KYC update on his phone on 04.01.2020. Thereafter, the respondent no. 4 downloaded an Application i.e. Team Viewer App and soon Rs. 10,00,000/- were deducted from the bank accounts of the respondent no. 4, his son Akash Jain and his wife Meena Jain. Learned counsel for the petitioner further submitted that the Bank of the petitioner received an e-mail from Cyber Crime Cell of Kanpur Nagar on 18.01.2020 and in virtue thereof, the bank account of the petitioner was seized. Learned counsel for the petitioner further argued that the money was transferred from the account of respondent no. 4 to the bank account of Saddam Hussain and thereafter Saddam Hussain transferred the amount to M/s Systematic Services Pvt. Ltd. and the same was further transferred to the bank account of the petitioner. Learned counsel for the petitioner submits that no case under Section 66D of I.T. (Amendment) Act, 2008 is made out against the petitioner and prays to quash the impugned F.I.R.

4. Learned A.G.A. as well as learned counsel for the respondent no. 4 have jointly submitted that the allegations levelled in the FIR is correct and it is the matter of investigation and cognizable offence is made out against the petitioner and there is no justification for quashing of the impugned FIR.

5. Learned counsel for the petitioner has made reference to the judgment of the Apex court in the case of **State of Haryana vs. Bhajanlal), AIR 1992 SC 604**. Learned counsel for the petitioner in particularly, referred to paragraph 108(7) of the said judgment which is quoted herein for ready reference.

"108. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 of the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercise.

... ...

(7)Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

6. Although the learned counsel for the petitioner has relied on judgment in the case of **Bhajanlal**(supra), we do not find pleading of the nature required to make out a case under paragraph 108(7) of the judgment. The counsel for the petitioner was asked to invite attention of the Court towards the pleading to fall under paragraph 108(7) of the judgment in the case of **Bhajanlal**(supra). He failed to do so.

7. The allegations made in the F.I.R. discloses an offence. Any comments on merits may cause prejudice to the petitioner as the investigation is yet to be completed.

8. In view of the judgment of Apex Court in the case of **State of Telangana Vs. Habib Abdullah Jeelani & Ors.; (2017)2 SCC 779**, the jurisdiction of this Court is quite limited for quashing the F.I.R. It cannot marshal and record finding on the questions of fact. It remains in the domain of the Investigating Officer. The allegation in the F.I.R. is serious and regarding illicit money transaction and other allegations also which are quoted hereunder for ready reference.

"सेवा में थाना प्रभारी किदवई नगर, कानपुर दिनांक 04.01.2020 महोदय जी, साइबर फ्राड सम्बन्ध में मेरे बैंक खाते के बारे में मेरे पास Paytm के लिये KYC कराने के लिए मो०नं० 8918536632 से फोन आया था आज दिनांक 04.01.2020 समय लगभग 16.00 Hrs Pm उन्होंने हमसे QS app को Play store से Team VeEWerapp डाउनलोड करवाया फिर उसके निर्देशानुसार हम आगे बढते गये रहे। हमने देखा कि उन्होंने हमसे Rs. 1/-PAYTM में ट्रांसफर करवाया और उसके बाद मेरे पास कई OTP आने लगो फिर मेरे एकाउंट से Rs. 10,00,004.90 (Rs. Ten LAKH and Four and paise Ninety only) डेबिट हो गए। फिर Rs. 42,000/- निकल गए फिर Rs.10,000/- निकल गए उसके बाद Rs.5,000/-निकल गये। उसी समय Rs. 1,00,000/- भी निकल गए। लेकिन यह Rs.1,00,000/-PAYTM से हमें मनोज कुमार जैन के खाते में आकाश जैन के खाते से भी हमारे 1,00,000/-निकल गए। इस संबंध में हमने HDFC BANK में अपने खाता CEASE करा दिये। और REF.NO.111033377 हमें दिया गया। इसके अलावा हमारे पास फ्राड करने वाला का फोन आया 8918536632 मोबाइल नं० से और दुबारा पैसे का लेन देन फ्राड करने के लिए और मेरे अकाउंट HDFC BANK, गोविंद नगर कानपुर में है। जिसकी विवरणी निम्न है। दिनांक 04.01.2020 account number savings bank 1 02981600006383 मनोज कुमार जैन, निकासी-10,00,004.90/- debit card NO-43862401352938332.02981530005323 मीना जैन, निकासी 42,000/- निकासी Rs.10,000/कुल 52000/- debit card NO-41602108000891643.02981600005640 आकाश जैन, निकासी- Rs.1,00,000/- निकासी Rs.5000/- कुल 105000/- debit card no-5129670600714344 यह सब कार्यवाही 16:00pm बजे से 16:30 तक के लगभग हुई। कृपया आपका विभाग मेरी मदद करे जिससे कि मेरे रुपये मुझे मिल जाए अतिशय धन्यवाद sd अंग्रेजी अपठनीय 04.01.2020 मनोज कुमार जैन R/o 128/589, K Block, मेन रोड, किदवई नागर कानपुर-208011 थाना किदवई नगर Mob-9336331895 sd अंग्रेजी अपठनीय 04.01.2020 नोट- मैं का० 5260 आकाश तिवारी प्रमाणित करता हूँ कि यह तहरीर व कायमी मेरे द्वारा बोल बोलकर टाइप करायी गयी।"

9. In the recent judgment dated **27.11.2020** in **Criminal Appeal No.742 of 2020 (Arising out of SLP (Crl) No.5598 of 2020 (Arnab Manoranjan Goswami vs. State of Maharahtra and other) Hon'ble Supreme Court** has reiterated the principles with regard to quashing of F.I.R. and after referring to various earlier judgments observed as under :

*"42 Now, it is in this background that it becomes necessary for this Court to evaluate what, as a matter of principle, is the true import of the decision of this Court in **Habib Jeelani** (supra). This was a case where, on the basis of a report*

underSection 154off theCrPC, an FIR was registered for offences punishable underSections 147,148,149and307of the IPC. Challenging the initiation of the criminal action, the inherent jurisdiction of the High Court to quash an FIR was invoked. The High Court (as paragraph 2 of the judgment of this Court in Habib Jeelani (supra) indicates) expressed its "disinclination to interfere on the ground that it was not appropriate to stay the investigation of the case". It was in this background that the following issue was formulated in the first paragraph of the judgment of this Court, speaking through Justice Dipak Misra (as he then was), for consideration:

"1. The seminal issue that arises for consideration in this appeal, by special leave, is whether the High Court while refusing to exercise inherent powers underSection 482of the Code of Criminal Procedure (CrPC) to interfere in an application for quashment of the investigation, can restrain the investigating agency not to arrest the accused persons during the course of investigation."

Between paragraphs 11 and 15, this Court then evaluated the nature of the jurisdiction underSection 482of the CrPC or underArticle 226of the Constitution for quashing an FIR and observed:

"(11) Once an FIR is registered, the accused persons can always approach the High Court underSection 482CrPC or underArticle 226of the Constitution for quashing of the FIR.In Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 : AIR 1992 SC 604] the two- Judge Bench after referring to Hazari Lal Gupta v. Rameshwar Prasad [Hazari Lal Gupta v. Rameshwar Prasad, (1972) 1 SCC 452 : 1972 SCC (Cri) 208] , Jehan Singh v. Delhi Admn. [Jehan Singh v. Delhi Admn., (1974) 4 SCC 522 : 1974 SCC (Cri) 558 : AIR 1974 SC 1146] ,Amar Nath v. State of Haryana [Amar Nathv. State of Haryana, (1977) 4 SCC 137: 1977 SCC (Cri) 585] ,Kurukshetra University v. State of Haryana [Kurukshetra Universityv. State of Haryana, (1977) 4 SCC 451 : 1977 SCC (Cri) 613] ,State of Bihar v. J.A.C.Saldanha [State of Bihar v. J.A.C. Saldanha, (1980) 1 SCC 554 : 1980 SCC (Cri) 272 : AIR 1980 SC 326] ,State of W.B. v. Swapan Kumar Guha [State of W.B. v. Swapan Kumar Guha, (1982) 1 SCC 561 : 1982 SCC (Cri) 283 : AIR 1982 SC 949] ,Nagawwa v. Veeranna Shivalingappa Konjalgi [Nagawwav. Veeranna Shivalingappa Konjalgi, (1976) 3 SCC 736 : 1976 SCC (Cri) 507 : AIR 1976 SC 1947] , Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre, (1988) 1 SCC 692 : 1988 SCC (Cri) 234] ,State of Bihar v. Murad Ali Khan [State of Biharv. Murad Ali Khan, (1988) 4 SCC 655 : 1989 SCC (Cri) 27 : AIR 1989 SC 1] and some other authorities that had dealt with the contours of exercise of inherent powers of the High Court, thought it appropriate to mention certain category of cases by way of illustration wherein the extraordinary power underArticle 226of the Constitution or inherent power underSection 482CrPC could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice. The Court also observed that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad cases wherein such power should be exercised.

(12). The illustrations given by the Court need to be recapitulated: (Bhajan Lal case [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 :

AIR 1992 SC 604] , SCC pp. 378-79, para 102)

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers underSection 156(1)of the Code except under an order of a Magistrate within the purview ofSection 155(2)of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated underSection 155(2)of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisionsof the Codeor the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision inthe Codeor the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

It is worthy to note that the Court has clarified that the said parameters or guidelines are not exhaustive but only illustrative. Nevertheless, it throws light on the circumstances and situations where the Court's inherent power can be exercised.

13. There can be no dispute over the proposition that inherent power in a matter of quashment of FIR has to be exercised sparingly and with caution and when and only when such exercise is justified by the test specifically laid down in the provision itself. There is no denial of the fact that the power under Section 482CrPC is very wide but it needs no special emphasis to state that conferment of wide power requires the Court to be more cautious. It casts an onerous and more diligent duty on the Court.

14. In this regard, it would be seemly to reproduce a passage fromKurukshetra University [Kurukshetra University v. State of Haryana, (1977) 4 SCC 451 : 1977 SCC (Cri) 613] wherein Chandrachud, J. (as his Lordship then was) opined thus: (SCC p. 451, para 2) —

"2. It surprises us in the extreme that the High Court thought that in the exercise of its inherent powers underSection 482of the Code of Criminal Procedure, it could quash a first information report. The police had not even commenced investigation into the complaint filed by the Warden of the University and no proceeding at all was pending in any court in pursuance of the FIR. It ought to be realised that inherent powers do not confer an arbitrary

jurisdiction on the High Court to act according to whim or caprice. That statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases."

(15). We have referred to the said decisions only to stress upon the issue, how the exercise of jurisdiction by the High Court in a proceeding relating to quashment of FIR can be justified. We repeat even at the cost of repetition that the said power has to be exercised in a very sparing manner and is not to be used to choke or smother the prosecution that is legitimate. The surprise that was expressed almost four decades ago in Kurukshetra University case [Kurukshetra University v. State of Haryana, (1977) 4 SCC 451 : 1977 SCC (Cri) 613] compels us to observe that we are also surprised by the impugned order."

43 Thereafter, this Court noted that "the High Court has not referred to allegations made in the FIR or what has come out in the investigation". While on the one hand, the High Court declined in exercising its jurisdiction underSection 482to quash the proceedings, it nonetheless directed the police not to arrest the appellants during the pendency of the investigation. It was in this context that thisCourt observed that the High Court had, while dismissing the applications underSection 482, passed orders that if the accused surrenders before the trial Magistrate, he shall be admitted to bail on such terms and conditions as it was deemed fit and appropriate. After adverting to the earlier decision in ***Hema Mishra vs State of UP, (2014) 4 SCC 453,*** *this Court observed:*

"23. We have referred to the authority inHema Mishra [Hema Mishra v. State of U.P., (2014) 4 SCC 453 : (2014) 2 SCC (Cri) 363] as that specifically deals with the case that came from the State of Uttar Pradesh whereSection 438CrPC has been deleted. It has concurred with the view expressed inLal Kamlendra Pratap Singh [Lal Kamlendra Pratap Singh v. State of U.P., (2009) 4 SCC 437 : (2009) 2 SCC (Cri) 330] . The said decision, needless to say, has to be read in the context of the State of Uttar Pradesh. We do not intend to elaborate the said principle as that is not necessary in this case. What needs to be stated here is that the States whereSection 438CrPC has not been deleted and kept on the statute book, the High Court should be well advised that while entertaining petitions 226of the Constitution orSection 482CrPC, it exercises judicial restraint. We may hasten to clarify that the Court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, has the jurisdiction to quash the investigation and may pass appropriate interim orders as thought apposite in law, but it is absolutely inconceivable and unthinkable to pass an order of the present nature while declining to interfere or expressing opinion that it is not appropriate to stay the investigation. This kind of order is really inappropriate and unseemly. It has no sanction in law. The courts should oust and obstruct unscrupulous litigants from invoking the inherent jurisdiction of the Court on the drop of a hat to file an application for quashing of launching an FIR or investigation and then seek relief by an interim order. It is the obligation of the Court to keep such unprincipled and unethical litigants at bay."

44 The above decision thus arose in a situation where the High Court had declined to entertain a petition for quashing an FIR underSection 482 Cr.P.C.However, it nonetheless directed

the investigating agency not to arrest the accused during the pendency of the investigation. This was held to be impermissible by this Court. On the other hand, this Court clarified that the High Court if it thinks fit, having regard to the parameters for quashing and the self-restraint imposed by law, has the jurisdiction to quash the investigation "and may pass appropriate interim orders as thought apposite in law". Clearly therefore, the High Court in the present case has misdirected itself in declining to enquire prima facie on a petition for quashing whether the parameters in the exercise of that jurisdiction have been duly established and if so whether a case for the grant of interim bail has been made out. The settled principles which have been consistently reiterated since the judgment of this Court in ***State of Haryana vs Bhajan Lal, 1992 Supp.1 SCC 335("Bhajan Lal")*** *include a situation where the allegations made in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused. This legal position was recently reiterated in a decision by a two-judge Bench of this Court in* ***Kamal Shivaji Pokarnekar vs State of Maharashtra, (2019)14 SCC 350***

45 The striking aspect of the impugned judgment of the High Court spanning over fifty-six pages is the absence of any evaluation even prima facie of the most basic issue. The High Court, in other words, failed to apply its mind to fundamental issue which needed to be considered while dealing with a petition for quashing underArticle 226of the Constitution orSection 482of the CrPC. The High Court, by its judgment dated 9 November 2020, has instead allowed the petition for quashing to stand over for hearing a month later, and therefore declined to allow the appellant"s prayer for interim bail and relegated him to the remedy underSection 439of the CrPC. In the meantime, liberty has been the casualty. The High Court having failed to evaluate prima facie whether the allegations in the FIR, taken as they stand, bring the case within the fold ofSection 306read withSection 34of the IPC, this Court is now called upon to perform the task."

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57 While considering an application for the grant of bail under Article 226 in a suitable case, the High Court must consider the settled factors which emerge from the precedents of this Court. These factors can be summarized as follows:

(i) The nature of the alleged offence, the nature of the accusation and the severity of the punishment in the case of a conviction;

(ii) Whether there exists a reasonable apprehension of the accused tampering with the witnesses or being a threat to the complainant or the witnesses;

(iii) The possibility of securing the presence of the accused at the trial or the likelihood of the accused fleeing from justice;

(iv) The antecedents of and circumstances which are peculiar to the accused;

(v) Whether prima facie the ingredients of the offence are made out, on the basis of the allegations as they stand, in the FIR; and

(vi) The significant interests of the public or the State and other similar considerations.

*58 These principles have evolved over a period of time and emanate from the following (among other) decisions:****Prahlad Singh Bhati vs NCT, Delhi, (2001) 4 SCC***

280;Ram Govind Upadhyay vs Sudarshan Singh, (2002) 3 SCC 598; State of UP vs Amarmani(2001) 4 SCC 280(2002) 3 SCC 598 J Tripathi, (2005)8 SCC 2133;Prasanta Kumar Sarkar vs Ashis Chatterjee, (2010) 14 SCC 496;Sanjay Chandra vs CBI, (2012) 1 SCC 40; andP. Chidambaram vs Central Bureau of Investigation, (Criminal Appeal No.1605 of 2019 decided on 22 October 2019).

59 These principles are equally applicable to the exercise of jurisdiction underArticle 226of the Constitution when the court is called upon to secure the liberty of the accused. The High Court must exercise its power with caution and circumspection, cognizant of the fact that this jurisdiction is not a ready substitute for recourse to the remedy of bail underSection 439of the CrPC. In the backdrop of these principles, it has become necessary to scrutinize the contents of the FIR in the case at hand. In this batch of cases, a prima facie evaluation of the FIR does not establish the ingredients of the offence of abetment of suicide underSection 306of the IPC. The appellants are residents of India and do not pose a flight risk during the investigation or the trial. There is no apprehension of tampering of evidence or witnesses. Taking these factors into consideration, the order dated 11 November 2020 envisaged the release of the appellants on bail.

60 Human liberty is a precious constitutional value, which is undoubtedly subject to regulation by validly enacted legislation. As such, the citizen is subject to the edicts of criminal law and procedure.Section 482recognizes the inherent power of the High Court to make such orders as are necessary to give effect to the provisions of theCrPC "or prevent abuse of the process of any Court or otherwise to secure the ends of justice". Decisions of this court require the ***High(2005) 8 SCC 21(2010) 14 SCC 496(2012) 1 SCC 40Criminal Appeal No. 1605 of 2019 decided on 22 October 2019*** *Courts, in exercising the jurisdiction entrusted to them underSection 482, to act with circumspection. In emphasising that the High Court must exercise this power with a sense of restraint, the decisions of this Court are founded on the basic principle that the due enforcement of criminal law should not be obstructed by the accused taking recourse to artifices and strategies. The public interest in ensuring the due investigation of crime is protected by ensuring that the inherent power of the High Court is exercised with caution. That indeed is one - and a significant - end of the spectrum. The other end of the spectrum is equally important: the recognition bySection 482of the power inhering in the High Court to prevent the abuse of process or to secure the ends of justice is a valuable safeguard for protecting liberty. The Code of Criminal Procedure of 1898 was enacted by a legislature which was not subject to constitutional rights and limitations; yet it recognized the inherent power in Section 561A. Post- Independence, the recognition by Parliament of the inherent power of the High Court must be construed as an aid to preserve the constitutional value of liberty. The writ of liberty runs through the fabric of the Constitution. The need to ensure the fair investigation of crime is undoubtedly important in itself, because it protects at one level the rights of the victim and, at a more fundamental level, the societal interest in ensuring that crime is investigated and dealt with in accordance with law. On the other hand, the misuse of the criminal law is a matter of which the High Court and the lower Courts in this country must be alive. In the present case,*

the High Court could not but have been cognizant of the specific ground which was raised before it by the appellant that he was being made a target as a part of a series of occurrences which have been taking place since April 2020. The specific case of the appellant is that he has been targeted because his opinions on his television channel are unpalatable to authority. Whether the appellant has established a case for quashing the FIR is something on which the High Court will take a final view when the proceedings are listed before it but we are clearly of the view that in failing to make even a prima facie evaluation of the FIR, the High Court abdicated its constitutional duty and function as a protector of liberty. Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum - the district judiciary, the High Courts and the Supreme Court - to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum - the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting."

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"63 More than four decades ago, in a celebrated judgment in ***State of Rajasthan, Jaipur vs Balchand, (1977)4 SCC 306****, Justice Krishna Iyer pithily reminded us that the basic rule of our criminal justice system is bail, not jail. The High Courts and Courts in the district judiciary of India must enforce this principle in practice, and not forego that duty, leaving this Court to intervene at all times. We must in particular also emphasise the role of the district judiciary, which provides the first point of interface to the citizen. Our district judiciary is wrongly referred to as the 'subordinate judiciary'. It may be subordinate in hierarchy but it is not subordinate in terms of its importance in the lives of citizens or in terms of the duty to render justice to them. High Courts get burdened when courts of first instance decline to grant anticipatory bail or bail in deserving cases. This continues in the Supreme Court as well, when High Courts do not grant bail or anticipatory bail in cases falling within the parameters of the law. The consequence for those who suffer incarceration are serious. Common citizens without the means or resources to move the High Courts or this Court languish as undertrials. Courts must be alive to the situation as it prevails on the ground - in the jails and police stations where human dignity has no protector. As judges, we would do well to remind ourselves that it is through the instrumentality of bail that our criminal justice system''s primordial interest in preserving the presumption of innocence finds its most eloquent expression. The remedy of bail is the "solemn expression of the humaneness of the justice system". Tasked as we are with the primary responsibility of preserving the liberty of all citizens, we cannot countenance an approach that has the consequence of applying this basic rule in an inverted form. We have given expression to our anguish in a case where a citizen has approached this court. We have done so in*

order to reiterate principles which must govern countless other faces whose voices should not go unheard."

10. Taking note of the nature of the allegation made in the F.I.R. and the law laid down by the Hon'ble Apex Court and the discussion made above, this Court is not inclined to quash the F.I.R. Accordingly, the writ petition fails and is **dismissed**.

11. No order as to costs.

(2021)08ILR A260
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Crl. Misc. Writ Petition No. 6583 of 2021

Dr. Mukut Nath Verma
...Petitioner-in-Person
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dr. Mukut Nath Verma

Counsel for the Respondents:
A.G.A.

Serious allegations have been made by the Petitioners against respondent authorities-but neither supporting document nor any material available on record to support the contention-Petitioner has unauthorisedly filed the writ-as no authorization has been placed neither of accused nor of his family member.

W.P. dismissed with cost. (E-7)

List of Cases cited:

1. Improvement Trust Ropar through its Chairman Vs S. Tejinder Singh Gujral & ors., 1995 Supp. (4) SCC 577 (para-3)

2. Dhanraj Singh Choudhry Vs Nathulal Vishwakarma, (2012) 1 SCC 741 (Para-25)

3. O.P. Sharma Vs High Court of P&H, (2011) 6 SCC 86

4.Chandra Prakash Tyagi Vs Benarsi Das (dead) by legal representatives & ors., (2015) 8 SCC 506

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

1. Heard Dr. Mukut Nath Verma, petitioner in person through video conferencing and Sri Manish Goel, learned Additional Advocate General assisted by Sri A.K. Sand, learned AGA for State-respondent.

2. This writ petition has been filed praying for the following relief:

"I. Issue a writ, order or direction in the nature of mandamus to the respondent no. 5 & 6 SHO P.S. Hazratganj Kotwali Lucknow UP and SHO Colonelganj, Prayagraj, UP to lodge FIRs on the basis of complaints dated 22.12.2020 and 07.07.2021 respectively under Section 154 Cr P C made by the petitioner and to provide copy of the FIRs thereof;

II. Issue a writ, order or direction in the nature of mandamus to the respondent no. 12 Central Bureau of Investigation for investigating (C.B.I.) both the FIRs;

III. Issue a writ, order or direction in the nature of mandamus to the

respondent No. 1 & 2 to provide sufficient permanent security to the Petitioner in order to meet his client Mr. Mani Lal Patidar and to prosecute the petitions before the any Authorities as Petitioner has been receiving life threats from the agents of the Respondent no. 8, 9, 10 and 11;

IV. issue a writ, order or direction in the nature of mandamus to the respondent no. 1, 2, 3 & 4 that a meeting be arranged with the petitioner and his client Mr. Mani Lal Patidar (IPS) so that the petitioner can collect his remaining pending fee and seek further instructions;

V. Issue a writ, order or direction in the nature of mandamus to the respondent no. 2, 3 and 4 to initiate departmental proceedings against respondent no. 5,6,8, 9, 10 and 11;

VI. Issue a writ, order or direction in the nature of mandamus to the respondent no. 2 and 4 to suspend respondent no. 5, 6, 8, 10 and 11 so that they can not influence the investigation any manner;

VII. Issue a writ, order or direction in the nature of mandamus to the respondent no. 7 to withhold the pension and all other dues of respondent no. 9 till the investigation is completed by the Central Bureau of Investigation and a clearance is given by the Hon'ble Courts;

VIII. Issue a writ, order or direction in the nature of mandamus to the respondents to provide protection to the life and limb of the petitioner. So that he may perform his legal/ professional duties continuously along with his social obligations towards weaker sections of the society and to assist/ work fearlessly through his pro bono litigation / legal awareness program/ professional work/ litigation/ pre litigation in Uttar Pradesh;

IX. To pass any other relief as this Court deems fit in the interest of justice, equity and good conscience."

3. In paragraph-4 of the writ petition, the petitioner has stated that *"The petitioner is a practicing advocate in the Supreme Court of India under the Advocates Act, 1961 registered under Bar Council of Delhi bearing Enrolment No.D/1062/2014"*. As per alleged copy of Adhar Card (issuing dated 10.11.2020), the address of the petitioner is *"Khasra No.433/221, Chhattarpur Pahari, Chhattarpur, South Delhi, 110074". However, in writ petition, he has given his address as "C/o 177-P, Aram Bagh, Paharganj, New Delhi-110055".*

4. In paragraphs-5, 6, 7, 8, 9, 14, 21, 22, 29, 30, 34 and 44, the petitioner (an advocate) has made averments basically on personal knowledge relating to his client Mani Lal Patidar, as under:

"5. That the petitioner's client Mr. Mani Lal Patidar, aged about 32 years, who hails from Rajasthan is young, disciplined, honest and energetic gentle person, besides a law-abiding citizen and a farsighted IPS Officer of 2014 batch, had been assigned UP Police Cadre. He belongs to a middle-class family having no political background. By nature, he is an innocent person, who on several occasions worked against the corruption and criminals so that every citizen of the district shall enjoy a secured peaceful life. Mr. Patidar was posted as Superintendent of Police in 2019 of Mahoba District (UP), who during his tenure has tirelessly working for the safety and security of the nation.

6. That respondent no.9 Mr. Hitesh Chandra Awasthi (IPS- Retd) the then Director General of Police of Uttar Pradesh started pressurising Mr. Mani Lal Patidar (IPS) the then SP of Mahoba, UP in 2020 for the benefits of Khanan Mafia

(mining mafia) and criminals, but Mr. Patidar did not support his illegal and devious plan. Later on, Respondent No.8-Mr. Awanish Kumar Awasthi (IAS) as Addl. Chief Secretary (Home) also started pressurising Mr. Mani Lal Patidar (IPS) the then SP of Mahoba, for the benefits of Khanan Mafias. But Mr. Patidar neither agreed to support the illegal works of khanan mafias nor their other criminal activities. Mr. Patidar had never compromised with honesty by following the footprints titled "Apraadh Mukt & Bhay Mukt Uttar Pradesh' of Hon'ble the Chief Minister of Uttar Pradesh to set-right the illegal mining by Khanan Mafias, took stern legal actions against them from time to time. Consequently, illegal work of Khanan Mafias and such like criminals was stopped. Criminals started fleeing the city and because of which money flow from the Khanan Mafias to respondent no.9-Mr. Hitesh Chandra Awasthi (IPS Retd), the then Director General of Police of Uttar Pradesh and respondent no.8-Mr. Awanish Kumar Awasthi (LAS), Addl. Chief Secretary (Home) has been stopped. Resulting, these officers started enmity and were hatching heinous conspiracy in connivance with Khanan Mafias as well as other type of criminals against the victim, Mr. Mani Lal Patidar.

7. That respondent nos.9 & 8, in a pre-planned manner, in joint collaboration for corruption with Khanan Mafias and such like criminals composed a video, which got viral on the web/social media with totally false and concocted allegations against Mr.Mani Lal Patidar for their ulterior motives, as they abetted Mr. Indrakant Tripathi (now deceased) to commit suicide and sending a video thereof in advance through electronic media which was totally based upon a criminal conspiracy hatched between them against Mr. Patidar. So that Mr. Patidar could be implicated in a false charge leading to his false conviction by the appropriate courts in India. Consequently, Mr. Indrakant Tripathi (now deceased) in pre-planned manner attempted to commit suicide by making a small wound on 8th September 2020, but unfortunately it turned out to be fatal and later he died after being admitted to hospital for 4-5 days.

8. That Hon 'ble the Chief Minister of Uttar Pradesh suspended Mr. Mani Lal Patidar on 9.9.2020, for their ulterior motives and are sheltering the Khanan Mafias of the State of Uttar Pradesh. By this act, the morale of the criminals/Khanan Mafias get higher, however, lowered the dignity of an honest police officer by putting him into great difficulties. Due to pressure of Khanan Mafias and under the directions/help of respondent nos. 9 and 8, two FIRs have successfully been lodged with false and fabricated allegations with mala fide intentions i.e. FIR bearing No.0505 dated 10.9.2020, PS Kotwali Nagar, Mahoba, UP under sections 384 IPC, 7/13 of PC Act, 1988 and FIR no.0234 dated 11.9.2020 PS Kabrai, Mahoba, UP under sections 387, 307 (converted into 302 which finally converted into 306) 120B, IPC 1860, 7/13 PC Act, 1988 against Mr. Mani Lal Patidar (IPS) Ex-SP, Mahoba, UP and to investigate this matter, a Special Investigation Team (SIT) was constituted by U.P. Government headed by Mr. Vijay Singh Meena (IPS) IG zone Varanasi.

9. That the petitioner has been authorised as a legal representative and Advocate by Mr.Mani Lal Patidar (IPS), Ex-Superintendent of Police, Mahoba (UP) by way of an email dated 21.9.2020 and requested to look into his abovesaid matters to collect the relevant papers qua his investigation and further to represent

him on his behalf before the SIT Mahoba (UP) to put his version.

True copy of the email dated 21.9.2020 authorising the petitioner as legal representative and Advocate sent by Mr.Mani Lal Patidar, (IPS) Ex. SP Mahoba U.P. is being filed herewith marked as ***Annexure No.3*** *to this writ petition.*

14. That on 27.11.2020 (Friday) while Mr. Mani Lal Patidar was coming to meet the petitioner in relation to his legal matters and to pay pending professional fees, he has been arrested by the Uttar Pradesh Police on the same day and was deliberately detained by the police authorities, under a pre-planned manner for their ulterior motives.

21. That looking at the gravity of the matter, the petitioner had given a written complaint which covered cognizable offences to respondent No. 05-SHO, PS Hazratganj Kotwali, Lucknow by hand on 22.12.2020 as well as through speed post to lodge an FIR against the main conspirator i.e. the then Director General of Police of Uttar Pradesh-Mr. Hitesh Chandra Awasthi (IPS) now Retd. On 30.06.2021, the Addl. Chief Secretary (Home)-Mr.Awanish Kumar Awasthi (IAS) and others. A copy whereof had also been forwarded to the Lucknow Police Commissioner, Hon'ble the Chief Minister of Uttar Pradesh, Hon'ble Governor of Uttar Pradesh etc.

True copy of complaint letter dated 22.12.2020 addressed to the SHO, PS Hazratganj Kotwali, Lucknow regarding abduction, illegal detention, criminal conspiracy etc of Mr. Manilal Patidar is being filed herewith marked as ***Annexure No.10*** *to this writ petition.*

22. That the petitioner vide his communications dated 24.12.2020 (email) and 26.12.2020 (speed post) addressed to the Hon'ble Chief Minister of UP and Mr. Dhruv Kant Thakur (IPS), Police Commissioner, Lucknow had approached to direct the concerned police authorities to provide copy of the FIR and that if there is any doubt to the concern SHO/authority regarding allegation of charges or technical typing error mentioned in this earlier communication dated 22.12.2020 relates to the offences covered under Sections 109, 115, 116, 120B etc, they can seek clarification directly from the petitioner through his e-mail with an instruction to provide copy of the FIR within 72 hours from the date of receiving of that communication in which petitioner clearly told that in the matter of ***Lalita Kumari v. State of Uttar Pradesh, (2014) 2 SCC 1****, the Constitution Bench of the Hon'ble Supreme Court has held as under:*

"120. In view of the aforesaid discussion, we hold:

120.1 The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation."

Despite this, Respondent No. 5-SHO, PS Hazratganj Kotwali and Mr. Dhruv Kant Thakur, IPS (Police Commissioner, Lucknow) knowingly disobeyed directions under law with intention to cause injury for their wrongful gain. In addition they have also acted in collaboration in concealing the crime which has been committed under the guidance of Mr.Hitesh Chand Awasthi (IPS), the then DGP, UP and Mr. Avanish Kumar Awasthi (IAS), Addl Chief Secretary (Home) respondent nos.8 and 9 respectively.

True copies of letter for issuance of necessary direction for registration of FIR dated 23.12.2020 (email) and 26.12.2020 (Speed post) addressed to the Hon'ble Chief Minister of Uttar Pradesh

and the Police Commissioner, Lucknow (colly) being filed herewith marked as Annexure No.11 (Colly) to this writ petition.

29. That respondent no. 9-Mr. Hitesh Chandra Awasthi (IPS Retd)-the then Director General of Police of Uttar Pradesh and Respondent no.8-Mr.Awanish Kumar Awasthi (IAS), Addl. Chief Secretary (Home) UP with the full cooperation of other respondents, since inception, for the sake of minting money from the Khanan Mafias and other criminals, are adopting the different wrongful tactics and camouflage i.e. firstly by hatching a criminal conspiracy, hand-in-gloves with the Khanan Mafias and other criminals with the intend to injury for their wrongful gain, had abetted Mr. Inderkant Tripathi (now deceased) for suicide on 8.9.2020 and in a pre-planned manner falsely implicated my client-Mr. Mani Lal Patidar; secondly, my client-Mr. Mani Lal Patidar (IPS), Ex- SP has been suspended without going into the depth of the matter on 9.9.2020; thirdly immediately after suspension with malafide intention on 10.9.20 and 11.9.20 abovesaid two FIRs were registered against the petitioner's client on the concocted grounds; fourthly, on 27.11.2020 when Mr. Mani Lal Patidar was coming to meet the petitioner personally along with his pending fees, he was abducted and illegally detained at some unknown place by the UP police authorities for ulterior motives and ultimately put under wrongful confinement at a secret place under the directions of respondents no.9&8 with the consent of Hon'ble the Chief Minister; fifthly during the unlawful detention of petitioner's client, they also have created so many false, fabricated documents for wrongful loss of petitioner's client and have announced fake award on 29.11.2020 of Rs.25,000/- by respondent no.10 (Mr. Arun Kumar Srivastava, SP, Mahoba) and later immediately on 6.12.2020, enhanced the amount of fake award to Rs. 50,000/- by Mr. K. Satyanarayana, IG, Chitrakoot Dham Banda, UP for production of Mr. Mani Lal Patidar dead or alive, besides lodging a fake case as absconder in PS Kabrai, Mahoba on 12.12.2020 under section 174-A IPC for the purpose of cheating with the intent to injury when petitioner's client is under their illegal detention since 27.11.2020; sixthly for the purpose of cheating, they concealed the genuineness of the facts and misguided the Hon'ble High Court of Allahabad and its subordinate courts with the intent to cause injury to the petitioner's client. A complete monitoring of the above said conspiracy is performed by respondents the guidance and supervision of respondent nos. 8 & 9 with ulterior motives, which fact is well within the knowledge of respondent no.2, no action has been taken/ solicited till date against any of the culprits rather a protection has been granted to their wrongful acts. All these facts has been mentioned in the Habeas Corpus Writ Petition bearing no.353/2021 titled, "Dr. Mukut nath Verma v. State of UP & 11 Ors.", the contents thereof may please be read as part and parcel of this petition.

30. While respondents the public servants are bound to serve the nation with deep honesty, but they are deliberately involved in unlawful and several heinous criminal activities for his wrongful gain in the interest of Khanan Mafias. Not only this, they are misusing their power for their self-benefits in different modes contrary to law i.e. they used to get the work done through their subordinate police officers to pressurise the criminals to work according to their whims and fancies and managing/promoting various illegal works

for their wrongful gain and by taking bribe/gratification from the criminals and/or to work for the benefits of criminals because of which the high morale of the honest police officers is getting down. By taking gratification from criminals and well-wishers/erring police officers, they shelter crime of murder abduction/kidnapping, dacoity etc. Consequently, the crime and morale of criminals are getting high which is dangerous for every citizens of the nation. All over the U.P. State neither victims are getting the FlR/NCR lodged in easy way nor any receipt to most of the complaints is being given by the concerned police stations, rather SHO of the concerned police station harassing the victim/complainant by delaying tactics. More so, U.P. Police neither investigate fairly nor protect the victim but support/favour the accused for the wrongful gain. Sometimes, they also used abusive behaviour against the complainant to draw a fear in them, but no action is being taken against the erring police officials and the honest/innocent police officer is being harassed by drawing him accused. These officers by grabbing all media agencies into their hands or of putting fear of false allegations; by concealing real picture of the crime in the U.P. state, by advertising/flashing false news and tarnishing the image of an honest person/police officer/media person, by lodging false complaint against him and by manipulating a false FIR to save the criminals and because of these reasons, any common man/journalist/writer/professor/ teacher remains under fear for publishing, speaking and/or writing true news. Consequent to their defective working procedure adopted by them, several innocent persons have been put to severe custody, got imprisonment due to their false and fabricated allegations, fake encounters, forced to suicide etc. Because of all these reasons, the life of Inderkant Tripathi (now deceased) comes to an end and Mr. Mani Lal Patidar based on false and fabricated allegations became accused. Mr. Hitesh Chandra Awasthi and Mr.Awanish Kumar Awasthi, respondent nos. 9 and 8 respectively are so powerful that they have made several people suffer in custody, and are capable of even detaining or arranging for wrongful confinement of the victim, Mr. Mani Lal Patidar. In fact, a thorough and complete enquiry is called for against both respondent nos. 8 & 9 as many innocent people are languishing in prison because of them. They with the above said illegal activities are putting a fear and terror over the victims, it is possible either the client of the petitioner can be murdered or can be eloped at some unknown place/abroad. In view of the fact that they are under the influence of the Khanan Mafias, it can be possible that these two authorities (respondent nos.8 & 9) may have connection with the other agencies involved in terrorist activities resulting a shabby picture of the UP State.

34. That since Mr. Mani Lal Patidar is a honest and innocent police officer who took legal action against Khanan Mafias and their alliance. As there is collaboration of respondents with Khanan Mafias, so other respondents are working under pressure of them. Knowingly all respondents remain silent spectators of whole of the issue and never feel duty bound to clear cut the issue or to help Mr. Manilal Patidar.

44. That it is astonishing to note that the Petitioner has been writing and sending several representations to various authorities in the State and to the Central

Government but till date the whereabouts of the victim Mr. Mani Lal Patidar has not been disclosed or brought on record by the UP Police. It is shocking to see that such a senior police officer of the UP Police has been missing/ arrested/ illegally detained but till date no action has been taken by the UP Police."

5. The affidavit accompanying the writ petition has also been sworn by the petitioner as deponent. The swearing clause of the affidavit is reproduced below:

"1. That the deponent is the petitioner representing accompanying petition in person. He is Hindu by religion and is an Advocate by profession and is filing the photo copy of the Aadhar Card as a proof of his identity, and as such he is fully acquainted with the facts deposed to below and those stated in the writ petition.

That the contents of paragraph 1 of this affidavit and those of paragraphs ***1 to 45*** *of the writ petition are true to the personal knowledge of the deponent, those of paragraphs* ***1, 4, 9, 10, 11, 12, 16, 18, 20, 21, 22, 23, 24, 26, 27, 28, 31, 33, 36, 39, 40, 41, 43*** *of the writ petition are based on perusal of records those of paragraph are based on the Information received by the deponent, those of paragraph* ***45*** *of the writ petition are based on the legal advice which also the deponent verily believes to be true, and nothing material has been concealed and that no part of the affidavit is false.*

SO HELP ME GOD.
DEPONENT"

6. Along with the writ petition, the petitioner herein has filed a declaration as under:

"DECLARATION

IN
CIVIL MISC. WRIT PETITION NO. OF 2021
(Under Article 226 of the Constitution of India)
(DISTRICT: MAHOBA)
Dr. Mukut Nath Verma .....Petitioner-in-Person
Versus
Union of India, through Home Secretary & Others ... Respondents

Dr. Mukut Nath Verma S/o Shri Ram Deo Verma, aged about 42 years, Correspondence address 177-P, Aram Bagh, Paharganj, New Delhi-110055 and official address as Khasra No.433/221, Chhattarpur Pahari, Chattarpur, South Delhi, Delhi- 110074 (I Card of Supreme Court Bar Association V-406 & Aadhar Card no.993450334460)

That the petitioner who is representing the accompanying petition in-person, is a practicing advocate in Hon'ble the Supreme Court of India and as such is fully acquainted with the facts deposed to below and those state in the criminal misc. writ petition.

That due to the Covid-19 pandemic in the entire country, the formalities of the affidavit have not been fully complied with and deponent undertakes that the same shall be duly complied with once the situation becomes normal, as per the High Court guidelines.

That in view of the abovesaid facts and circumstances, this Hon'ble Court may graciously be pleased to take this verification/declaration on record, treating the same as part of the criminal misc. writ petition to meet the ends of justice.

DEPONENT
(DR. MUKUT NATH VERMA)
Petitioner-in-Person

Khasra No.433/221, Chhattarpur Pahari, Chattarpur, South Delhi, Delhi-110074
*Email: **advocatedrverma@gmail.com***
Date: 19.07.2021
Allahabad.
Mob: 8800949892"

7. In paragraph 9 of the writ petition, the petitioner has stated that he has been authorised as legal representative and advocate by Mani Lal Patidar (IPS, Ex-Superintendent of Police, Mahoba U.P.) by way of e-mail as Anenxure-3 to the writ petition which is reproduced below:

"Mon, Sep 21, 2020 at 12:18 AM
2 minute craft<*manilal.engineer@gmail.com*>
To. digrvns@up.nic.in
CC:shome@nic.in, dgpcontrol-up@nic.in, spmba-up@nic.in,
advocatedrverma@gmail.com
URGENT/THR.E-MAIL
Shri Vijay Singh Meena sir , IPS,
IG Varanasi Range
&
The Head In-Charge,
SIT Mohoba.
REF : FIR No.0234 PS Kabrai, Mahoba dated 11.9.2020
JAI HIND,
Respected Sir(s)
I would like to inform you that as from the last week my father is suffering from cold-cough with high fever and admitted to hospital yesterday with COVID positive sign. I too have sign of cold and throat infection, my doctor has advised me complete quarantine for few days due to which I am unable to put my side of representation before the Special investigation Team Sir.
However, my utmost humbly & polite request to authorities is to please kindly allow Dr.Mukut Nath Verma, Advocate, Supreme Court of India ***to appear on my behalf to collect the relevant necessary papers and represent myself before Special Investigating Team at this pandemic situation as per the prescribed schedule. Since I have full faith upon him, I am too authorising and requesting Dr. Verma for that purpose to appear before the authorities so that there shouldn't be any delay at the initial stage on my part in investigation.*** *I am further expecting for a favourable and graceful opportunity to appear before the Investigating Authorities, to put my side truthfully before coming to any conclusion and submitting any report at the higher level of the Administration/ Government.*
Yours Sincerely,
(MANI LAL PATIDAR)
IPS
Ex-Superintendent of Police, Mohoba
ID NO.
Cadre year : RR-2014
CC: 1. The Add chief Secretary (Home), Government Uttar Pradesh
2. The Director General of Police, Lucknow (UP)
3. SP MAHOBA
4. Dr.Mukut Nath Verma, Advocate, Supreme Court of India,
(Enrolment No.D/1062/2014) - for collecting documents and to present before the Special Investigation Team.
(MANI LAL PATIDAR)
IPS Ex-Superintendent of Police, Mohoba"

8. As per own allegation of the petitioner, in afore-quoted paragraph-9 of the writ petition read with alleged e-mail (Annexure-3), the petitioner as an advocate has been allegedly authorised by the accused Mani Lal Patiar to appear on his behalf to collect relevant and necessary

papers and represent before the SIT and other authorities.

9. However, the petitioner herein, i.e. Dr. Mukut Nath Verma Advocate has filed a **Habeas Corpus Writ Petition No.353 of 2021 (Dr. Mukut Nath Verma vs. State of U.P. and 11 others)** to produce the accused Mani Lal Patidar, which is stated to be pending. It further appears that the accused Mani Lal Patidar had filed a **Criminal Misc. Writ Petition No.11301 of 2020 (Mani Lal Patidar vs. State of U.P. and 2 others)**, which was **dismissed** by the Division Bench **by order dated 02.11.2020** and liberty was granted to him to move an application under Section 438 of the Cr.P.C. It further appears that the accused Mani Lal Patidar had also filed a **Criminal Misc. Anticipatory Bail Application under Section 438, Cr.P.C. No.8921 of 2020 (Mani Lal Patidar vs. State of U.P. and another),** which was **rejected** by the learned Single Judge **vide order dated 16.12.2020.** It appears that the aforesaid accused Mani Lal Patidar had also filed a **Criminal Misc. Writ Petition No.11774 of 2020 (Mani Lal Patidar vs. State of U.P. and 2 others)**, which was **dismissed** as not pressed, **by order dated 03.11.2020** passed by the Division Bench. The accused Mani Lal Patidar filed another **Criminal Misc. Bail Application No.8533 of 2020 (Mani Lal Patidar vs. State of U.P. and another)**, which was **dismissed by order dated 03.12.2020.**

10. Perusal of the orders passed in the above referred Criminal Misc. Writ Petition No.11301 of 2020 dismissed on 02.11.2020, Criminal Misc. Writ Petition No.11774 of 2020 dismissed as not pressed on 03.12.2020 and Criminal Misc. Anticipatory Bail Application No.8921 of 2020 rejected on 16.12.2020, all filed by the accused Mani Lal Patidar, would show that all these orders are subsequent to the alleged missing of accused Mani Lal Patidar since 27.11.2020 as alleged in paragraph-14 of the writ petition, but perusal of the orders passed in the aforesaid cases argued by advocates and senior advocates of this court, would reveal that no statement was made that the accused is missing. Perusal of the order dated 03.12.2020 passed in Criminal Misc. Anticipatory Bail Application under Section 438 Cr.P.C. No.8533 of 2020, reveals that the learned Single Judge has noted the allegations that the applicant/ accused is absconding and is not cooperating in the investigation.

11. In the order dated 16.12.2020 passed in Criminal Misc. Anticipatory Bail Application under Section 438 Cr.P.C. No.8921 of 2020 (Mani Lal Patidar vs. State), the learned Single Judge has noted the submissions made by learned counsel for the accused-applicant, the informant's counsel and the learned Additional Advocate General, as under:

"In the backdrop of the allegations, learned counsel appearing for the applicant submits that after preliminary inquiry conducted on the direction of the State Government, it transpired that investigation is to be carried out for offence under section 306 IPC. It is urged that ingredients of the offence under section 306 IPC is not made out against the applicant; deceased shot himself by using his own weapon; applicant is not in a position to escape investigation; applicant is entitled to bail.

Learned counsel appearing for the State, in rebuttal, submits that ***applicant is already facing criminal case being Crime Case No. 234 of 2020, under***

sections 387/306/120-B/ IPC and section 7 & 13 of Prevention of Corruption Act, 1988; in the said case applicant has been declared an absconder. In the instant case applicant is absconding; coercive measures have been initiated under section 82 of Cr.P.C; a F.I.R has been lodged under section 174-A IPC being Case Crime No. 0331 of 2020, police station Kabrai, District Mahoba. *It is further urged that government has announced reward of Rs. 50,000/- vide communication dated 16.12.2020, inviting information about the applicant from the public.* ***It is urged that applicant is a senior civil servant and his conduct in not participating in the investigation or the departmental inquiry does not augur well, either with the department, or in the administration of justice.*** *It will not be in public interest at this stage to grant anticipatory bail to the applicant; it is a case of custodial interrogation. Applicant, a protector of law has become law unto himself. It is further submitted that charge sheet has been filed against the other accused police personnel and the investigation is kept open against others, including, the applicant. It is further informed that anticipatory bail application of the applicant (No. 8533 of 2020) in the other crime case has been rejected by this Court vide order dated 03.12.2020."*

12. The submissions of learned counsel for the accused Mani Lal Patidar as aforequoted were made on 16.12.2020 in which there is no whisper about alleged missing of the accused. There is no disclosure in the present writ petition about the family members of the accused Mani Lal Patidar. There is no averment in the writ petition that any of the family members of the accused Mani Lal Patidar have either instructed or approached the petitioner herein to file the present writ petition. There is also no allegation in the writ petition that any of the family members of the accused Mani Lal Patidar have approached the petition herein for filing various alleged representations/ repeated representations etc. at various forums. Source of finance towards cost of litigation by the petitioner herein has also not been disclosed in the writ petition.

13. One of the letters of the petitioner dated 04.12.2020 was allegedly replied by the Superintendent of Police, Mahoba by letter dated 21.12.2020 (Annexure-9 to the writ petition), which is reproduced below:

"ANNEXURE No. 9 (Colly)

सेवा में,

डा0 मुकुट नाथ वर्मा, एडवोकेट
सुप्रीम कोर्ट ऑफ इण्डिया
चेम्बर–SCBA लाइब्रेरी, SCI
पोस्ट बॉक्स नं0–5758
नई दिल्ली– 110055

कृपया आप अपने पत्रांकः Information/2020 दिनांक 04.12.2020 का संदर्भ ग्रहण का कष्ट करें, जो 1–अध्यक्ष, राष्ट्रीय मानवाधिकार आयोग, नई दिल्ली 2–महामहिम राज्यपाल उ0प्र0, 3–मा0 मुख्यमंत्री उत्तर प्रदेश को सम्बोधित करते हुए पूर्व पुलिस अधीक्षक महोबा श्री मणिलाल पाटीदार के अवैध निरूद्धीकरण उत्तर प्रदेश पुलिस द्वारा किये जाने के संबंध में है। अवगत कराना है किः–

1– मु0अ0सं0–505/2020 वादी नितेश पाण्डेय द्वारा थाना कोतवाली महोबा पर दिनांक 10.09.2020 को पंजीकृत कराया गया, जिसकी विवेचना क्षेत्राधिकारी नगर, महोबा द्वारा सम्पादित की जा रही है। इस अभियोग में आपके क्लाइन्ट (वांछित अभियुक्त) मणिलाल पाटीदार ने एण्टिसिपेटरी बेल (अर्न्तगत धारा 438 सीआरपीसी) मा0 उच्च न्यायालय इलाहाबाद में दिनांक 19.11.2020 को क्रिमिनल रिट पिटीशन योजित किया गया, जिसे मा0 उच्च न्यायालय द्वारा दिनांक 03.12.2020 को निरस्त किया गया।

2– मु0अ0सं0–234/2020 वादी रविकान्त त्रिपाठी द्वारा थाना कबरई जनपद महोबा पर दिनांक 11.09.2020 को पंजीकृत कराया,

जिसकी विवेचना वर्तमान में पुलिस अधीक्षक अपराध, जनपद प्रयागराज द्वारा सम्पादित की जा रही है। इस अभियोग में आपके क्लाइन्ट (वांछित अभियुक्त) मणिलाल पाटीदार ने **मा0 उच्च न्यायालय इलाहाबाद में पी0आई0एल0 दिनांक 05.10.2020 को योजित किया जो कि मा0 उच्च न्यायालय द्वारा दिनांक 02.11.2020 को निरस्त कर दिया गया। दिनांक 14.10.2020 को FIR Quash करने व गिरफ्तारी पर स्थगन प्राप्त करने हेतु रिट योजित किया गया, जिसे मा0 उच्च न्यायालय ने दिनांक 02.11.2020 को निरस्त कर दिया।**

इसी अभियोग में आपके क्लाइन्ट के विरूद्ध पी0सी0 कोर्ट–9 लखनऊ द्वारा दिनाक 25.10.2020 को एन0बी0डब्लू0 निर्गत किया गया जिसे दिनांक 19.10.2020 को तथा धारा 82 सीआरपीसी का अधिपत्र निर्गत दिनांक 13.11.2020 को दिनांक 17.11.2020 को नियमानुसार तामील कराया गया। धारा 82 सीआरपीसी के आदेश का अनुपालन आपके क्लाइन्ट मणिलाल पाटीदार द्वारा न करने के कारण दिनांक 12.12.2020 को धारा 174ए भादवि का अभियोग थाना कबरई पर इनके विरूद्ध पंजीकृत किया गया।

3– आपके क्लाइन्ट **मणिलाल पाटीदार द्वारा मु0अ0सं0–234/2020** थाना कबरई के अभियोग में मा0 उच्च न्यायालय में एण्टिसिपेटरी बेल धारा 438 सीआरपीसी अर्न्तगत **रिट दिनांक 04.12.2020 को योजित किया गया, जिसे मा0 उच्च न्यायालय ने दिनांक 16.12.2020 को निरस्त कर दिया।**

4– इसी मध्य दिनांक 27.11.2020 को कुछ चैनलो व ट्वीटर पर यह समाचार प्रसारित किया गया कि मणिलाल पाटीदार को राजस्थान से गिरफ्तार किया गया, जिसे बाद में पुष्टि न होने के कारण चैनलो द्वारा वापस कर लिया गया।

5– आप द्वारा प्रेषित दिनांक 04.12.2020 के इस नोटिस में जिसमें वांछित अभियुक्त मणिलाल पाटीदार को उत्तर प्रदेश पुलिस द्वारा दिनांक 27.11.2020 से **Illegal Detention** किये जाने का उल्लेख किया गया है, से **प्रतीत होता है कि आपके द्वारा ही सुनियोजित ढंग से षड़यन्त्र करते हुए गिरफ्तारी का समाचार चैनलो/ट्वीटर पर दिया गया क्योंकि यदि गिरफ्तारी की बात सही है तो मा0 उच्च न्यायालय में अर्न्तगत धारा 438 सीआरपीसी एण्टिसिपेटरी बेल आपके कलाइन्ट वांछित अभियुक्त मणिलाल पाटीदार द्वारा योजित न करते हुए अर्न्तगत धारा 439 सीआरपीसी में योजित किया जाता।** इससे स्पष्ट है कि आप एवं आपके क्लाइन्ट वांछित अभियुक्त मणिलाल पाटीदार ने मनगढ़न्त तथ्यों का सहारा लेते हुए एक खतरनाक ढंग से षड़यन्त्र कर मा0 आयोग एवं मा0 उच्च न्यायाल को दिगभ्रमित करने का असफल प्रयास किया गया है, जो कि अपराध की श्रेणी में आता है। यदि इस पत्र का उत्तर दिनांक 30.12.2020 तक प्राप्त नही होता है, तो आपके विरूद्ध विधिपूर्ण कार्यवाही करते हुए प्रकरण **BAR Counsil** को भी संदर्भित कर दिया जाये।

संलग्नक– 1–ट्विट 27.11.2020
2–रिट नं0–8921/2020
3–मा0 उच्च न्यायालय का दि0 16.12.2020 का आदेश

प्रत्र संख्याः एसटी/एसपी–45/2020 ह0 अपठनीय

दिनांकः दिसम्बर 21, 2020 21.12.2020

पुलिस अधीक्षक

महोबा

प्रतिलिपिः

1. अपर पुलिस महानिदेशक, प्रयागराज जोन, प्रयागराज को सादर अवलोकनार्थ।

2. पुलिस महानिरीक्षक, चित्रकूटधाम परिक्षेत्र, बांदा को सादर अवलोकनार्थ।"

14. Perusal of the contents of the afore-quoted reply/ letter of the Superintendent of Police, Mahoba dated 21.12.2020 *prima facie* reflects about the conduct of the petitioner.

15. Perusal of the swearing clause as afore-quoted would reveal that the afore-quoted paragraphs of the writ petition have been sworn by the petitioner herein i.e. an advocate, on the basis of his personal knowledge. It has not been stated in the writ petition that how the petitioner being an advocate has personal knowledge of the

allegations made in the afore-quoted paragraphs of the writ petition, which relates to the accused Mani Lal Patidar personally and at best may be within his (Mani Lal Patidar) knowledge. Thus, swearing of the afore-quoted paragraphs of the writ petition by the petitioner on personal knowledge is without foundation as well a conscious attempt to mislead this court.

16. From the facts briefly noticed above, it appears that the accused Mani Lal Patidar is absconding and against him proceedings under Section 82, Cr.P.C. has also been initiated and whose criminal misc. writ petitions have been dismissed and anticipatory bail applications have been rejected. The habeas corpus writ petition filed by the petitioner herein to produce the accused Mani Lal Patidar is stated to be pending. Under the circumstances, the present writ petition is apparently an abuse of process of law by the petitioner herein, which has stated himself to be an advocate.

17. Thus, in view of the facts and discussion noted above, the **relief Nos. (I) and (II)** have neither any substance nor can be granted. The **Relief Nos.(III) and (IV)** sought by the petitioner herein are mischievous in nature. The relief sought by the petitioner for collecting his remaining pending fees from the accused Mani Lal Patidar , can not be granted. In **Improvement Trust Ropar through its Chairman vs. S. Tejinder Singh Gujral and others, 1995 Supp. (4) SCC 577 (para-3),** Hon'ble Supreme Court held that *"We find that the High Court had allowed the writ petition filed by the respondent-advocate for the recovery of his professional fees from the petitioner.* ***No writ petition can lie for recovery of an amount under a contract.*** *The High Court was clearly wrong in entertaining and allowing the petition. There is no separate law for the advocates."*

18. In **Dhanraj Singh Choudhry vs. Nathulal Vishwakarma, (2012) 1 SCC 741 (Para-25),** Hon'ble Supreme Court observed as under:

"Any compromise with the law's nobility as a profession is bound to affect the faith of the people in the rule of law and, therefore, unprofessional conduct by an advocate has to be viewed seriously. ***A person practising law has an obligation to maintain probity and high standard of professional ethics and morality.****"*

19. In **O.P. Sharma vs. High Court of P&H, (2011) 6 SCC 86 (para-38),** Hon'ble Supreme court held as under:

"An advocate's duty is as important as that of a Judge. Advocates have a large responsibility towards the society. A client's relationship with his/her advocate is underlined by utmost trust. An advocate is expected to act with utmost sincerity and respect. ***In all professional functions, an advocate should be diligent and his conduct should also be diligent and should conform to the requirements of the law by which an advocate plays a vital role in the preservation of society and justice system. An advocate is under an obligation to uphold the rule of law and ensure that the public justice system is enabled to function at its full potential. Any violation of the principles of professional ethics by an advocate is unfortunate and unacceptable. Ignoring even a minor violation/misconduct militates against the fundamental foundation of the public justice system.****"*

20. The principles laid down in the case of **Dhanraj Singh Choudhry and O.P. Sharma (supra)** as aforequoted, have been quoted with approval by Hon'ble Supreme Court in **Chandra Prakash Tyagi vs. Benarsi Das (dead) by legal representatives and others, (2015) 8 SCC 506.**

21. From perusal of the present writ petition, it appears that the petitioner herein has been continuously filing various applications at different forums and has also filed the present writ petition. But he has not disclosed the source of finance of the litigation for his alleged client, i.e. the accused Mani Lal Patidar. Non-disclosure of this fact itself indicates some hidden motive in filing the present writ petition.

22. The **Relief Nos. (V), (VI) and (VII)** as sought in the present writ petition are beyond scope of criminal misc. writ petition inasmuch as departmental proceeding, suspension and pension of an employee are all service law matters.

23. Neither the employee, i.e. the accused nor any of his family members have filed the present writ petition. There is nothing on record to show that the accused employee Mani Lal Patidar or any of his family members has authorised the petitioner herein to file the present writ petition for the relief sought. Thus, the petitioner herein has unauthorisedly filed the present writ petition.

24. The **Relief No.(VIII)** sought by the petitioner, under the facts and circumstances of the case as discussed above; is an abuse of process of court and such reliefs without there being any material on record, cannot be granted.

25. From perusal of the aforequoted paragraphs of the writ petition, it appears that serious allegations have been made by the petitioner against the respondent authorities but neither any supporting document has been annexed with the writ petition nor any material is available on record to believe the contention. Although the petitioner in the affidavit filed in support of the writ petition, has sworn the afore-quoted paragraphs on his personal knowledge, but has completely failed to disclose his source of knowledge as well as material, if any, to support the allegations.

26. It is also obvious from reading of afore-quoted paragraphs of the writ petition that only vague allegations of *mala fide* have been levelled and that too without any basis. The *mala fide* can be made out with specific object of damaging the interest of the petitioner and such action is helping some one which results in damage to the party alleging *mala fides*. It would be seen that there is no allegation whatsoever in the pleadings in respect of the petitioner. An inference of *mala fides* has been sought to be drawn in the course of vague pleading that the respondent authorities are allegedly helping the mining *mafias*.

27. Serious allegations have been made against the respondents, which appear to be *mala fide* in order to malign the image of the State -respondents. The petitioner is expected to disclose true and correct facts before making any allegation against respondents. The petitioner in person, being a practising lawyer, is also expected to verify the same, himself and then levelled such allegations against the respondents. It is also expected that source of such information as well as material, if any, must be brought on record and in

absence thereof, the allegations made in the writ petition cannot be accepted.

28. For all the reasons afore-stated and the law laid down by Hon'ble Supreme Court in the judgments referred above, **the writ petition is dismissed with cost of Rs.05 lakhs (five lakhs),** which shall be deposited by the petitioner with the High Court Legal Services Committee, High Court Allahabad, within one month from today.

29. A copy of this order along with copy of the writ petition be also sent by the Registrar General of this Court to the Bar Council of Delhi for taking appropriate action against the petitioner - Dr. Mukut Nath Verma, Advocate, (Advocate Roll No.D/1062/2014) in accordance with law and without being influenced by any of the observations made in the body of this order.

(2021)08ILR A273
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Writ Petition No. 16343 of 2020

Gopal Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri P.K. Singh

Counsel for the Respondents:
A.G.A.

Section 438 Cr.P.C. -shall apply to cases under the Scheduled Castes and Scheduled Tribes Act, 1989 if complainant does not make out a prima facie case for applicability of the said act- in such event- the bar created by section 18 and 18 (A) shall not apply.

W.P. disosed off. (E-7)

List of Cases cited:

1. Rahna Jalal Vs St. of Kerala & anr. (Criminal Appeal No. 883) of 2020, decided on 17.12.2020

2. Prithvi Raj Chauhan Vs U.O.I. & ors., (2020) 4 SCC 727

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

1. Heard learned counsel for the petitioner and learned A.G.A.

2. This writ petition has been filed, praying for the following relief:-

"(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned First information Report dated 11.10.2020 registered as Case Crime No. 0476 of 2020, under Sections 34, 452, 354, 323, 504, 506 I.P.C. and Section 3 (1) (dha) of SC/ST Act, 1989, Police Station Shivli, District Ramabai Nagar (Annexure No.1 to the writ petition.)

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 not to arrest the petitioner in pursuance of the impugned First information Report dated 11.10.2020 registered as Case Crime No. 0476 of 2020, under Sections 34, 452, 354, 323, 504, 506 I.P.C. and Section 3 (1) (dha) of SC/ST Act, 1989, Police Station Shivli,

District Ramabai Nagar (Annexure No.1 to the writ petition.)

3. Learned counsel for the petitioner submits that no offence under Section 3 (i) (dh) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is made out, inasmuch as, as per allegations made in the impugned FIR, neither the incident took place at any public place nor any specific role of the petitioner has been assigned. It is further submitted that accused Nos. 1 and 2 namely, Deepak and Anil Kumar @ Kater are close relatives of the informant-respondent no.3 and all are residing in one and the same house. Accused No.1 Deepak is "Dever" and accused No.2 Anil Kumar @ Kater is the "Nephew" of the informant-respondent no.3 and the petitioner, who is the accused No.3 has merely tried to intervene between the petitioner and her Dever and Nephew and consequently he has been falsely implicated. He further submitted that although no prima facie case under SC/ST Act has been made out and yet petitioner could not apply for anticipatory bail as Sections 18 and 18-A of the Act, 1989 specifically bar the applicability of Section 438 Cr. P.C.

4. Learned A.G.A. submitted that since on bare reading of the FIR, a cognizable offence is made out, therefore, no interference can be made with the impugned FIR.

Discussion and Finding

5. We have carefully considered the submissions of the learned counsel for the parties.

6. As per submissions of the learned counsel for the petitioner, the provisions of anticipatory bail under Section 438 Cr. P.C. shall not be available to the petitioner to apply for anticipatory bail in view of the bar imposed under Sections 18 and 18A of Act 1989.

7. For ready reference, the provisions of Sections 18, 18-A and Section 3 (1) (Dha) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 are reproduced below:

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 also contains similar provisions, which exclude the application of Section 438 of Cr. PC. Sections 18 and 18-A provide as follows:-

*"**18. Section 438 of the Code not to apply to persons committing an offence under the Act.**--Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.*

***18-A. No enquiry or approval required.**--(1) For the purposes of this Act--(a) preliminary enquiry shall not be required for registration of a first information report against any person; or(b) the investigating officer shall not require approval for the arrest, if necessary, of any person,against whom an accusation of having committed an offence under this Act has been made, and no procedure other than that provided under this Act or the Code shall apply.(2)The provisions of Section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."*

3(1) (ध) लोक दृष्टि में आने वाले किसी स्थान पर जाति के नाम से अनुसूचित जाति या अनुसूचित जनजाति के किसी सदस्य को गाली गलौज करेगा।

8. Similar submissions with regard to exclusion of Sections 18 and 18-A of Act, 1989 was considered by Hon'ble Supreme Court in the case of **Rahna Jalal Versus State of Kerala and another (Criminal Appeal No. 883) of 2020**, decided on 17.12.2020, and it was observed as under:-

15. Section 18 explicitly excludes the application of Section 438 of the CrPC in relation to any case involving the arrest of any person on an accusation of having committed an offence under the Act. Sub-section (2) of Section 18-A specifically excludes the application of the provisions of Section 438 of the CrPC, notwithstanding any judgment, order or direction of a court. The provisions of Section 18 and 18A have been interpreted by a three Judge Bench of this Court Crl.A./202012 in ***Prathvi Raj Chauhan v.Union of India and Others(2020) 4 SCC 727("Chauhan").*** *Justice Arun Mishra speaking for himself and Justice Vineet Saran, while construing these provisions, observed that:*

"11. Concerning the applicability of provisions of Section 438 CrPC, it shall not apply to the cases under the 1989 Act. However, if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18-A(i) shall not apply. We have clarified this aspect while deciding the review petitions."

16. The same view has been taken in the concurring judgment of Justice S Ravindra Bhat, in the following observations:

"32.As far as the provision of Section 18-A and anticipatory bail is concerned, the judgment of Mishra, J. has stated that in cases where no prima facie materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail."

17. Thus, even in the context of legislation, such as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)Act 1989, where a bar is interposed by the provisions of Section 18 and Sub-section (2) of Section 18-A on the application of Section 438 of the CrPC, this Court has held that the bar will not apply where the complaint does not make out "a prima faciecase" for the applicability of the provisions of the Act.A statutory exclusion of the right to access remedies for bail is construed strictly, for a purpose. Excluding access to bail as a remedy,impinges upon human liberty. Hence, the decision in Chauhan(supra) heldthat the exclusion will not be attracted where the complaint does not prima facieindicate a case attracting the applicability of the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.

18. For the abovereasons, we have come to the conclusion thaton a true and harmonious construction of Section 438 of CrPCand Section 7(c) of the Act, there is no bar on granting anticipatory bail for an offencecommittedunder the Act, provided that the competent courtmust hear the married Muslim woman who has made the complaint before granting the anticipatory bail. It would be at the discretion of the court to grant ad-interim relief to the accused during the pendency of the anticipatory bail application, having issued notice to the married Muslim woman.

9. Perusal of the law laid down by Hon'ble Supreme Court in the case of **Rahna Jalal (supra)** and in the case of **Prithvi Raj Chauhan vs Union of India and others, (2020) 4 SCC 727** (supra) would show that **Section 438 shall apply to the cases under the Act, 1989 if the complainant does not make out a prima**

facie case for applicability of the provisions of the Act, 1989. If an accused is able to demonstrate that the complaint does not make out "a prima facie case for applicability of the provisions of the Act, 1989, then the bar created by Sections 18 and 18(A) shall not apply.

10. In view of the above discussion we hold that provision of Section 438 Cr. P.C. shall be available to an accused for anticipatory bail for alleged offences under the Scheduled Castes and Scheduled Tribes Act, 1989, if the accused/applicant is able to demonstrate that the complaint/F.I.R. does not make out " a prima facie" case for applicability of the provisions of the Act 1989. In such cases the bar created under sections 18 and 18A of the Act, 1989 shall not apply.

11. Since the learned counsel for the petitioner has taken a stand before us that *prima facie* no case has been made out under Section 3 (1) (dh) of the Act, 1989, therefore, it is for the petitioner to demonstrate the position before the competent court in his anticipatory bail application and if the petitioner succeeds in demonstrating, then the bar of Sections 18 and 18-A of the Act, 1989 shall not come in the way of the application of the petitioner for anticipatory bail under Section 438, Cr.P.C.

12. With the aforesaid observations, **we dispose of this writ petition,** leaving it open to the petitioner to apply for anticipatory bail before the competent authority. It is made clear that we have not expressed any opinion on merits of the case of the petitioner.

(2021)08ILR A276
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2021

BEFORE

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

Crl. Misc. Writ Petition No. 17665 of 2020

Sheoraj Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ishir Sripat

Counsel for the Respondents:
A.G.A.

Challenged made to the FIR -to quash-cannot be examined by the Writ Court-as questions of facts and appreciation of evidence -does not fall within the arena of jurisdiction under Article 226 of Constitution of India.

W.P. dismissed. (E-7)

List of Cases cited:

1. St. of Har. & ors. Vs Ch.Bhajan Lal, AIR 1992 SC 605

2. U.O.I.Vs Prakash P. Hinduja & anr., (2003) 6 SCC 195

3. Ajit Singh @ Muraha Vs St. of U.P. (2006(56) ACC433)

4. Satya Pal Vs St.of U.P. (2000 Cr.L.J. 569)

5.St. of Orissa Vs Saroj Kumar Sahoo (2005) 13 SCC 540

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

1. Heard Sri Ishir Sripat, learned counsel for the petitioners and learned A.G.A. for the State.

2. Petitioners have made the following prayers:-

(i) issue a writ of certiorari quashing the First Information Report dated 10.12.2020 registered as Case Crime no. 0626 of 2020, under Sections 304B, 498A IPC and ¾ Dowry Prohibition Act, P.S. Ghandhi Park, District Aligarh.

(ii) issue a writ of mandamus directing the respondent no. 2 not to arrest the petitioners in Case Crime no. 0626 of 2020, under Sections 304B, 498A IPC and ¾ Dowry Prohibition Act, P.S. Ghandhi Park, District Aligarh.

(iii) Any other or further writ, order or direction as is deemed fit and proper by this Hon'ble Court.

3. Facts in nutshell for our puposes are that daughter of the first informnat had married Pushpendra Singh. The daughter of the first informant on 2.8.2020 gave birth a girl child at Jaideep Nursing Home, which was now creator of the problem between the parties. It is a matter of fact that after delivery when the deceased was shifted to Varun Hospital, she died. The respondent no. 3 preferred a complaint under Section 156(3) Cr.P.C., which was registered as Application No. 256/11/20 before the Chief Judicial Magistrate, Aligarh. The court of C.J.M., Aligarh directed the concerned police station to submit a report on the said complaint. The police station submitted a report before the learned Chief Judicial Magistrate along with death certificate issued by the hospital. Unfotunately, death of the Vimlesh was projected as death for dowry and all six petitioners were arrayed as accused. Learned counsel for the petitioner relied upon the reports issued by the hospital and the report of the police but the first informant was bent on seeing all accused to be prosecuted.

4. Going through the factual scenario and as the investigation is on and the death is occurred during seven years of the marriage, at this stage, we would be loath in interfering with the investigation.

5. It has been argued by learned counsel for the petitioner that entire allegations made in the impugned F.I.R. against the petitioners are false and baseless and the petitioners have been falsely implicated only for the purpose of harrassment. Brief allegations levelled in the F.I.R. are that the daughter of the first informant Vimlesh married to Pushpendra Singh on 16.11.2016 in which nearly Rs. 12 lakhs were spend by him but the family of the husband was not happy and kept demanding for dowry and a Car. A girl child was born out of the wedlock within one year of the marriage and thereafter the daughter of the first informant was expecting another child in the month of August, 2020. Learned A.G.A. further contended that the in-laws threatened the daughter of the first informant that if she will give birth to another girl child then they will get her kill during the delivery of the child. Learned A.G.A. further contended that on 2.8.2020 the daughter of first informant gave birth to a girl child at Jaideep Nursing Home Aligarh and as soon as the girl child was born, the petitioners went in to meet the doctor and suddenly the wife of first informant who was also present in the nursing home during the delivery heard her daughter, Vimlesh, now deceased, shouting in pain.

6. It has been argued that the petitioners have not committed any offence and prima facie no case is made out against them and hence the present F.I.R. is liable to be quashed.

7. Per contra learned A.G.A. has submitted that from the perusal of the allegations made in the F.I.R., it cannot be said that no cognizable offence is made out, hence the impunged F.I.R. is not liable to be quashed.

8. It has been well settled by the Hon'ble Apex Court that the jurisdiction should be exercised sparingly and only in exceptional cases while quashing a complaint, F.I.R. or a charge-sheet and Courts should not interfere with the investigations of cognizable offences as a matter of routine . On the contrary, if no prima facie case is made out from the the F.I.R. or the complaint, the F.I.R. or the charge-sheet may be quashed in exercise of powers under Article 226 or inherent powers under Section 482 of the Cr.P.C. The Hon'ble Apex Court, in the case of State of Haryana and others Vs. Ch. Bhajan Lal, AIR 1992 SC 605 Supreme Court held that those guidelines should be exercised sparingly and that too in the rarest of rare cases. Guidelines are as follows:

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety to do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 156(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can every reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

9. The Hon'ble Apex Court, further in the case of **Union of India vs. Prakash P. Hinduja and Another, (2003) 6 SCC 195** has rediscussed the scope of quashing. Howver, in the said case, The Hon'ble Apex Court has narrowed down the scope of **Ch. Bhajan Lal (supra)** and held as follows:

"The grounds on which power under Section 482 Cr.P.C. can be exercised to quash the criminal proceedings are: (1)

where the allegations made in the FIR or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, (2) where the uncontroverted allegations made in the FIR or the complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused, (3) where there is an express legal bar engrafted in any of the provisions of the Code of Criminal Procedure or the Act concerned to the institution and continuance of the proceedings. But this power has to be exercised in a rare case and with great circumspection."

10. In case of **State of Haryana v. Bhajan Lal & Ors. (supra)** also, in guideline number 3 it was laid down that where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and do not make out a case against the accused, the Court may quash the FIR as well as the investigations, however a note of caution was added by observing that the power of quashing a criminal proceeding should be exercised sparingly and with circumspection and that too in the rarest of rare cases. It was held that the Court would not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint.

11. The Hon'ble Apex Court, further in the various precedents i.e. Rupan **Deol Bajaj v. K.P.S. Gill; reported in (1995) SCC (Cri) 1059, Rajesh Bajaj v. State of NCT of Delhi; reported in (1999) 3 SCC 259 and Medchl Chemicals & Pharma (P) Ltd. v. Biological E Ltd. & Ors; reported in 2000 SCC (Cri) 615**, has made crystal clear that if a prima facie case is made out , theCourt should not quash the complaint. On the contrary, it was held that the Courts should not hesitate to quash the complaint if no prima facie case is made out. However, as a note of caution while considering such petitions, the Courts should be careful. Thus, there is no conundrum about the legal proposition that in case a prima facie case is made out, the F.I.R. or the proceedings in consequence thereof cannot be quashed.

12. Further the Full Bench of this Court also in the case of **Ajit Singh @ Muraha v. State of U.P. (2006(56) ACC433)** reaffirmed the stand taken by the earlier Full Bench in **Satya Pal v. State of U.P. (2000 Cr.L.J. 569)** after considering the various decisions including **State of Haryana vs. Bhajan Lal (AIR 1992 SC 604)** no case of interference with the investigation is made out until and unless cognizable offence is not ex-facie discernible or there is any statutory restriction operating on the power of the Police to investigate a case.

13. In the instant case, there are allegations in the impugned F.I.R. that the petitioners have committed murder of the deceased for illegal demand of dowry. It is alleged that deceased Smt. Vimlesh died due to post delivery complications and no conspiracy was made to kill the deceased. No offence under Section 304-B IPC is made out against the petitioners. The family members of the husband of the deceased tried to their best and shifted her to a superior hospital but the deceased could not be saved. The first informant is trying to misuse process of law and by means of the present case he is trying to create pressure on the husband of the

deceased to give custody of the children to the first informant.

14. The submissions raised by learned counsel for petitioners relate to the questions of fact and thus, can not be examined by this Court in proceedings under Article 226 of the Constitution of India. The appreciation of evidence or the reliability of the allegations can not be examined at this stage. In **State of Orissa v. Saroj Kumar Sahoo (2005) 13 SCC 540** it has been held that probabilities of the prosecution version cannot be analysed at this stage. Likewise, the allegations of mala fides of the informant are of secondary importance. The relevant passage reads thus: (SCC. 550, para 11).

"11.....It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with."

15. From the above discussed case laws and after giving our thoughful consideration to the facts of the instant case, it can be safely concluded that the contentions raised by the learned counsel for the petitioner(s) can not be examined by this Court at this stage. The adjudication of questions of facts and appreciation of evidence or examining the reliability and credibility of the version, does not fall within the arena of jurisdiction under Article 226 of the Constitution of India.

16. In view of the material on record no case of inteference is made out and the impugned criminal proceeding cannot be said to be manifestly attended with malafide and maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal venonmous agenda. F.I.R. or criminal proceedings can be quashed only according to the parameters laid down by Hon'ble Apex Court in catena of its judgement.

17. However, if the petitioners appears before the court below seeking their liberty by way of application under Section 438 Cr.P.C., and or 437 read with 439 Cr.P.C., the same shall be decided immidiately as at this stage role of each of the accused is not borne out. The petitioners are not relevant who are not stationed at the same place when the offence took place. In that view of the matter, we direct the petitioners to move the court below for to be enlarged on bail. None of the observations are for grant or refuse of bail but are under the realm of writ jurisdiction. We refuse to intertain the petition as we are not hundred per-cent sure as what is the role genesis from each of the accused and therefore, we are restraining ourselves from entertaining this petition at this stage as we do not think at this stage that the prosecution can be nibbed in its inception.

18. In the light of above, we are of the opinion that present petition does not fall in any of such category, wherein this Court can exercise jurisdiction under Article 226 of the Constitution of India to quash the impugned F.I.R. Hence no ground exists for quashing of the F.I.R. or staying the arrest of the petitioner(s).

19. In view of aforesaid, the petition lacks merit and thus, liable to be dismissed.

20. Accordingly, petition is dismissed.

(2021)08ILR A281
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Writ Petition No. 21817 of 2019

Haushila Dubey ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Brahm Prakash Mishra

Counsel for the Respondents:
G.A.

Externment order passed without considering Petitioner's representation-many years have lapsed since expiry of the order-Appeal also dismissed-no cause of action survives.

W.P. disposed.(E-7)

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

1. Heard learned counsel for the petitioner, learned AGA for the State and perused the record.

2. This writ petition has been filed with the following prayers;

"i) issue a writ, order or direction in the nature of certiorari to quash the order dated 25.03.2019 passed by Commissioner, Varanasi Division, Varanasi in Case No.500 of 2015 (Computer Case No.C2015140000500 (Haushila Dubey Vs. State of U.P.) under Section 3(1) U.P. Control of Goondas Act, 1970, through Additional District Magistrate (Civil Supply), Varanasi passed by order dated 11.03.2015 in Suit No.124 of 2014 (State of U.P. Vs. Haushila Dubey) under Section 3(1) U.P. Control of Goondas Act, 1970, Police Station Cholapur District Varanasi.

ii) issue a writ, order or direction in the nature of mandamus commanding the respondent no.2 & 3 to stay the effect and operation of the order dated 25.03.2019 passed by Commissioner, Varanasi Division, Varanasi in Case No.500 of 2015 (Computer Case No.C2015140000500 (Haushila Dubey Vs. State of U.P.) under Section 3(1) U.P. Control of Goondas Act, 1970, through Additional District Magistrate (Civil Supply), Varanasi passed by order dated 11.03.2015 in Suit No.124 of 2014 (State of U.P. Vs. Haushila Dubey) under Section 3(1) U.P. Control of Goondas Act, 1970.

iii) issue any other and further writ, order or direction as this Hon'ble Court may deem fit and proper, in the circumstances of the case.

iv) Award the costs to the petitioners."

3. Learned counsel for the petitioner submits that the notice under Section 3(1) U.P. Control of Goondas Act, 1970 (hereinafter referred to as the 'Act') has been issued to the petitioner for submitting representation/reply, thereafter, the petitioner submitted a detailed representation/reply but the respondent No.3 without considering the submissions made by the petitioner passed the externment order dated 11.03.2015 and petitioner was directed to remain outside the district for a period of one month being aggrieved against the said order, the petitioner preferred an appeal, under Section 6 of the Act before the

Commissioner, respondent no.2. The learned Commissioner also without considering the grounds taken by the petitioner in the appeal and without giving opportunity of hearing dismissed the appeal vide order dated 25.03.2019, thereafter, the petitioner by means of the present writ petition challenged both the orders before this Court for quashing the same on the ground that both the orders are bad in the eye of law.

4. Per contra learned AGA has submitted that the present writ petition has now become infructuous due to reason that at present no cause of action survives in the present writ petition as the externment order passed against the petitioner was only for a period of one month and the appeal against the said order has also been dismissed, so in the present writ petition nothing remain to be decided nor there is any adverse order against the petitioner for which he is aggrieved.

5. Learned counsel for the petitioner in rejoinder argued that there is an apprehension in the mind of the petitioner that the respondent authorities may take disadvantage of the impugned orders in future against the petitioner.

6. I have considered the rival submissions made by the parties and perused the record.

7. From the perusal of the externment order, it is not disputed that the same is already expired and the appeal filed against the said externment order before the Commissioner, respondent no.2, under section 6 of the Act is also dismissed and after lapse of so many years, there is no externment order against the petitioner nor any fresh order exists in the present case, which causes any harm to the petitioner. In the present writ petition nothing remains to be decide on merit, as no cause of action survives in the present writ petition at present nor there is any adverse order against the petitioner, for which he is prejudiced.

8. The apprehension of the petitioner that the authorities may take disadvantage of the impugned orders in future against him is also not justified unless he is not involved in any other criminal case. If he is aggrieved by any other order passed by the respondents he may approach the competent court of law for redressal of his grievances.

9. With the above observations, the present writ petition is **disposed of.**

10. No order as to cost.

(2021)08ILR A282
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.08.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Habeas Corpus No. 412 of 2021
connected with
Habeas Corpus No. 414 of 2021
with
Habeas Corpus No. 416 of 2021

Parvez ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Narendra Gupta

Counsel for the Respondents:

Govt. Advocate

A. National Security Act, 1980 – Section 3(2) – Preventive Detention – Scope of interference – Public Order – Case of cutting cow beef in pieces in the secrecy of his own house – Slaughtering because of poverty or lack of employment or hunger – No material to assert repetition of activity in future – Held, it can at best be described as a matter affecting law and order and not public order – An act of slaughtering a cow in the secrecy of one's own house in the wee hours probably because of poverty or lack of employment or hunger, would perhaps only involve a law and order issue and could not be said to stand on the same footing as a situation where a number of cattle have been slaughtered outside in public view and the public transport of their flesh or an incident where aggressive attack is made by the slaughterers against the complaining public, which may involve infractions of public order. (Para 31 and 40)

B. National Security Act, 1980 – Section 3(2) – Preventive Detention – Subjective Satisfaction of Authority – Judicial Review – Scope of interference – Held, in detention cases, the subjective satisfaction is open to limited judicial scrutiny – It would be wrong to contend that there is complete embargo on the powers of the Court to look at the sufficiency of the ground from any perspective, although the probative value of the material adduced for inferring whether the detenue was engaged in a particular activity, was a matter primarily for the satisfaction of the detaining authority, and the Court could not evaluate it as it would have evaluated material on an appeal. (Para 34)

C. Constitution of India – Article 226 – Writ – Sufficiency of evidence – Scope of interference – Held, normally in exercise of powers under Article 226 of the Constitution of India, the High Court has limitations in considering the sufficiency of the evidence for ascertaining the factual involvement of a detenue, but the Court can certainly see whether the activities complained of have resulted in an infringement of public order or only involve a law and order issue. (Para 36)

Writ petition allowed. (E-1)

Cases relied on :-

1. Habeas Corpus Writ Petition No. 319 of 2019, Mehboob Ali Vs U.O.I.. & 3 ors., decided on 31.05.2019

2. Ramveer Jatav Vs St.of U.P. & ors., (1986) 4 SCC 762

3. S.R. Bommai Vs U.O.I., AIR 1994 SC 1918

4. T. Devaki Vs Govt. of T.N. & ors., (1990) SCC 456

5. Ramesh Yadav Vs D.M. , Etah & ors., AIR 1986 SC 315

6. Sama Aruna Vs St. of Telangana & anr., (2018) 12 SCC 150

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

1. At the outset, Sri Narendra Gupta, learned Counsel for the detenues/petitioners have submitted that applications for amendment, bearing C.M. Application No. 53220 of 2021 *in re*: Habeas Corpus No. 412 of 2021, C.M. Application No. 53294 of 2021 *in re*: Habeas Corpus No. 414 (H/C) of 2021 and C.M. Application No. 53175 of 2021 *in re*: Habeas Corpus Petition No. 416 of 2021, are pending.

2. On due considerations, we **allow** aforesaid amendment applications and permit the learned Counsel for the petitioners to make necessary amendment in the memo of the writ petition during the course of the day.

3. Questioning the legality and validity of the orders dated 14.08.2020 passed by the District Magistrate, Sitapur

(respondent no.3), directing detention of Parvez, Irfan and Rahamtullah in exercise of its power under Section 3 (2) of the National Security Act, 1980 (hereinafter referred to as the '**Act, 1980**'), which was subsequently confirmed by Uttar Pradesh Advisory Board under Section 11 of the Act, 1980 and on the basis of same, the orders for confirmation dated 05.10.2020 and 06.11.2020 have been passed by the Under Secretary, Home (Confidential) Department, Government of Uttar Pradesh (respondent no.2), petitioner/detenue Parvez has preferred Habeas Corpus Petition No. 412 of 2021, petitioner/detenue Irfan preferred Habeas Corpus Petition No. 414 of 2021 and petitioner/detenue Rahamtullah preferred Habeas Corpus Petition No. 416 of 2021, through his brother Imran.

4. In addition to the aforesaid, by means of the amendment, the detenues/petitioners is also seeking a writ of certiorari to quash the order dated 10.02.2021 passed by the respondent no.2-Under Secretary, Home (Confidential) Department, Government of Uttar Pradesh, by which the detention period of the detenues/petitioners has been extended for a period of nine months from the date of detention i.e. 14.08.2020.

5. Since the above-captioned Habeas Corpus petitions arise out of a common factual matrix and law, we are disposing them of by a common judgment.

6. Shorn off unnecessary details, the facts giving rise to the controversy involved in the above Habeas Corpus petitions are as under :-

While Incharge Inspector Ranvir Singh along with Sub-Inspector Sri Tribhuwan Kumar Yadav, S.I. Ramesh Kumar Kannaujia, Head Constable Sanjay Pratap, Head Constable Satya Prakash, Constable Akhilesh Kumar, Constable Harendra Kumar, Constable Shyam Singh, Constable Dipak Shukla were on duty for maintaining law and order in the area as well as searching and checking the wanted persons/vehicles within the area of the police station Talgaon, district Sitapur on 12.07.2020 through Government Vehicle (Tata Sumo), bearing registration no. U.P. 34 G 0660 and in private vehicle, bearing registration no. U.P. 34 G 0505, and reached Emalia Chauraha via village Angrashi, an informer had told them that two butchers of the Vishwan, after slaughtering a cow elsewhere, have brought beef in the house of Rahmatullah in village Emalia and in the house, Rahmatullah and his brother as well as two butchers of the Vishwan have made small pieces of beef for selling and if quickness be made, then, they can be caught at home. On believing the aforesaid information of the informer, the police party raided the house of Rahmatullah and found that five persons were cutting the lump of the beef in small pieces by banka and as soon as the police party entered into the house, all persons started running away. However, two persons, namely, Irfan (petitioner of Habeas Corpus No. 414 of 2021) and Parvez (petitioner of Habeas Corpus No. 412 of 2021) were arrested on spot, who disclosed the name of Rahamtullah (petitioner of Habeas Corpus No. 416 of 2021) and two others, namely, Kurban and Rafi. Thereafter, beef was kept in a white bag and with the help of the aforesaid two accused persons, one banka, a piece of wood, one knife and one spear were seized and for testing the recovered beef, it was sent to Veterinary Doctor, Parsendi, who, after verifying the same, reported that the recovered beef was of cow.

7. For the aforesaid incident, a case, bearing First Information Report No. 0235, under Sections 3/5/8 of the U.P. Prevention of Cow Slaughter Act, 1955 and Section 7 of the Criminal Law Amendment Act, 2013, was lodged against accused Parvez and Irfan, Rahamtullah (detenue/petitioners herein), Rafi and Kurban at Police Station Talgaon, District Sitapur and detenue/petitioners Parvez and Irfan were arrested on the same day of the incident i.e. on 12.07.2020, whereas detenue/petitioner Rahamtullah was arrested on 13.07.2020. and were sent to jail. Later on, while the detenue/petitioners were in jail in connection with the aforesaid F.I.R., another F.I.R., bearing No. 0250 of 2020, under Section 2 (kha)(17)/3 of the UP Gangsters and Anti-Social Activities (Prevention) Act, 1986 have been lodged against the detenue/petitioners as well as other co-accused persons, namely, Rafi, Kurban, Mohd. Safiq and Jamil on the basis of single criminal case.

8. While the detenues/petitioners were in jail in connection with the aforesaid criminal cases, the Station House Officer, Police Station Talgaon, District Sitapur had submitted a report dated 01.08.2020 that due to cow slaughtering, a large number of Hindu Community had gathered due to which the public order was badly disturbed and further on account of the act of the detenues/petitioners and co-accused, the sense of insecurity and terror had spread in the whole area. It was also reported that the fallout of the incident had culminated in the chaos, disturbing congenial atmosphere, flaring horrific feeling, affecting the maintenance of public order and anyhow the peace was maintained even though the situation was tense for a period of three days in the village and surrounding villages. Further, the bail application of the detenue/petitioners were rejected by the learned Magistrate-I, Sitapur vide orders dated 22.07.2020, against which they had moved an application before the District & Sessions Judge, Sitapur on 24.07.2020, wherein the hearing date was fixed for 14.08.2020. In these backgrounds, it was reported that under Article 48 of the Constitution of India, it is the duty of the State Government to protect the cow and if the petitioners would be enlarged on bail, he would again indulge in criminal activity of cow slaughtering which is prejudicial to public order.

9. On receipt of the aforesaid report dated 01.08.2020 of the Station House Officer, Police Station Talgaon, District Sitapur (respondent no.5), the Superintendent of Police, Sitapur (respondent no.4) had referred the matter to the District Magistrate, Sitapur (respondent no.3) for invoking the provisions of Act, 1980 while exercising the power under Section 3 (2) of the Act, 1980. On receipt of the aforesaid report of the respondent nos.4 and 5, the District Magistrate, Sitapur has invoked the provisions of Section 3 (2) of the Act, 1980 and passed the impugned order of detention dated 14.08.2020 against the deteneues/petitioners and also forwarded the copies of the impugned detention order dated 14.08.2020, the grounds of detention as well as other connected papers to the State Government as per the provisions of Section 3 (4) of the Act, 1980. Thereafter, the State Government has placed the matter before the U.P. Advisory Board (Detention) under Section 10 of the Act, 1980 and after confirmation of the impugned order of detention by the U.P. Advisory Board (Detention) under Section 11 of the Act, 1980, the State Government, while exercising the powers under Section 3 (3)

of the Act, 1980, has also confirmed the impugned order of detention dated 14.08.2020 vide order dated 05.10.2020 for a period of three months. Thereafter, the State Government, vide order dated 06.11.2020, extended the detention of the detenues/petitioners for a period of six months.

10. It has been stated by the petitioners that during pendency of the aforesaid process, the detenues/petitioners were released on bail in F.I.R. No. 235 of 2020, under Sections 3/5/8 of the U.P. Prevention of Cow Slaughter Act, 1955 and Section 7 of the Criminal Law Amendment Act, 2013 by the IV Additional District and Sessions Judge/Special Judge (Essential Commodities) Act, Sitapur vide order dated 27.08.2020 in Bail Application No. 997 of 2020. Subsequently, the detenues/ petitioners were also enlarged on bail in F.I.R. No. 250 of 2020, under Sections 2 (kha) 17/3 of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986 by this Court vide order dated 11.11.2020 in Criminal Misc. Case No. 8724 (B) of 2020.

11. It has also been stated by the petitioners that they have preferred a representation dated 24.08.2020 against the impugned order of detention dated 14.08.2020 to the District Magistrate, Sitapur through the Superintendent of Jail, District Jail, Sitapur but neither the same was rejected nor any order has been passed.

12. Feeling aggrieved by the aforesaid action of the respondents, the detenues/petitioners have filed the above-captioned habeas corpus petitions.

13. Heard Sri Narendra Gupta, learned Counsel for the detenues/petitioners, Sri S.P. Singh, learned Additional Government Advocate for the State/respondents and perused the material brought on record.

14. Learned Counsel for the petitioners argued that it is an admitted fact that co-accused Kurban and Rafi have brought the beef in the house of Rahamtullah, which shows that the petitioners have no role in cow slaughtering. He argued that there was absolutely no material before the detaining authority, which could justify the belief the detaining authority that the acts allegedly committed by the detenues/petitioners were in any way prejudicial to the public order.

15. Elaborating his submission, learned counsel for the petitioner argued that the impugned order of preventive detention was passed by the respondent no. 3 against the detenues/petitioners while they were in prison under judicial custody on account of they being involved in F.I.R. No. 235 of 2020, under Sections 3/5/8 of the U.P. Prevention of Cow Slaughter Act, 1955 and Section 7 of the Criminal Law Amendment Act, 2013. He further argued that there was no material placed before the detaining authority for recording his satisfaction about the release of the petitioners from the jail in near future. In paragraph 06 of the grounds of detention, it has been mentioned that the petitioners, who were confined in District Jail, Sitapur, was making continuous efforts for obtaining bail and there was strong possibility of the petitioners being released on bail and upon being release on bail, there was all likelihood of the petitioners indulging in activities which would disturb the public order. He argued that the bald observation of the detaining authority that there is likelihood of the petitioner being released on bail and on his being released

on bail, he would again indulge in similar activities disturbing the public peace and order and keeping the petitioners in captivity, is contrary from the facts and circumtances of the case and also in contravention of fundamental rights enshrined under Article 21 of the Constitution of India.

16. Lastly, learned Counsel for the detenues/petitioners has pointed out that during pendency of the aforesaid petitions, the respondent no.2 has passed the order dated 10.02.2021 by which the detention period has been extended for a period of nine month from the date of detention i.e. 14.08.2020.

17. To strengthen his submission, learned Counsel for the petitioners has drawn our attention towards a decision rendered by a Co-ordinate Bench of this Court at Allahabad in **Habeas Corpus Writ Petition No. 319 of 2019** : *Mehboob Ali Vs. Union of India and 3 others*, decided on 31.05.2019, dismissing the habeas corpus writ petition and has argued that against the judgment and order dated 31.05.2019, Mahboob Ali (detenue/ writ petitioner) approached the Hon'ble Supreme Court by filing Special Leave to Appeal (Crl.) No. 6921 of 2019, wherein the Hon'ble Supreme Court, vide order dated 30.08.2019, while issuing notice, stayed the preventive detention order and extension thereof. Hence, he prays that the impugned order of detention as well as consequential orders are liable to be quashed.

18. A short counter has been filed by Superintendent of Jail, District Jail, Sitapur, wherein it is stated that the grounds of detention along with all documents have been furnished to the detenues on the date of passing the impugned order of detention i.e. 14.08.2020. Thereafter, information for invocation of NSA against the detenues have also been furnished by the detaining authority to the Central Government, State Government and other authorities through Radiogram dated 14.08.2020. On 20.08.2020, the State Government had approved the impugned order of detention and the same was also served upon the detenues on 20.08.2020 and an information to this effect was also sent to the State Government on 21.08.2020. The representation submitted by the detenues was forwarded on the same day vide letter dated 24.08.2020 to the concerned authority. The approval order dated 20.08.2020, which was passed by the State Government, had been sent to by the detaining authority along with letter dated 02.09.2020, was also served upon the detenues on 02.09.2020 and information to this effect was also served upon the detaining authority. The District Magistrate, vide order dated 03.09.2020, has rejected the representation of the detenues/petitioners and same was also communicated to the detenues/petitioners on 03.09.2020. Thereafter, the State Government, vide order dated 14.09.2020, rejected the representation of the detenues/petitioenrs, which was also communicated through radiogram dated 14.09.2020. The rejection order dated 14.09.2020 was received by the Superintendent of Jail, District Jail, Sitapur on 15.09.2020 and the same was served upon the petitioner on 15.09.2020. On 22.09.2020, the detenues/petitioners were produced before the Advisory Board on 22.09.2020 through Video Conferencing in compliance of the order dated 18.09.2020 passed by the State Government. Thereafter, on receipt of the report of the Advisory Board, the State Government has

passed the impugned order dated 05.10.2020, whereby the detention under NSA was confirmed tentatively for three months, which was also served upon the detenues/petitioners. Vide order dated 26.10.2020, the Central Government had rejected the representation dated 24.08.2020 submitted by the petitioners/detenues and the same was also communicated to the detenues/petitioners on 26.10.2020. Thereafter, vide order dated 06.11.2020, the State Government has extended the detention order for further six months tentatively and the same was also served upon the detenues/petitioners on 06.11.2020.

19. A counter affidavit has also been filed by the respondent no.2/Under Secretary, Home (Confidential), State of U.P., reiterating the contents of the short counter affidavit filed by Jail Superintendent, District Jail, Sitapur. In the counter affidavit filed on behalf of the District Magistrate, Sitapur, it has been contended that the petitioner and other co-accused had committed heinous crime and annoyed the Hindu Community because they were involved in slaughter of cow and from them recovery of beef was made and due to this reason, it had disturbed the public order, which was brought under control because the prompt action taken by the district administration. It has also been stated that when the accused Irfan and Parvez was arrested, cow beef was recovered from their possession and as the news spread, the situation became tense, communal harmony was disturbed and a large police contingent was deployed in the area from various Police Stations to control the situation. In this way, the public order was disturbed. It has also been stated that the decision for invocation of National Security Act against the detenues/petitioners and other co-accused has been taken on the basis of the police report and nature of crime committed by them as they had disturbed the communal harmony, which resulted in serious disturbance of the law and order situation, which was ultimately controlled after deploying number of police force. Thus, the act of the petitioner and other co-accused had adversely affected the public order.

20. In the rejoinder affidavit, the detenues/petitioners have refuted the contents made in the counter affidavit and have stated that the impugned order of detention and its extension have been passed only on account of pendency of one criminal case relating to Cow Slaughtering Act. During the pendency of the aforesaid criminal case, Gangster Act was also slapped upon the detenues/petitioners. It has also been stated that the extended period of the detention order dated 10.02.2021 is illegal as the same has been passed ignoring the fact that other co-accused, Rafi and Kurban against whom the National Security Act was slapped and against them number of criminal cases are pending as has been reflected from the ground of detention itself and have also brought cow beef in the house of detenues/petitioners, have been released on 21.01.2020 while the detenues /petitioners, who neither brought the beef nor was involved in slaughtering, his detention period has been extended for further three months. It has also been stated that the detention period has been extended only on the ground for preventing the petitioners/detenues from releasing on bail and there is no evidence that after releasing on bail, the petitioners/detenues will indulge in activities prejudicial to the public order. It has also been stated that

before extension of period for detention by the authorities concerned, the same was not sent before the Advisory Board as has been provided under para-21 of the General Clauses Act, wherein it has been provided that the decision can be amended or changed by the same process as it was got done earlier and the detention period has been extended without following the due process of law and without approval of the Advisory Board, hence the extension period of detention is itself illegal.

21. We have examined the submissions advanced by the learned Counsel for the parties and gone through the pleadings on record.

22. It transpires from the record that the impugned order of detention together with the grounds of detention were served on the detenues/petitioners on the same day, i.e. on 14.08.2020 when the detenues/petitioners were confined in the District Jail, Sitapur in connection with a case registered as First Information Report No. 0235 of 2020, under Sections 3/5/8 of the U.P. Prevention of Cow Slaughter Act, 1955 and Section 7 of the Criminal Law Amendment Act, 2013, against accused Parvez and Irfan, Rahamtullah (detenue/petitioners herein), Rafi and Kurban at Police Station Talgaon, District Sitapur.

23. It is pertinent to mention here that after lodging the First Information Report No. 0235 of 2020, under Section 3/5/8 of the U.P. Prevention of Cow Slaughter Act, 1955 and Section 7 of the Criminal Law Amendment Act, 2013, another F.I.R., bearing No. 0250 of 2020, under Section 2 (kha)(17)/3 of the UP Gangsters and Anti-Social Activities (Prevention) Act, 1986 have been lodged against the detenues/petitioners as well as other co-accused persons on the basis of single criminal case and, thereafter, impugned detention order has been passed by the detaining authority but from perusal of the grounds of the detention reflects that the filing of FIR No. 0250 of 2020 under Sections 2(kha)(17)/3 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 has not been mentioned in the grounds of detention. It appears that the factum of lodging FIR No. 0250 of 2020 under Sections 2(kha)(17)/3 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 against the detenues/petitioners has not been brought to the notice of the detaining authority by the sponsoring authority i.e. Station House Officer, Police Station Talgaon, District Sitapur and Superintendent of Police, Sitapur and the detaining authority has passed the impugned order of detention only on the basis of single case i.e. F.I.R. No. 0235 of 2020.

24. The basic grounds for detaining the detenues/petitioners were that on receipt of information from the informer that the detenues/petitioners Parvez, Irfan and Rahmatullah along with two butchers of village Biswan, namely, Rafi and Kurban were cutting the beef for the purposes to sell it, the Incharge Inspector along with other police personnels of police station Talgaon, district Sitapur visited/raided the house of the detenues/petitioners at 5.30 A.M. and the petitioners/detenues Parvez and Irfan were arrested on the spot along with beaf and weapons for cutting the beaf, however, their associates Rahmatullah, Karim and Rafi were fled away from the spot. The recovered beef was examined by the Veterinary Doctor, Parsendi and after examining, it was verified that the

recovered meat was of beef. Thereafter, the aforesaid F.I.R. i.e. F.I.R. 0235 of 2020, against the petitioners/detenues and co-accused Karim and Rafi were lodged at Police Station Talgaon, District Sitapur. On 13.07.2020, petitioner/detenue Rahmatullah and other two co-accused persons, namely, Karim and Rafi were arrested and sent to jail. When the aforesaid news spread in the area, villagers of Hindu community gathered near the house of the petitioners/detenues and all of them were excited and communal amity was disturbed. After great efforts, the police succeeded in assuaging the general public and taking steps for restoring public order. It is further clarified in the grounds of detention that as a result of the acts of the petitioners/detenues and co-accused, the sentiments of the Hindu community were hurt and Hindu-Muslim harmony was adversely affected and an atmosphere of fear and terror was generated, public order was disturbed and the crowd became belligerent. As the relationship between the two communities was adversely affected and disturbed due to the petitioners/detenues' action, hence the detention order was passed as aforesaid.

25. It also transpires from the ground of detention that as a result of the act of the detenues/petitioners, the normal course of the general public was disturbed. On being satisfied by the report of the Superintendent of Police, Sitapur and Station House Officer, Police Station Talgaon, District Sitapur and further on being satisfied that in order to maintain public order and that there was a likelihood of the petitioners/detenues being released on bail, the detaining authority passed the impugned order detaining the petitioners/detenues under Section 3(2) of the Act, 1980.

26. The main plank of the argument of the learned counsel for the detenues is that since the detenues were in custody of the police authorities for a substantive offence and during that period, another F.I.R. No. 250 of 2020 was registered under the Gangsters Act, therefore, there was no need to direct their preventive detention merely on the basis of a solitary incident of cutting beef in pieces to sell it, which was carried out in the secrecy of their home and that when the said beef was brought by co-accused, Rafi and Karim in the house of the petitioners /detenues, it could not be inferred that the detenues/petitioners on being released from jail would repeat the activities that might be prejudicial to maintenance of public order. Further since the grounds of detention mentioned that the friends of petitioners/detenues had a bad reputation as against them henious crimes have been registered at police station Vishwan district Sitapur, therefore, because of these extraneous considerations where only a solitary incident of cutting beef was only involved, the impugned order of detention was a *mala fide* exercise of jurisdiction. It was further contended that the solitary incident of cutting beef in pieces could not have disturbed public order as there was no material to show that any untoward incident had taken place in the village. In fact the report itself mentioned that the public, which had gathered at the spot, was disbursed after being pacified by the police.

27. On the other hand, learned Additional Government Advocate urged that only the subjective satisfaction of the detaining authority that the action of the detenues/petitioners could have disturbed even the tempo of life was sufficient for clamping an order of preventive detention and the same could not be subject to

judicial review as the said order was necessary for the protection of society and a balance has to be struck between the needs of the community and the liberty of a citizen. A habeas corpus petition challenging the preventive action by the District Magistrate cannot proceed like an appeal against the detention order and the Court cannot look into the probative value of the evidence available against the petitioners/detenues, nor was the Court empowered to substitute its opinion for the subjective satisfaction of the authority. The cutting of beef to sell it offends religious faith and feelings of a section of the society, which certainly disturbs public tranquility, peace and communal harmony and hence it is a clear cut case of breach of public order which affected the even tempo of society.

28. We have examined the writ petition, counter affidavits, rejoinder affidavit and also considered the rival submissions of the parties as well as perused the impugned orders passed under Sub-section (2) of Section (3) of the Act, 1980.

29. We note that the grounds of detention clearly indicate that the incident had taken place in the secrecy of the petitioners/ detenues' house at 5.30 in the morning. It was a solitary incident of cutting cow beef in pieces away from the public eye. There was no resistance when the petitioners/detenues Parvez and Irfan and the other co-accused were being arrested by the police at that time. Further, to the specific averment in the writ petition that the petitioners/detenues had no criminal history and there was no material to indicate that the petitioners /detenues on being released from jail, would again indulge in the activity of cutting cow beef in pieces to sell, there was no specific denial in the counter affidavit of the District Magistrate, which simply mentioned that on the basis of the solitary incident the petitioners/detenues could be preventively detained. Further in the counter affidavit, it has been mentioned that the nature of the activity of the petitioners/detenues itself suggested that the petitioners/detenues may have been involved in slaughtering of a cow. It was also mentioned that so far as the allegation of discriminatory treatment against the petitioners/detenues for being singled out for detention under the National Security Act was concerned, it was refuted by the petitioners to the fact that the house belonged to the petitioners, and the other co-accused had brought the beef in the house of the petitioners but they were released from the charges levelled against them.

30. In **Ramveer Jatav Vs. State of U.P. and others** : (1986) 4 SCC 762, the Apex Court has held that it is possible for the detaining authority to assume that the accused could repeat the action, but for reaching that conclusion there must be some material and circumstances on record, to justify such a conclusion. Ramveer Jatav (Supra) was a case of broad day-light murder and it was observed by the Apex Court that it was difficult to infer from a solitary incident that such an act would disturb public order or that if the petitioner was not detained, he would be likely to indulge in such an activity in future.

31. In the instant case, the case of the petitioners/detenues, which are a case of cutting cow beef in pieces in the secrecy of his own house, can at best be described as a matter affecting law and order and not public order. Moreover, there was no

material for reaching the conclusion that the petitioners/detenues would repeat the activity in future.

32. The contention of the learned Additional Government Advocate that this is a matter for the subjective satisfaction of the detaining authority and the Court has no jurisdiction to adjudicate on the probative value, and the propriety or sufficiency of the ground of the ground of detention of the detaining authority is immune from judicial review is a proposition which cannot be accepted when stated so broadly.

33. In the case of **S.R. Bommai Vs. Union of India** : AIR 1994 SC 1918, the Apex Court has held that even the Presidential satisfaction under Article 356 of the Constitution to impose emergency is not completely immune from judicial challenge although Presidential satisfaction and the satisfaction of the Constitutional machinery is capable of being objectively determined only to a very limited extent. Therefore, in certain cases specially where *mala fide* exercise of power or action on extraneous consideration was concerned, a limited power of judicial review has been conferred even when the President was exercising his powers under Article 356 of the Constitution. But as mentioned by Hon'ble K. Ramaswamy, J in paragraph 150 of S.R. Bommai's case (Supra), the satisfaction of the President cannot be equated with the discretion conferred upon an administrative agency which can be tested on objective material to some extent:

"The satisfaction of the President cannot be equated with the discretion conferred upon an administrative agency, of his subjective satisfaction upon objective material like in detention cases, administrative action or by subordinate legislation."

34. Thus, it is crystal clear that in detention cases, the subjective satisfaction is open to limited judicial scrutiny. Therefore, it would be wrong to contend that there is complete embargo on the powers of the Court to look at the sufficiency of the ground from any perspective, although the probative value of the material adduced for inferring whether the detenue was engaged in a particular activity, was a matter primarily for the satisfaction of the detaining authority, and the Court could not evaluate it as it would have evaluated material on an appeal.

35. In the present case, we find that learned counsel for the petitioners has not raised any question of fact and has not disputed that no such incident has taken place. His basic contention was that the incident took place in the secrecy of the home of the petitioners and it was not an act, which was intended to cause a conflagration or an act of confrontation where number of cows may have been slaughtered or assault made on persons, who protested against the slaughtering. Furthermore, there is no suggestion that any witness has turned hostile and it has not even been argued by the learned counsel for the petitioners that either the accused has been discharged, acquitted or that the case would end in discharge or acquittal or that there is want of evidence in the case.

36. At this juncture, it would be apt to mention that it cannot be denied that normally in exercise of powers under Article 226 of the Constitution of India, this Court has limitations in considering the sufficiency of the evidence for ascertaining the factual involvement of a detenue, but this Court can certainly see whether the activities complained of have resulted in an

infringement of public order or only involve a law and order issue.

37. The only submission that learned petitioners' counsel has advanced is that on the basis of a solitary incident, where there was no material to infer that repetition was likely, the order of detention was not justified.

38. At the cost of repetition, it would be relevant to mention here that the petitioners and co-accused were mutely arrested when they were found cutting a beef in the wee hours of the morning in the house of the petitioners. We also do not know whether the cause was poverty, lack of employment or hunger, which may have compelled the petitioners and the other co-accused to take such a step. It is thus, a matter of quality and degree whether the act has been done in public gaze and in an aggressive manner with scant regard to the sentiments of the other community or whether it has been done in a concealed manner, which can resolve the question whether the case is one involving public order, or is only a matter affecting law and order.

39. In the case of ***T. Devaki Vs. Government of Tamil Nadu and others***, (1990) SCC 456, the Apex Court observed that merely making averments in the grounds of detention that as a result of an offence in public and in broad day light alarm, fear and a sense of insecurity was generated in the minds of the public of the area and thereby the detenue could be said to have acted in a manner prejudicial to the maintenance of public order which affected the even tempo of life of the community, was not sufficient. Repetition of these words in the grounds are not sufficient to inject the requisite degree of quality and potentiality in the incident in question, but there must be some substantive material to indicate that public order has been jeopardized.

40. In the present case, to the contrary we find that on the arrival of the police in the wee hour, the public had been pacified and disbursed and that the beef and weapons of cutting beefs i.e. banka, wood and knife were recovered and sent to Veterinary Doctor for test. Thus, an act of slaughtering a cow in the secrecy of one's own house in the wee hours probably because of poverty or lack of employment or hunger, would perhaps only involve a law and order issue and could not be said to stand on the same footing as a situation where a number of cattle have been slaughtered outside in public view and the public transport of their flesh or an incident where aggressive attack is made by the slaughterers against the complaining public, which may involve infractions of public order.

41. In **Ramesh Yadav vs District Magistrate, Etah and others** : AIR 1986 SC 315, the Apex Court has observed as under :

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. ***Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail***

an order of detention under the National Security Act should not ordinarily be passed. *We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in series of cases relating to preventive detention. The impugned order, therefore, has to be quashed."****(emphasis supplied)***

42. The aforesaid dictum of the Apex Court in **Ramesh Yadav vs District Magistrate, Etah and others (Surpa)** has also been followed by the Apex Court in **Sama Aruna v State of Telangana and another** : (2018) 12 SCC 150.

43. Considering the aforesaid, we are of the opinion that there was no material to indicate that the petitioners/detenues had any criminal history and it was only a surmise based on no material or evidence that the petitioners/detenues might have been earlier involved in such an incident and he may show such a repetitive tendency, in case they will be released on bail.

44. In view of the above, all the above-captioned habeas corpus petitions succeed and are allowed. The detention order dated 14.08.2020 and impugned consequential orders are quashed. The detenues/petitioners shall be released forthwith unless wanted in connection with some other criminal case.

45. No order as to costs.

(2021)08ILR A294
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2021

BEFORE

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

Habeas Corpus Writ Petition No. 429 of 2021

Priyanshu (Minor) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jitendra Kumar

Counsel for the Respondents:
A.G.A.

A. Constitution of India – Article 226 – Writ – Habeas Corpus – Scope – Detention – Jurisdictional fact – Habeas Corpus is a prerogative writ and an extraordinary remedy – It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown – Held, exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detention is unlawful – It is only where the jurisdictional fact is established, the applicant becomes entitled to the writ as of right. (Para 8 and 9)

B. Constitution of India – Article 226 – Writ – Habeas Corpus – Issuance of – When warranted – Matter relating to custody of minor – Principle laid down – Principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody the child presently is – Proceedings in the nature of habeas corpus may not be used to examine the

question of the custody of a child. (Para 13 and 14)

C. Constitution of India – Article 226 – Hindu Marriage Act, 1955 – S. 26 – Writ – Habeas Corpus – Scope of interference – Alternative remedy – Custody of minor – Subject matter relating to custody of children during the pendency of the proceedings under the HMA is governed in terms of the provisions contained under Section 26 – Proceedings under the HMA being pending before the Family Court, it is open to the parties to invoke the jurisdiction of the court under Section 26 for seeking orders with regard to custody of the minor. (Para 19 and 21)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Mohammad Ikram Hussain Vs St. of U.P. & ors., AIR 1964 SC 1625

2. Kanu Sanyal Vs D.M., Darjeeling, (1973) 2 SCC 674

3. Nithya Anand Raghvan Vs State (NCT of Delhi) & anr., (2017) 8 SCC 454

4. Sayed Saleemuddin Vs Dr. Rukhsana & ors., (2001) 5 SCC 247

5. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42

6. Rachhit Pandey (Minor) & anr. Vs St. of U.P.& 3 ors., 2021 (2) ADJ 320

7. Master Manan @ Arush Vs St.of U.P. & ors., 2021 (5) ADJ 317

8. Krishnakant Pandey (Corpus) & ors. Vs St. of U.P. & ors., 2021 2 AWC 1053 All8

9. Gaurav Nagpal Vs Sumedha Nagpal, (2009) 1 SCC 42

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

1. Heard Sri Jitendra Kumar, learned counsel for the petitioner and Sri Sameer Shankar, learned Additional Government Advocate appearing for the State-respondents.

2. The present petition has been filed on behalf of petitioner (minor) through Jai Singh who has asserted to be father of the minor.

3. Pleadings in the petition indicate that soon after the birth of the petitioner (corpus), on 17.02.2018, some dispute arose between his father and mother (Respondent No.4) and on 22.10.2020 when the petitioner was about two years of age the Respondent No.4 left her matrimonial home along with the minor child. It is an admitted fact that the Respondent No.4 has not returned to her matrimonial home since then.

4. Learned Additional Government Advocate on the basis of instructions submits that the Respondent No.4 along with her minor child is living separately and that some litigation is pending between the parties before the Family Court.

5. Learned counsel for the petitioner submits that the matter which is pending before the Family Court is under Section 13 of the Hindu Marriage Act, 1955 i.e. proceedings for divorce. He states that the only relief which is being sought in the present proceedings is a claim related to custody of the minor child.

6. The dispute between the parties, which is sought to be agitated by means of the present petition, essentially is, regarding the custody of the minor child, who is presently about three and a half years of age (date of birth-17.02.2018).

7. In a petition seeking a writ of habeas corpus in a matter relating to a claim for custody of a child, the principal

issue which is to be taken into consideration is as to whether from the facts of the case, it can be stated that the custody of the child is illegal.

8. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown, as held in **Mohammad Ikram Hussain vs. State of U.P. and others**1 and **Kanu Sanyal vs. District Magistrate Darjeeling**2.

9. The exercise of the extraordinary jurisdiction for issuance of a writ of habeas corpus would, therefore, be seen to be dependent on the jurisdictional fact where the applicant establishes a prima facie case that the detention is unlawful. It is only where the aforementioned jurisdictional fact is established that the applicant becomes entitled to the writ as of right.

10. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration in **Nithya Anand Raghvan Vs. State (NCT of Delhi) and another**3, and it was held that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person.

11. Taking a similar view in the case of **Sayed Saleemuddin vs. Dr. Rukhsana and others**4, it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed. It was stated thus:-

"11. ...it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court…"

12. The question of maintainability of a habeas corpus petition under Article 226 of the Constitution of India for custody of a minor was examined in **Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others**5, and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective. The observations made in the judgment in this regard are as follows:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully

deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

x x x

19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

13. It is, therefore, seen that in an application seeking a writ of habeas corpus for custody of a minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody the child presently is.

14. Proceedings in the nature of habeas corpus may not be used to examine the question of the custody of a child. The prerogative writ of habeas corpus, is in the nature of extraordinary remedy, and the writ is issued, where in the circumstances of a particular case, the ordinary remedy provided under law is either not available or is ineffective. The power of the High Court, in granting a writ, in child custody matters, may be invoked only in cases where the detention of a minor is by a person who is not entitled to his/her legal custody.

15. In a case where facts are disputed and a detailed inquiry is required, the court

may decline to exercise its extraordinary jurisdiction and may direct the parties to approach the appropriate court. The aforementioned legal position has been considered in a recent judgement of this Court in **Rachhit Pandey (Minor) And Another vs. State of U.P. and 3 others6, Master Manan @ Arush Vs. State of U.P. and others7** and **Krishnakant Pandey (Corpus) and others Vs. State of U.P. and others**8.

16. In the present case, it has been pointed out that the date of birth of the child is 17.02.2018, and in terms of the provisions under Section 6 (a) of the Hindu Minority and Guardianship Act, 19569 the custody of a minor who has not completed the age of five years is to be ordinarily with the mother, and in view thereof the custody of the petitioner (minor son) with the respondent no.4 (mother) *prima facie* cannot be said to be illegal.

17. It is undisputed that the minor child is with his mother since 22.10.2020 under her custody. The submissions of the counsel for the parties indicate the existence of a dispute between the parties and also pendency of proceedings for divorce under Section 13 of the Hindu Marriage Act, 195510.

18. A writ of habeas corpus, as has been consistently held, though a writ of right is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child.

19. The subject matter relating to custody of children during the pendency of the proceedings under the HMA is governed in terms of the provisions contained under Section 26 thereof. The aforesaid section applies to "any proceeding" under the HMA and it gives the power to the court to make provisions in regard to: (i) custody, (ii) maintenance, and (iii) education of minor children. For this purpose the court may make such provisions in the decree as it may deem just and proper and it may also pass interim orders during the pendency of the proceedings and all such orders even after passing of the decree.

20. The provisions under Section 26 of the HMA were considered in **Gaurav Nagpal v Sumedha Nagpal**11, and it was held as follows:-

"Section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the Court could make, from time to time, such interim orders as it might deem just and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible."

21. In the case at hand, proceedings under the HMA being pending before the Family Court, it is open to the parties to invoke the jurisdiction of the court under Section 26 for seeking orders with regard to custody of the minor.

22. It is made clear that the observations made, herein above, are *prima facie* in nature and the same are without prejudice to the rights and contentions of the parties, which may be agitated in proceedings before the appropriate forum.

23. Having regard to the aforestated facts, this Court is not inclined to exercise its extraordinary jurisdiction in the matter.

24. The petition stands accordingly dismissed.

(2021)08ILR A299
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 656 of 2019

Mahesh Dayal ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Brijesh Sahai, Sri Bhavya Sahai

Counsel for the Respondents:
A.G.A., Sri Vinay Saran, Sri Pradeep Kumar Mishra

A. Constitution of India – Article 226 – Writ – Habeas Corpus – Issuance of – When warranted – Detention in criminal cases – B-warrant and P.T. warrant – Petitioner has been taken into custody in reference to other cases where the bail has not yet been granted and not in pursuance to B-warrant – The B-warrant was issued in reference to five to seven cases and not for all – Chart given by the petitioner shows custody pursuant to other cases and not in pursuant to the B-warrant in all cases – Held, a writ of habeas corpus is maintainable only when it is a case of illegal detention – Judgment of the Apex Court in Ram Dass Ram's case distinguished holding that it apply to the cases where accused is kept in custody pursuant to P.T. warrant despite his acquittal or bail. (Para 10, 12 and 14)

Writ Petition dismissed. (E-1)

Cases relied on :-

1. Habeas Corpus Petition No. 1151 of 2010, K.S. Muthuramalingam

Vs State decided by Madras High Court on 01.07.2010

2. Ram Dass Ram Vs St. of Bihar & anr., AIR 1987 SC 1333

(Delivered by Hon'ble Munishwar Nath Bhandari, J.
&
Hon'ble Shamim Ahmed, J.)

1. Heard Sri Bhavya Sahai, learned counsel for the petitioner, Sri Pradeep Kumar Mishra holding brief of Sri Vinay Saran, Senior Advocate for the respondents and the learned A.G.A.

2. A writ of habeas corpus has been filed alleging illegal detention of the petitioner.

3. Learned counsel for the petitioner submits that an FIR was registered against the petitioner followed by many other FIRs on same set of facts. The bail was granted to him in few cases but the petitioner has not been released. The petitioner is detained pursuant to B-Warrant though the detention pursuant to B-Warrant is not permissible.

4. Learned counsel for the petitioner has made reference of the judgment of Madras High Court in the case of ***K.S.Muthuramalingam vs. State*** dated 01.07.2010 in Habeas Corpus Petition No.1151 of 2010. There a reference of judgment of the Apex Court in the case of ***Ram Dass Ram vs. State of Bihar and another, AIR 1987 SC 1333*** has been given. It has been held that detention pursuant to P.T. Warrant is illegal if the accused has already been acquitted or

granted bail. In the instant case, the petitioner has been granted bail in the criminal case registered against him, thus the said bail should have been taken to be bail in all other cases because allegation in all the FIRs subsequent to first are identical.

5. Learned counsel for the petitioner has made a reference to the counter affidavit so as the order passed by this Court to show admission of the A.S.G. regarding detention of the petitioner pursuant to B-Warrant. It is admitted by the learned A.G.A. that one cannot be detained pursuant to B-Warrant. A reference of the cases has been given where B-Warrant has been issued. Accordingly, the petitioner should be released.

6. The petition has been contested by the A.S.G. He submits that a reference of B-Warrant has been given ignoring as to how many cases have been registered against the petitioner and in which he has been arrested. At one stage, it was brought to to the notice of the Court that petitioner has obtained bail in around 50 cases. The aforesaid is coming out from the order dated 1.9.2020 passed by this Court. The report of other cases registered against the petitioner was also sought which has not been given to the Court.

7. It is submitted by counsel for petitioner that around 100 cases have been registered against the petitioner. Copy of all the FIRs has not been enclosed to show that it contains one and same allegation. Petitioner can be taken into custody pursuant to the Criminal cases lodged against him unless bail is granted in such cases.

8. Grant of bail in one case does not mean bail in all cases registered separately. If that would have been so, there was no reason for the petitioner to apply for bail in each case because according to him, bail has been granted in around 50 cases leaving others. In view of the above, it is not a case of illegal detention because petitioner is not in custody pursuant to the B-Warrant but in reference to number of cases lodged against him. The prayer is accordingly to dismiss the petitioner.

9. We have considered the rival submission of parties and perused the record.

10. A writ of habeas corpus is maintainable only when it is a case of illegal detention. The petitioner was taken into custody pursuant to the criminal cases lodged against him. At one stage when bail was granted in one case, the petitioner could not be released in absence of completion of formalities. It is coming out from the order dated 15.10.20219 passed by this Court. An affidavit was filed by the petitioner to show compliance of required formalities for release. It is however a fact that petitioner is involved in more than 100 cases as per the statement of the counsel for the petitioner himself. It is alleged to be on one and same set of facts and allegation. Learned counsel for the petitioner is fair enough to state that he has not filed a copy of all the FIRs lodged against the petitioner to verify that all the FIRs contain one and same allegation.

11. In view of the above, it could not be proved that petitioner has been implicated on same set of allegations. It is otherwise not a writ petition to challenge the FIRs but the writ petition for release alleging illegal detention. The main argument of learned counsel is that once bail is granted in one case, it is to be treated to be a bail in all other cases. The argument aforesaid cannot be accepted rather to be

rejected summarily. No judgment on the issue or provision of law has been shown. Bail in one case cannot be taken to be bail in all other criminal cases registered separately. If bail in one case is to be taken as bail in all the cases than it could not be explained as to why petitioner applied for bail in 50 cases. Release even after the bail is subject to compliance of formalities of bail order. The petitioner has been arrested in other criminal cases or is in custody pursuant to a remand order in cases registered separately.

12. It is not shown that petitioner had completed all the formalities for release on bail in all the cases where he has been granted bail. The fact aforesaid is relevant for the reason that bail was granted to the petitioner earlier in one case, he could not be released in absence of completion of the formalities. It was completed later on but it has to be in all the cases where petitioner has been granted bail. It is not on record to show that required formalities for release after grant of bail were completed by the petitioner in all the cases where bail was granted. The petitioner has been taken into custody in reference to other cases where the bail has not yet been granted and not in pursuance to B-Warrant. The B-Warrant was issued in reference to five to seven cases and not for all. Even if the chart given by the petitioner is taken into consideration, it shows custody pursuant to other cases and not in pursuant to the B-Warrant in all cases.

13. In the light of aforesaid, the judgment of Madras High Court in the case of K.S.Muthuramalingam (supra) would have no application so as the judgment in the case of Ram Dass Ram (supra). There the issue was in regard to custody of the accused pursuant on P.T.Warrant. The custody pursuant to P.T.Warrant may not be proper after acquittal or bail but in the instant case, the petitioner has not been taken into custody pursuant to B-Warrant (P.T.) but pursuant to other pending cases.

14. The judgment of Apex Court in the case of Ram Dass Ram (supra) would not apply to the facts of this case. The custody is not justified pursuant to the P.T. Warrant when accused has been acquitted or released on bail. The P.T.Warrants are issued for the production of the accused confined in jail in reference to other cases. It is issued for production of the accused thus cannot be used to keep the accused in custody even after the bail or acquittal. Thus the judgment of the Apex Court would apply to the cases where accused is kept in custody pursuant to P.T. Warrant despite his acquittal or bail. In this case, petitioner is in custody in reference to the cases registered against him.

15. In view of the discussion made above, we do not find it to be a case of illegal detention and accordingly the writ petition fails and is **dismissed**.

(2021)08ILR A301
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.08.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE MRS. SAROJ YADAV, J.

Habeas Corpus No. 24213 of 2020

Kanhaiya Awasthi ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Nadeem Murtaza, Sudhanshu S. Tripathi

Counsel for the Respondents:
G.A., Varun Pandey

A. National Security Act, 1980 – Section 3(2) – Preventive Detention – Subjective satisfaction of authority – Judicial Review – Scope of interference – Generally the Court cannot sit as an appellate authority in such cases over the subjective satisfaction of the detaining authority – However, judicial review of such exercise of power by the detaining authority on his subjective satisfaction is available – High Court declined to interfere in the subjective satisfaction of the detaining authority in passing the impugned detention order. (Para 13 and 14)

B. Constitution of India – Article 21 and 22(5) – National Security Act, 1980 – Section 3(2) – Preventive Detention – Representation of the detenue – District Magistrate took seven days to forward the representation – No Explanation – Central Govt. took 43 days to decide representation – Delay in consideration of the representation – It's effect on detention process – Highly cherished right enshrined in Article 21 and 22(5) of the Constitution castes a legal obligation on the Government to consider the representation as early as possible – Held, even if some delay in consideration of the representation may not become fatal to the detention but non-explanation of the same would certainly impeach the detention order – There is no explanation on the part of the District Magistrate as to why he has forwarded the petitioner's representation after seven days – District Magistrate has not justified the period taken for forwarding the petitioner's representation to the State Government and the Central Government after seven days – High Court quashed the impugned detention order holding the District Magistrate and the Central Government at fault. (Para 29, 32, 33, 37, 44 and 45)

Writ petition allowed. (E-1)

Cases relied on :-

1. Lahu Shrirang Gatkal Vs St. of Maharashtra through the Secretary & ors., (2017) 13 SCC 519

2. Senthamilselvi Vs St. of T.N., (2006) SCC 676

3. U.O.I. Vs Dimple Happy, AIR 2019 SC 3428

4. T. Devaki Vs Government of T.N. & ors., 1990 (2) SCC 456

5. Secretary to Government of Tamil Nadu Public (Law and Ordre) Revenue Department & ors. Vs Kamala & ors., (2018) 5 SCC 322

6. Commissioner of Police Vs Gurbux Anandram Bhiryani, 1988 (Supp) SCC 568

7. K.M. Abdulla Kunhi & B.L. Abdul Khader Vs U.O.I. & ors., (1991) 1 SCC 476

8. Rama Dhondu Borade Vs K. Sarqf, Commissioner of Police & ors, (1989) 3 SCC 173

9. Rajammal Vs St. of T.N. & anr., 1999 (1) SCC 417

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

1. Questioning the legality and validity of the order dated 06.09.2020 passed by the District Magistrate, Unnao (respondent no.3), directing detention of Kanahaiya Awasthi (detenue/petitioner herein) in exercise of its power under Section 3 (2) of the National Security Act, 1980 as well as the order dated 14.09.2020 passed by the Under Secretary, Home (Confidential) Department, Government of Uttar Pradesh (respondent no.2), confirming the order of detention dated 06.09.2020, petitioner/detenue Kanahaiya Awasthi has preferred the instant Habeas Corpus petition through his next friend and sister-in-law Shivangi Awasthi.

2. The prejudicial activities of the petitioner/detenue impelling the third respondent (District Magistrate, Unnao) to clamp the impugned detention order against him are contained in grounds of detention, according to which, on 19.06.2020 at 3:30

p.m., one Subham Mani Tripathi, who was a journalist by profession and the district correspondent of a news daily "Kampumali' published from Unnao, was murdered by the petitioner and other co-accused persons. In this regard, brother of deceased, namely, Rishabh Mani Tripathi, lodged an F.I.R. on 19.06.2020, which was registered as case crime no. 188 of 2020, under Sections 147, 148, 149, 302/34, 120B I.P.C. and Section 7 of the Criminal Law Amendment Act, 1932, at Police Station Gangaghat, District Unnao. Thereafter, the petitioner was arrested and detained in judicial custody for the aforesaid incident. While the detenue was in jail w.e.f. 30.06.2020, the Inspector Incharge, Police Station Gangaghat, District Unnao had forwarded a dossier to the Superintendent of Police, Unnao, who, in turn, forwarded the same to the District Magistrate, Unnao recommending that the detention of the detenue may be ordered under the appropriate provisions of National Security Act, 1980 (hereinafter referred to as **"N.S.A."**). The aforesaid Sponsoring Authority, while recommending to detain the detenue under N.S.A., has stated the facts that the detenue has also been involved in six other criminal cases and the detenue has tried to bail out in the aforesaid cases and there is liklihood that if the detenue be released on bail, he may indulge in other criminal activities. Thereafter, the District Magistrate, Unnao, on considering the recommendation of the sponsoring authority, invoked the provisions of Section 3(2) of the N.S.A. and passed the order of detention dated 06.09.2020, directing to detain the detenue/petitioner under the N.S.A., which is impugned in the instant habeas corpus petition.

3. It transpires from the record that the detention order along with the grounds of detention dated 06.09.2020 and other relevant document(s) was served upon the petitioner/detenu on 06.09.2020 itself. On 14.09.2020, the State Government approved the order of detention dated 06.09.2020 and the same was also served upon the petitioner/detenue on 14.09.2020. Thereafter, the detenue/petitioner had filed his representation dated 22.09.2020 to the Uttar Pradesh Advisory Board (Detention), Lucknow, Secretary (Home), Union of India, North Block, New Delhi as well as the Secretary, Department of Home, State of U.P. The said representation of the petitioner dated 22.09.2020 was forwarded by the Superintendent, District Jail, Unnao to the District Magistrate, Unnao vide letter dated 22.09.2020. Thereafter, the District Magistrate, Unnao vide letter dated 29.09.2020, forwarded the representation of the petitioner to the State Government (respondent no.2), Central Government (respondent no.1). The State Government has received the representation of the petitioner on 30.09.2020, whereas the Union of India (respondent no.1) has received the petitioner's representation dated 22.09.2020 on 05.10.2020.

4. After due consideration, the State Government had rejected the representation of the petitioner dated 22.09.2020 on 06.10.2020 and information in this regard was also communicated to the petitioner through District Magistrate, Unnao by the State Government via radiogram dated 06.10.2020. Thereafter, the U.P. Advisory Board (Detention), Lucknow, after due consideration, opined that there is sufficient cause for the preventive detention of the petitioner under N.S.A. The said report and records of the case were received in the concerned Section of the State Government on 19.10.2020 through the letter of the Registrar, U.P. Advisory Board (Detentions) dated 19.10.2020.

5. On receipt of the aforesaid report of the U.P. Advisory Board (Detentions) vide letter dated 19.10.2020, the State Government had examined the issue afresh and confirmed the detention order dated 06.09.2020 and also for keeping the detenue/ petitioner under detention for a period of three months tentatively from the date of actual detention of the petitioner i.e. since 06.09.2020, vide orders dated 22.10.2020. Thereafter, on the basis of the report/recommendation dated 21.11.2020 of the District Magistrate, Unnao, the aforesaid orders dated 22.10.2020 was amended vide order dated 26.11.2020, extending the period of detention tentatively for six months from the actual date of detention i.e. since 06.09.2020.

6. Heard Sri Nadeem Murtaza and Sri Sudhanshu Shekhar Tripathi, learned Counsel for the detenue/petitioner, Mr. S.B. Pandey, learned Assistant Solicitor General of India, assisted by Sri Varun Pandey, learned Counsel for the Union of India and Mr. S.P. Singh, learned Additional Government Advocate for the State.

7. Challenging the impugned order of detention as well as impugned confirmation order of detention, it has been argued by the learned Counsel for the detenue/petitioner that the proceedings recommending invocation of N.S.A. had been initiated by the sponsoring authority much belatedly after two and half months of the alleged solitary incident of 19.06.2020, which itself creates doubt on the veracity of the entire proceeding for invocation of preventive detention under N.S.A. as well as same has a broken life link between the alleged prejudicial activity and the passage of the impugned detention order. He further argued that the detaining authority, without application of mind, had passed impugned detention order irrespective of the fact that the criminal antecedents of the petitioner pertain merely to offences of petty in nature, which were neither life threatening nor heinous. Moreover, the detaining authority even failed to appreciate that the alleged prejudicial activity was also not attributable to the petitioner as the investigation was still going on at the time of passing the impugned detention order and the charge-sheet was submitted much belatedly after invocation of NSA on 20.09.2020 as well as the alleged offence of the petitioner is yet to be ascertained by the Court of law. The detaining authority has also failed to appreciate that at most, the act may only be considered as a disturbance of law and order rather than a social order, affecting merely the individual deceased and his family, thereby rendering the impugned detention order as bad in law.

8. Learned Counsel for the detenue/petitioner, while placing reliance upon **Lahu Shrirang Gatkal Vs. State of Maharashtra through the Secretary and others** : (2017) 13 SCC 519, has argued that the proviso to Section 3 (2) of the N.S.A. prescribed that no order passed under Section 3 (2), shall, in the first instance, exceed six months and if the State Government is satisfied that the order is required to be passed for a further period, it may extend the period of detention by such period not exceeding three months at any one time and in no case, the period of detention would exceed the period of one year in total. He argued that in the present case, perusal of the impugned order of detention passed by the detaining authority as well as impugned order of affirmation passed by the State Government reveals that it does not specify the period for which detention has been ordered and, therefore,

in view of the ratio laid down by the Apex Court in **Lahu Shrirang Gatkal Vs. State of Maharashtra through the Secretary and others (supra)**, the impugned detention order and consequential order is illegal.

9. The next contention of the learned Counsel for the petitioner is that admittedly the statutory representation of the detenue was forwarded by the detaining authority after a considerably delay of seven days, which was received by the Ministry of Home Affairs, Government of India on 05.10.2020. The Union Government in the most callous and lackadaisical manner processed the same for consideration much belatedly after a delay of nine days after receipt of the statutory representation for which no explanation at all has been afforded by the Central Government. Further, there is a long and inordinate delay of 43 days in disposing of the statutory representation of the petitioner. There is also inordinate and unexplained delay of four days in communication of its result to the petitioner, which has been admitted by the jail authorities. Thus, the impugned order of detention as well as consequential orders are liable to be quashed on this ground alone.

10. Union of India, Ministry of Home Affairs through Under Secretary, Smt. Meena Sharma has filed supplementary counter affidavit and in para 4, there is explanation for delay, if any, in disposal of representation, which is reproduced as under:-

"4. That in continuation of para 5 of the affidavit dated 24.12.2020, it is further submitted that a copy of the representation dated 22.09.2020 of the detenue along with parawise comments of the detaining authority was forwarded by the District Magistrate, Unnao to the Central Government in the Ministry of Home Affairs vide letter dated 29.09.2020. The same was received in the section concerned in the Ministry of Home Affairs on 05.10.2020. It is pertinent to mention that after relaxation of few COVID norms, the section received 51 nos. of receipts including 09 nos. of representations from various State Governments during 05.10.2020 and 06.10.2020. Due to roaster system as well as in view of the large nos. of receipts and representations, the matter was examined in detail by the dealing hand and was put up for consideration of Union Home Secretary on 14.10.2020. During this, there was an intervening period of two holidays on 10.10.2020 and 11.10.2020 being Saturday and Sunday. The file reached the Under Secretary (NSA) on 14.10.2020. The Under Secretary (NSA) was on leave on 15.10.2020 and 16.10.2020 and there was an intervening period on 17.10.2020 and 18.10.2020 being Saturday and Sunday. Thereafter, the matter was examined in detail as document provided by the State Government was voluminous. After satisfying the same viz a viz representation of the petitioner, it was considered that an independent report from the central agency may be sought to ascertain the detenu's complicity in crime, his antecedents and the likely impact of his release on public order. Thereafter, the Under Secretary with her comments forwarded the same to the Deputy Legal Advisor on 20.10.2020. The Deputy Legal Advisor forwarded the same to the Joint Secretary (IS-II) on 21.10.2020. The Joint Secretary (IS-II) with his comments forwarded the same to the Union Home Secretary on 21.10.2020. The Union Home Secretary approved the same and sent the file back to the Joint Secretary (IS-II) on

22.10.2020. The file reached the section through aforesaid level on 23.10.2020. Accordingly, the requisite report was sought from the Central Agency on 23.10.2020. The report from the Central Agency was received in the section concerned on 06.11.2020. Thereafter, there was an intervening period of 2 holidays on 07th and 8th November, 2020 being Saturday and Sunday. After receiving the input from the Central Agency, the matter was examined by the Under Secretary, in consultation of section level officials, to ascertain the facts provided by the Central Agency viz a viz the report and the representation of the detenue. After satisfying the facts, she processed the representation of the detenue along with para-wise comments and the report of the central agency for the consideration and forwarded the file to Deputy Legal Advisor on 11.11.2020. The Deputy Legal Advisor forwarded the file to the Joint Secretary (IS-II) on 11.11.2020. The Joint Secretary (IS-II) with his comments forwarded the file to the Union Home Secretary (IS-II) with his comments forwarded the file to the Union Home Secretary on 13.11.2020. After that there was an intervening period of two holidays on 14.11.2020 and 15.11.2020 being Saturday and Sunday. The Union Home Secretary having carefully gone through the material on record, including the order of detention, the grounds of detention, the representation of the detenue, the comments of the detaining authority thereon and the inputs from central agency concluded that the detenue had failed to bring forth any material cause or grounds in his representation to justify the revocation of the order by exercise of the powers of the Central Government under Section 14 of the National Security Act, 1980. He, therefore, rejected the representation on 16.11.2020 and sent the file back to the Joint Secretary (IS-II). The file reached the section concerned through aforesaid level on 17.11.2020. Accordingly, the authorities concerned and the detenue were informed vide Wireless Message No. II/15028/150/2020-NSA dated 17.11.2020. It is further submitted that despite of unprecedented situation of COVID-19, the matter was examined and processed with utmost care and caution with promptitude. Hence, there was no bonafide or wilful delay in disposal of the representation of the Respondent No.01 i.e. the Union of India."

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

12. Learned counsel for the petitioner has attacked the impugned order of detention on the following grounds :-

"(1) The solitary incident, on the basis of which, the impugned detention order has been passed was allegedly committed on 19.06.2020, whereas the impugned detention order has been passed on 06.09.2020 i.e. after two and half months but the detaining authority, without applying his mind and without forming any cogent satisfaction, has passed the impugned order of detention on the basis of past conduct of the detenue.

(2) The detention order does not specify the period for which detention has been ordered, hence in view of the law laid down by the Apex Court in **Lahu Shrirang Gatkal Vs. State of Maharashtra through the Secretary and others (supra)**, the detention order is illegal.

(3) There is an inordinate and unexplained delay in adjudication of the representation of the detenue by the Central Government, hence constitutional

safeguard provided to the detenue under Article 22 (5) of the Constitution of India is violated.

13. So far as first question with regard to slapping detention order upon the detenue on the basis of a solitary case after two and half months from the date of incident is concerned, it is trite law that generally the Court cannot sit as an appellate authority in such cases over the subjective satisfaction of the detaining authority. However, judicial review of such exercise of power by the detaining authority on his subjective satisfaction is available. At this juncture, it is worthwhile to refer to the decision of the Apex Court rendered in the case of ***Senthamilselvi v. State of T.N.*** reported in (2006) SCC 676, which is referred to in the decisions in the case of **Union of India v. Dimple Happy** reported in (AIR 2019 SC 3428). In the said decisions, satisfaction of the authority in coming to the conclusion that there is likelihood of the detenue being released on bail is "subjective satisfaction" based on the material and normally subjective satisfaction is not to be interfered with. In the present case also, the detaining authority has referred to every material placed before him and has also considered the retracted statements of the persons concerned and has satisfied himself to pass the detention order against the detenue/ petitioner.

14. Considering the aforesaid, we are of the view that no interference is required to be exercised on the subjective satisfaction of the detaining authority in passing such detention order.

15. The next argument of the learned Counsel for the detenue/petitioner is that the detention order does not specify the period for which detention has been ordered, hence in view of the law laid down by the Apex Court in **Lahu Shrirang Gatkal Vs. State of Maharashtra through the Secretary and others (supra)**, the detention order is illegal, it transpires from the record that this plea has been taken by the detenue/petitioner in paragraph-39 and ground (WW) in the memo of the writ petition but the same has not been denied in para-24 of the short counter affidavit filed on behalf of the respondent no.3-District Magistrate, Unnao. Thus, the undisputed fact is that no period of detention has been mentioned in the impugned detention.

16. Now, the question as to whether in non-mentioning of the period of detention in the impugned order of detention, it is illegal and on this ground, the impugned order of detention can be quashed.

17. Before analyzing the aforesaid question, we deem it appropriate to reproduce Section 3 of the N.S.A., which reads as under :-

"3. Power to make orders detaining certain persons.-

(1) The Central Government or the State Government may,--

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner

prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of Public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation.--For the purposes of this sub-section, "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" does not include "acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community" as defined in the *Explanation* to sub-section *(1)* of section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

(4) When any order is made under this section by an officer mentioned in sub-section (3), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government:

Provided that where under section 8 the grounds of detention are communicated by the officer making the order after five days but not later than 1 [fifteen days] from the date of detention, this sub-section shall apply subject to the modification that, for the words "twelve days", the words 2 "[twenty days]" shall be substituted.

(5) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order."

18. Section 13 of the N.S.A. deals with the maximum period of detention, which reads as under :

"13. Maximum period of detention. - The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under Section 12 shall be twelve months from the date of detention:

Provided that nothing contained in this section shall affect the power of the appropriate Government to revoke or

modify the detention order at any earlier time"

19. In **Lahu Shrirang Gatkal Vs. State of Maharashtra through the Secretary and others (supra)**, upon which the learned Counsel for the detenue/petitioner has placed reliance, the Two Hon'ble Judges Bench of the Apex Court has held that any blanket order of detention passed without specifying the period of detention is invalid in view of proviso to sub-section (2) of Section 3 of the N.S.A.

20. The view of Three Hon'ble Judges Bench of the Apex Court in **T. Devaki Vs. Government of Tamil Nadu and others** : 1990 (2) SCC 456 has been followed by the Apex Court in **State of Maharashtra & others vs. Balu S/o Waman Patole** (Criminal Appeal No. 1681 of 2019, decided on 13.11.2019), wherein the Apex Court, while also considering the provisions of Sections 3 and 13 of the N.S.A., has observed as under :-

"On fair reading of Section 3 of the Act, more particularly, subsection (2) of Section 3 of the Act, upon which much reliance has been placed by the High Court, **sub section (2) of Section 3 relates to the period for which the order of delegation issued by the State Government is to remain in force. It has no relevance to the period of detention.** The Legislature has entrusted the power of detention to the State Government. However, those powers can be delegated to the Jurisdictional District Magistrate or the Commissioner of Police, as provided in subsection (2) of Section 3 of the Act.

As per Section 13 of the Act, a person can be detained under the Act for such period not exceeding the maximum period of 12 months from the date of detention. The order of detention passed by the authorities mentioned in subsection (2) of Section 3 of the Act is required to be confirmed by the State Government. As per Section 13 of the Act, once the order of detention is confirmed by the State Government, the maximum period for which the detenu shall be detained cannot exceed 12 months from the date of detention. **The Act nowhere requires the detaining authority to specify the period for which the detenu is required to be detained.**

5.2 An identical question came to be considered by this Court in the case of T. Devaki (supra). In paragraph 10, this Court has observed and held as under:

"10. Provisions of the aforesaid sections are inbuilt safeguards against the delays that may be caused in considering the representation. If the time frame, as prescribed in the aforesaid provisions is not adhered to, the detention order is liable to be struck down and the detenu is entitled to freedom. Once the order of detention is confirmed by the State Government, maximum period for which a detenu shall be detained cannot exceed 12 months from the date of detention. The Act nowhere requires the detaining authority to specify the period for which the detenu is required to be detained.

The expression "the State Government are satisfied that it is necessary so to do, they may, by order in writing direct that during such period as may be specified in the order" occurring in subsection (2) of Section 3 relates to the period for which the order of delegation issued by the State Government is to remain in force and it has no relevance to the period of detention. The legislature has taken care to entrust the power of detention to the State Government; as the detention

without trial is a serious encroachment on the fundamental right of a citizen, it has taken further care to avoid a blanket delegation of power, to subordinate authorities for an indefinite period by providing that the delegation in the initial instance will not exceed a period of three months and it shall be specified in the order of delegation. But if the State Government on consideration of the situation finds it necessary, it may again delegate the power of detention to the aforesaid authorities from time to time but at no time the delegation shall be for a period of more than three months.

The period as mentioned in Section 3(2) of the Act refers to the period of delegation and it has no relevance at all to the period for which a person may be detained. Since the Act does not require the detaining authority to specify the period for which a detenu is required to be detained, order of detention is not rendered invalid or illegal in the absence of such specification."

5.3 Applying the law laid down by this Court in the aforesaid decision and, even otherwise, considering the provisions of Section 3 read with Section 13 of the Act, the High Court has committed a grave error in holding that as the period of detention of 12 months was mentioned in the order of detention, the same is contrary to Section 3 of the Act and, therefore, the same is liable to be quashed and set aside.

5.4 The High Court has wrongly relied upon and misinterpreted Section 3 (2) of the Act with respect to the period of detention. As observed hereinabove, subsection (2) of Section 3 of the Act relates to the period for which the order of delegation issued by the State Government is to remain in force and does not relate to the period of detention."(emphasis supplied)

21. The view taken by the Two Hon'ble Judges Bench of the Apex Court in **Lahu Shrirang Gatkal Vs. State of Maharashtra through the Secretary and others (supra)** came up for consideration before the Three Hon'ble Judges Bench of the Apex Court in the case of **Secretary to Government of Tamil Nadu Public (Law and Ordre) Revenue Department and others Vs. Kamala and others** : (2018) 5 SCC 322, wherein the Apex Court, on considering the law laid down by the Apex Court in **T. Devaki Vs. Government of Tamil Nadu (Supra) and Commissioner of Police Vs. Gurbux Anandram Bhiryani** : 1988 (Supp) SCC 568, has overruled the decision rendered by the Apex Court in **Commissioner of Police Vs. Gurbux Anandram Bhiryani (supra)** and has observed as under :-

"5 In the circumstances, **the High Court was not justified in quashing the order of detention on the basis that no period of detention was provided in the order.** The High Court has proceeded on the basis of the decision of this Court in Bhiryani which is no longer good law in view of the subsequent decision of a larger Bench in Devaki. The decision of the High Court in Santhi, to the extent that it adopts the same position as in Bhiryani, will not reflect the correct legal position."(emphasis supplied)

22. Considering the aforesaid, particularly the decisions of **T. Devaki Vs. Government of Tamil Nadu (Supra)** and **Secretary to Government of Tamil Nadu Public (Law and Order) Revenue Department and others Vs. Kamala and others (Supra)** were rendered by three Hon'ble Judges Bench, larger than the Bench which decided the case of **Lahu Shrirang Gatkal Vs. State of**

Maharashtra through the Secretary and others (supra), we are of the considered view that there is no substance in the plea of the detenue/petitioner that the impugned detention order and the impugned order confirming the detention order, both are bad in law as they do not mention the period of detention at the first instance.

23. The next submission of the learned Counsel for the detenue/ petitioner is that the delay and latches committed by the respondent no.1-Union of India in considering the representation has infringed fundamental rights of the detenue enshrined under Article 21 and 22 (5) of the Constitution of India. To justify inordinate delay in considering the petitioner's representation, the learned Counsel for the petitioner has drawn our attention to certain relevant dates and correspondences that took place between different authorities.

24. From the record, it transpires that the petitioner was detained under N.S.A. on 06.09.2020 and the detention order as well as grounds of such detention was also supplied to the detenue on the same day i.e. on 06.09.2020. Thereafter, the petitioner has submitted his representation to the U.P. Advisory Board (Detention), Lucknow, Secretary (Home), Department of Home (Internal Security), Government of India, New Delhi and the Secretary (Home), Government of Uttar Pradesh, Lucknow through Superintendent, District Jail, Unnao on 22.09.2020. The said representation of the petitioner dated 22.09.2020 has been forwarded to the District Magistrate, Unnao by the Superintendent, District Jail, Unnao on 22.09.2020 itself.

25. According to the learned Counsel for the petitioner, the delay was committed in forwarding the representation of the petitioner to the State Government as well as to the Central Government and thereafter the Central Government committed inordinate delay in disposing of the same. According to him, the detenu's representation dated 22.09.2020 was forwarded by the District Magistrate, Unnao after a considerable delay of seven days as the District Magistrate, Unnao has sent the petitioner's representation vide letter dated 29.09.2020 to the State Government as well as Central Government, which was received by the Ministry of Home Affairs, Union of India (respondent no.1) on 05.10.2020, whereas the State Government (respondent no.2) has received the same on 30.09.2020. The State Government has rejected the petitioner's representation on 06.10.2020 but the Central Government took nine days in processing the petitioner's representation after receipt of the statutory representation of the petitioner. Ultimately, the representation of the petitioner was rejected by the Central Government only on 16.11.2020 and the order of rejection was communicated to the petitioner on 17.11.2020 via wireless message. Thus, there is a long and inordinate delay of 43 days in disposing of the statutory representation of the petitioner.

26. The Under Secretary, Home (Confidential), State of U.P., Lucknow, District Magistrate, Unnao, District Magistrate, Unnao and Deputy Jailor, District Jail, Unnao have filed their short counter affidavits. However, the District Magistrate, Unnao as well as Deputy Jailor, District Jail, Unnao are conspicuously silent about the date on which date petitioner's representation was forwarded to the Central Government. According to Deputy Jailor, District Jail, Unnao, no

representation addressed to the District Magistrate, Unnao was at all submitted by the detenue/petitioner. However, the Under Secretary, Home (Confidential), State of U.P., has stated in its short counter affidavit that a copy of the petitioner's representation dated 22.09.2020 along with parawise comments was received in the concerned section of the State Government on 30.09.2020 along with the letter of District Magistrate, Unnao dated 29.09.2020. Smt. Meena Sharma, Under Secretary, Ministry of Home Affairs, Government of India, New Delhi, has stated in its supplementary counter affidavit that a copy of the petitioner's representation dated 21.09.2020 with parawise comments of the detaining authority was forwarded by the District Magistrate, Unnao to the Central Government in the Ministry of Home Affairs, vide letter dated 29.09.2020 and the same was received in the section concerned in the Ministry of Home Affairs on 05.10.2020.

27. The petitioner has admitted the fact of not submitting any separate representation to be examined and considered by the District Magistrate, Unnao. In Ground (R) of the writ petition, it has been stated that representation should be considered with reasonable expedition and it is imperative on the part of every competent authority, whether in merely transmitting or dealing with it, to discharge their obligation with all reasonable promptness and diligence without giving room for any complaint of remissness, indifference or avoidable delay since the delay caused by the slackness on part of any competent authority, will ultimately result in the delay of the disposal of the representation which in turn invalidates the order of detention as having infringed the mandate of Article 22 (5) of the Constitution of India.

28. It is true that neither Article 22(5) of the Constitution of India nor N.S.A. has prescribed time limit for consideration of representations. However, if one looks at various provisions of N.S.A., prescribing specific periods for furnishing grounds of detention, approval of the detention by the State Government, submitting report to the Central Government and Advisory Board, the period prescribed for considering the detention order and representations by the Advisory Board, etc. the intention of the legislature can safely be inferred that representations of detenues have to be considered with all promptitude.

29. The Apex Court, in the case of **K.M. Abdulla Kunhi & B.L. Abdul Khader v. Union of India and Ors.** : (1991) 1 SCC 476(C/B) has held that the representation relates to the liberty of the individuals, the highly cherished right enshrined in Article 21 of the Constitution, Clause (5) of Article 22 castes a legal obligation on the Government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words *"as soon as may be"* occurring in Clause (5) of Article 22 reflects the concern of the framers that the representation should be expeditiously considered and disposed of with the sense of urgency without any unavoidable delay.

30. Again, in the case of **Rama Dhondu Borade v. V.K. Sarqf, Commissioner of Police and Ors.:** (1989) 3 SCC 173 , the Apex Court reiterated that the detenue has an independent constitutional right to make his representation under Article 22(5) of the

Constitution of India. Correspondingly there is a constitutional mandate commanding the concerned authority to whom the detenue forwards his representation questioning the correctness of the detention order clamped upon him and requesting for his release, to consider the said representation within reasonable despatch and to dispose of the same as expeditiously as possible.

31. In the case of **Rajammal v. State of Tamil Nadu and another :** 1999 (1) SCC 417, the Apex Court restated the legal principle in the following words:

"The position, therefore, now is that if delay was caused on account of any indifference, or lapse in considering the representation, such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So, test is not the duration or range of delay, but how it is explained by the authority concerned."

32. For brevity of judgment, we are refraining from adverting of scores of other authorities on this point. Suffice is to hold that even though there is no fixed period of time for disposal of representation, the underlying message in the law is that all the concerned authorities, who are empowered to issue, approve or revoke detention orders, are duty bound to consider and dispose of the representations as expeditiously as possible. By now, it is also the settled principle of law that even if some delay in consideration of the representation may not become fatal to the detention but non-explanation of the same would certainly impeach the detention order.

33. Coming to the case at hand, we find that the writ petitioner was detained under N.S.A. on 06.09.2020 and submitted a representation on 22.09.2020 through the Superintendent, District Jail, Unnao, who, in turn, forwarded the same to the District Magistrate, Unnao on the same day i.e. 22.09.2020. The District Magistrate took seven days in forwarding the petitioner's representation dated 22.09.2020 as it is an admitted fact of the State Government as well as Central Government that the District Magistrate, Unnao has sent the petitioner's representation vide letter 29.09.2020 to them. There is no explanation on the part of the District Magistrate, Unnao as to why he has forwarded the petitioner's representation after seven days nor a whisper of word in the short counter affidavit filed on behalf of the District Magistrate, Unnao in this regard. Thus, the District Magistrate, Unnao has not justified the period taken for forwarding the petitioner's representation to the State Government and the Central Government after seven days.

34. However, the State Government has received the petitioner's representation on 30.09.2020 along with the letter of the District Magistrate, Unnao dated 29.09.2020 and the Central Government has received the petitioner's representation dated 22.09.2020 along with the letter of the District Magistrate, Unnao dated 29.09.2020 on 05.10.2020.

35. It transpires that the State Government took nearly six days in disposing of the representation as according to the petitioner, the State Government disposed of the petitioner's representation

on 06.10.2020. This factual position has been admitted in the short counter affidavit submitted by the Under Secretary, Home (Confidential), State of U.P. In this way, the State has justified the period taken for consideration of the representation.

36. Now, we come to examine the second leg of delay for disposal of the representation at the end of the Central Government.

37. The learned Counsel for the petitioner submitted that the Central Government received the representation on 05.10.2020 but it came to be rejected only on 16.11.2020. In this way, 43 days' time was taken by the Central Government to perform its legal duty.

38. From the supplementary counter affidavit submitted by Smt. Meena Sharma, Under Secretary, Ministry of Home Affairs, Govt. of India, we find that though a copy of the petitioner's representation dated 21.09.2020 of the detenue along with parawise comments of the detaining authority was received by the Central Government in the Ministry of Home Affairs from the District Magistrate, Unnao on 05.10.2020 but it could only be processed on 14.10.2020 when the file reached to the office of Under Secretary (NSA) on account of the fact that after relaxation of few COVID norms, the section received 51 numbers of receipts including nine numbers of representations from various Governments during 05.10.2020 and 06.10.2020. Strangely, the Central Government had made nine days' in processing the petitioner's representation. The affidavit further indicated that as on 15.10.2020 and 16.10.2020, the Under Secretary (NSA) was on leave and there was an intervening period on 17.10.2020 and 18.10.2020 being Saturday and Sunday and, thereafter, the matter was examined in detail as document provided by the State Government was voluminous and after satisfying the same viz-a-viz representation of the petitioner, it was considered that an independent report from the Central Agency may be sought to ascertain the detenue's complicity in crime, his antecedents and the likely impact of his release on public order and thereafter, the Under Secretary with her comments forwarded the same to the Deputy Legal Advisor on 20.10.2020. This shows that the petitioner's representation was lying with the Under Secretary w.e.f. 14.10.2020 to 19.10.2020 i.e. for five days. The affidavit further indicated that on receipt of the comments from the Under Secretary, the Deputy Legal Advisor has forwarded the same on 21.10.2020 to the Joint Secretary (IS-II), who, in turn, forwarded the same to the Union Home Secretary on 21.10.2020 itself. On 22.10.2020, the Union Home Secretary approved the same and sent the file back to the Joint Secretary (IS-II), which has reached the Section through aforesaid level on 23.10.2020. Thereafter, on 23.10.2020, requisite report was sought from the Central Agency, which was received in the section concerned on 06.11.2020 i.e. almost after 13 days. Thereafter, on 7th and 8th November, 2020 being Saturday and Sunday, therefore, the Under Secretary has processed the petitioner's representation and after examining it, forwarded the file to Deputy Legal Advisor on 11.11.2020 i.e. after almost five days. Thereafter, the Deputy Legal Advisor has forwarded the file to the Joint Secretary (IS-II) on 11.11.2020 itself and the Joint Secretary (IS-II) with his comments forwarded the file to the Union Home Secretary on 13.11.2020. Thereafter, on 14.11.2020 and 15.11.2020 being

Saturday and Sunday, therefore, Union Home Secretary has carefully gone through the material on record and rejected the representation of the petitioner on 16.11.2020 and the file was sent back to the Joint Secretary (IS-II) and the same was reached to the section concerned through aforesaid level on 17.11.2020 and the same was communicated to the petitioner through wireless message on 17.11.2020.

39. From the aforesaid assertions of the affidavit filed on behalf of the respondent no.1, it transpires that the processing of the petitioner's representation on day to day basis between the period 06.10.2020 to 13.10.2020 and between 24.10.2020 to 05.11.2020 has not been explained in the said affidavit and, therefore, in the interest of justice, this Court, vide order dated 09.08.2021, provided an opportunity to explain the day to day explanation and directed the Union Government (respondent no.1) to file a fresh affidavit giving day to day basis explanation in deciding the petitioner's representation.

40. In compliance of the order dated 09.08.2021, Sri Dharmendra Kumar, Deputy Secretary, Ministry of Home Affairs, Government of India, New Delhi, has filed response affidavit today, which is on record. Paras 2 and 3 of the aforesaid response affidavit are reproduced as under :-

"2. It is submitted that all the representations received by the answering respondent are dealt with due care and utmost promptitude and the officer dealing with them is very sincere, hard working and understands the gravity of the issues. She has been dealing with the National Security Act matters with due sincerity. The answering respondent submits that all the relevant facts related to the matter and the actionable dates are duly mentioned in the affidavit dated 24.12.2020 and thereafter as directed by Hon'ble Court, in supplementary affidavit dated 12.08.2021, but at the same time craves the leave of the Hon'ble Court to apologize at the outset if an impression has been drawn due to non-mentioning of day-to-day movement in the affidavit dated 24.12.2020 filed by the officer. It is further submitted that the directions of the Hon'ble Court are being complied with in letter and spirit, in the affidavits henceforth being filed before the Hon'ble Court.

(3) That it is further submitted that the answering respondent has utmost regard of the Hon'ble Court and are sensitive to the fundamental right of the detenue. It is humbly submitted that as the directions of Hon'ble Court are being complied with, the Hon'ble Court may accept the submission made herein above and the Hon'ble Court is requested to dispense with filing of personal affidavit by the Home Secretary, Ministry of Home Affairs.

41. It is relevant to mention here that vide order dated 09.08.2021, this Court directed the Union of India, Ministry of Home Affairs, New Delhi to file fresh affidavit giving day to day basis explanation in deciding the representation but surprisingly, instead of giving response to day to day affairs in disposal of the petitioner's representation in pursuance of the order dated 09.08.2021, Sri Dharmendra Kumar, Deputy Secretary, Ministry of Home Affairs, Government of India, New Delhi has filed response affidavit dated 13.08.2021, stating that all the relevant facts related to the matter and the actionable dates are duly mentioned in

the affidavit dated 24.12.2020 as well as supplementary counter affidavit dated 12.08.2021.

42. At this stage, Sri S.B. Pandey, learned Assistant Solicitor General of India appearing on behalf of the respondent no.1 has accepted the fact that there has been laxity on the part of Deputy Secretary in filing the affidavit in a casual manner. He submits that due to heavy rush of the representations coming out from various States, the same could not be filed by the Deputy Secretary properly, however, he has instructed the Secretary to ensure that proper and effective affidavit are filed in the habeas corpus petition in future.

43. Taking into consideration the aforesaid submission of the learned Assistant Solicitor General of India, we refrain ourselves to record any findings on the conduct of the official(s) of the Ministry of Home in filing the affidavits in the Habeas Corpus Petitions before this Court.

44. However, from the affidavit submitted by the Under Secretary, Ministry of Home Affairs, Government of India, it transpires that the petitioner's representation could not processed between 05.06.2020 to 13.06.2020 due to 51 numbers of receipts including 09 numbers of the representations from various State Governments during 05.10.2020 and 06.10.2020 have been received after relaxation of few Covid norms. We have given out anxious consideration whether this could have been a proper explanation for withholding the representation. In our considered opinion, both the District Magistrate, Unnao and the Central Government were at fault. It is true that in the present case, the detenue had submitted a representation on 22.09.2020 through Superintendent, District Jail, Unnao and the Superintendent, District Jail, Unnao has sent the same to the District Magistrate, Unnao on 22.09.2020 itself but the District Magistrate, Unnao took nine days in forwarding the same to the State Government and Central Government as the said petitioner's representation dated 22.09.2020 has been sent by the District Magistrate, Unnao on 29.09.2020 to the State Government and District Magistrate, Unnao and there is no explanation on behalf of the District Magistrate, Unnao in forwarding the petitioner's representation beyond nine days. This procedural lacuna resulted in loss of nine days in forwarding the representation of the detenue dated 22.09.2020 by the District Magistrate, Unnao. Furthermore, the Central Government though has received the petitioner's representation on 05.10.2020 but it could only be processed on 14.10.2020 when it has been placed before the Under Secretary and the reasons for such a delay or day to day explanation in dealing with the file has not been made in the affidavit. Moreso, the file relating to the petitioner's representation was reached to the office of Joint Secretary (IS-II) on 23.10.2020 and, thereafter, report was sought from Central Agency and in doing so, 13 days time was taken by the Central Agency and the required report was submitted before the Under Secretary on 06.11.2020. It transpires that no day to day explanation w.e.f. 23.10.2020 to 06.11.2020 have been made on behalf of the respondent no.1 (Union of India). Accordingly, there was cumulative delay in disposal of the representation of the petitioner by the District Magistrate, Unnao as well as Central Government. Thus, having regard to the nature of detention and rigor of law, we are of the view that there was disproportionate delay at both the ends.

45. For the reasons aforesaid, we are of the view that the plea of the detenue/petitioner that there is delay in forwarding the petitioner's representation on the part of the District Magistrate, Unnao and also delay in disposal of the petitioner's representation on the part of respondent no.1 (Union of India), has substance and on this count alone, the impugned detention order is liable to be quashed.

46. In the result, the instant Habeas Corpus Petition is **allowed**. The impugned order of detention dated 06.09.2020 and the consequential orders are quashed. The detenue/petitioner is ordered to be set at liberty forthwith unless required in connection with any other case.

47. For the facts and circumstances of the case, there is no order as to costs.

(2021)08ILR A317
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.07.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 2315 of 2019

Jyoti Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Trinetra Shankar Pandey, Radhey Shyam Tiwari

Counsel for the Respondents:
C.S.C.

Inadvertent error in filling up the form by school authorities-as form was fill up by the teachers of the school-application for correction rejected-hyper technical view taken only on ground of limitation-impugned order quashed.

W.P. allowed. (E-7)

List of Cases cited:

1. Jyoti Pandey Vs St. of U.P. &ors., Writ Petition No.222212 (M/S) of 2017

2. Anand Singh Vs Sta. of U.P. Secondary Education & ors. , 2014 (2) U.P.L.E.B.C. 1330

3.Babu Ram & ors. Vs St. of U.P. & anr., Special Appeal No.1202 of 2010

4.Anand Singh Vs St. of U.P. Secondary Education & ors., 2014 (2) U.P.L.E.B.C. 1330

5. Akash Sharma Vs St. of U.P. & ors. reported in 2016 (3) Alld. L.J 146

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

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

2. This petition has been filed by the petitioner challenging the order dated 12.09.2018 passed by the Opposite party no.2 Madhyamik Shiksha Parishad Uttar Pradesh.

3. It has been submitted by the learned counsel for the petitioner that the petitioner was a regular student of Vidya Mandir Inter College, Milkipur, Faizabad, and took the examination of High School in the year 2011. But when she received her Marksheet and Transfer Certificate it was found that her date of birth was incorrectly shown as 15.07.1995 in place of correct date of birth which is 21.01.1996 as per Transfer Certificate /Schools record. The petitioner approached the Principal of

Vidya Mandir Inter College, Milkipur, Faizabad, praying for correction of her date of birth but in the meantime, she had completed B.Sc. in 2016 and was admitted for MBBS in AIIMS Delhi. The Principal assured her that he will get corrected her date of birth in High School Certificate-cum-Marksheet as two dates of birth have been mentioned in High School Certificate and in Transfer Certificate. The Opposite party no.4 the Principal of Vidya Mandir Inter College, Milkipur, Faizabad, wrote to the opposite party no.2 on 20.09.2016 for correction of date of birth of the petitioner as per school record but no action was taken.

4. Thereafter, the petitioner approached this Court by filing a Writ Petition No.222212 (M/S) of 2017 (**Jyoti Pandey Vs. State of U.P. & Others**), this Court disposed of the petition on 18.09.2017 with a direction to the petitioner to make appropriate representation to the Secretary alongwith all necessary documents and the Secretary should consider the case of the petitioner for correction of date of birth in the light of the observations made by the Division Bench of this Court in **Anand Singh Vs. State of U.P. Secondary Education and Others reported in 2014 (2) U.P.L.E.B.C. 1330**, the Court left it open for the Authorities concerned to call for the reports and documents from District Authorities of the Education Department and also from the School concerned while passing the order on the representation of the petitioner.

5. The petitioner approached to the Opposite party no.2 again alongwith all necessary documents and the opposite party no.2 called for a report from the District Inspector of Schools, Faizabad, who submitted his report on 19.03.2018 saying that the date of birth of the petitioner according to the Transfer Certificate issued by Ram Pati Balbhadra Prasad Shukla, (R.P.B.P.), Junior High School, Milkipur, Faizabad, for Classes VII and VIII shows her date of birth as 21.01.1996 whereas the High School Certificate and Marksheet shows her date of birth as 15.07.1995.

6. The opposite party no.2 also called for the Educational record of her School i.e. Vidya Mandir Inter College, Milkipur, Faizabad and thereafter passed the impugned order by observing that he had gone through the record produced by Ram Pati Balbhadra Prasad Shukla, (R.P.B.P.), J.H.S., Milkipur, Faizabad, wherein at the stage of admission of the petitioner initially in Class VII her date of birth was correctly mentioned. The student's Attendance Register and the Registration as per the hand written data made available for her showed some over writing. On the same the date of birth mentioned in the School records was 10.07.1996 (15.07.1995) and therefore, her application Form submitted to the Board for appearing Class X in examination also mentioned incorrect date of birth.

7. This Court has carefully perused the impugned order and finds that it is evident therefrom that as per Transfer Certificate issued by the Ram Pati Balbhadra Prasad Shukla (R.P.B.P.) Junior High School, Milkipur, Faizabad for Classes VII and VIII the date of birth of the petitioner was mentioned as 20.01.1996. But at the time of filling up of her form the details of the petitioner were incorrectly filled by the Vidya Mandir Inter College, Milkipur, Faizabad, as a result her date of birth was incorrectly shown in her High School Certificate and Marksheet.

8. The Opposite party no.2 has referred to Regulation-7 of Chapter-III of the Regulations attached to the Intermediate Education Act to say that the Secretary of the Board could make correction in the Certificate/Marksheet of a candidate if such mistake was inadvertent or a typographical error or a mistake in printing the Certificate but such correction could be done only if the application was moved within two years of issuance of such Certificate or Marksheet. In the case of the petitioner, the application was moved for the first time, in 2016 whereas the High School Certificate and Marksheet were issued in the year 2011 much beyond the limitation mentioned in the Regulation -7 of Chapter 3 and therefore the opposite party no.2 refused to correct the date of birth of the petitioner.

9. With regard to the judgment of the Division Bench referred to by this Court i.e. **Anand Singh Vs. State of U.P. Board Secondary Education and others (Supra),** the opposite party no.2 has observed in his order dated 12.09.2018 that it related to only a typographical error or an error in the name of the candidate or his parents etc. but no in the case of correction of date of birth, therefore, the said case was not applicable to the petitioner.

10. Learned counsel for the petitioner has produced a copy of the judgment rendered in Anand Singh (Supra) and also a copy of order passed by another Division Bench in Special Appeal No.1202 of 2010 (**Babu Ram and Others Vs. State of U.P. and another**). **In Anand Singh Vs. State of U.P. Secondary Education and Others reported in 2014 (2) U.P.L.E.B.C. 1330** the Division Bench observed thus:- Regulation-7 of Chapter-3 was considered by the Division Bench and it was observed that in the case of the appellant therein that date of birth in the school record was mentioned as 01.09.1949 but in the record of the Board the date of birth of the appellant was shown as 01.09.1946 and his case for correction was rejected only on the ground of limitation. The Division Bench observed that there was no mistake in the certificate of passing, the mistake was in the record Register maintained by the Board, therefore the said Regulation would not be applicable in the case of the appellant. Once the respondents have issued certificate showing date of birth of the appellant as 01.09.1949 the respondent no.2 was bound to correct the clerical mistake in the record of the Board.

11. This Court has considered both the judgments rendered by two Division Benches of this Court and finds that the judgment in the case of Babu Ram is inapplicable on the facts of the case. However, the judgment in the case of Anand Singh (Supra) does observe that it is the duty of the Board to correct the mistake either inadvertent or typographical which lies in its inherent jurisdiction which is not governed by Regulation-7 of Chapter-3.

12. In the order impugned, it has been mentioned by the opposite party no.2 that the application form of the petitioner filled up as regular student of Vidya Mandir Inter College, Milkipur, Faizabad, showed her date of birth as 15.07.1995. The Transfer Certificate issued from her earlier school Ram Pati Balbhadra Prasad Shukla (R.P.B.P.) Junior High School, Milkipur, Faizabad, for Classes VII and VIIIth showed her date of birth as 20.01.1996. The Scholar Register and the Admission Register of Vidya Mandir Inter College, Milkipur, Faizabad, also showed her date of birth as 20.01.1996.

13. It is evident that there was an inadvertent error in filling up of her form by the School Authorities as a student of Classes IX or Xth is an adolescent and not competent or mature enough to correctly fill up the form. This Court can take judicial notice of the fact that it is always the teachers who fill up the form, and the students mostly sign on the dotted line. A student like the petitioner who may have been only 14 years of age at the time of filling up of her form for High School may have believed that whatever her teacher wrote in her application form was correct and may have signed without verifying the Date of Birth details from the Scholar Register maintained in her school on the basis of Transfer Certificate is issued by the Junior High School from which she passed her Classes VII and VIII.

14. In such a case the observations made by a Co-ordinate Bench of this Court in **Akash Sharma Vs. State of U.P. and Others reported in 2016 (3) Alld. L.J 146**, squarely apply. This Court in Akash Sharma (Supra) was considering a similar case where the writ petitioner was seeking a correction in the Date of Birth as printed in the High School pass Certificate-Cum-Marksheet which had been incorrectly shown. The Transfer Certificate and Character Certificate issued by the School had shown his Date of Birth correctly. The petitioner had thereafter passed his Intermediate from a different Inter College and took his Transfer Certificate from the said College also which showed his correct date of birth. The Institution from where the petitioner appeared in High School Examination had certified that in the School records the correct date of birth of the petitioner had been recorded as of the year 1993 and due to some mistake it was printed in the High School Certificate as 1990. The petitioner applied for correction under Regulation-7 Chapter-3 of the Regulation framed under the Intermediate Education Act and where a limitation of three years was provided for moving such application. The writ petitioner had admittedly moved the application after about five years from the date of issuance of High School Certificate. Consequently, his application was rejected by the Secretary of the Board. The Court observed in Paragraphs-11 to 19 of the said judgment as follows:-

"(11) A bare reading of above Regulation indicates that the clerical mistake occurring in the certificate, issued by the High School and Intermediate Education Board U.P. is rectifiable provided the candidate applies for its correction within a period of two years from the date of issuance of the certificate.

12. It is important to note that it is not the case of any party that the mistake of date of birth appearing in the High School Certificate of the petitioner had occurred due to any mistake on the part of the petitioner or that his correct date of birth is not 01.01.93 as appears in the records of the School/College, meaning thereby the correct date of birth of the petitioner is 01.01.93 and not 01.01.90 as mentioned in the High School Certificate.

13. An authority vested with the jurisdiction to issue a certificate and to maintain record of it has inherent power to rectify the mistake, if any, that may occur in the certificate so issued provide the mistake is genuine and the person concern has no role attached to it. Therefore, any mistake of a clerical nature accruing in the certificates can be rectified on the application of the candidate concern or even by the authority concern in suo motu exercise of its inherent power whenever the

mistake comes to its notice. In other words, any mistake in the High School Certificate can always be rectified either on an application by the person concern or by the authority/Board itself in suo- motu exercise of its inherent power.

The limitation of moving an application for rectification of the mistake of a clerical nature appearing in the High School Certificate is for the candidates and not for the Board to take suo-motu action in exercise of inherent power.

14. The law of limitation is founded on public policy so as to limit the life span of a litigation or the legal remedy. It does not aims to defeat the rights of the parties. In the case of N. Balakrishnan vs. M. Krishnamurthy,; (1998) 7 SCC 123 the Supreme Court of India observed if the remedy availed by the party who has been wronged does not smack of malafides or is not by way of dilatory tactics, the Courts must show utmost consideration to the suitor. In other words, a bonafide delay may not by itself be treated as sufficient to debar the remedy particularly where the record exfacie shows miscarriage of justice.

16. In the instant case, there is no dispute that the correct date of birth of the petitioner is 01.01.1993 and that in the High School Certificate it has been incorrectly mentioned as 01.01.90.

17. The limitation of two years provided in applying for rectification of the certificate is applicable to the candidates but there is no limitation for the Board to exercise its inherent power to correct the certificate issued by it. Thus, the Board certainly in exercise of its suo motu inherent power is authorised to correct a clerical mistake or error appearing in the High School Certificate once it is brought to its notice. It is incumbent duty of the Board to ensure that the certificates issued by it are correct and does not suffer from any error or mistake. Therefore, in order to put its records straight, the Board is under an obligation to correct all certificates issued by it irrespective of the limitation placed under Regulation-7 of Chapter-III of the Regulation in exercise of its inherent power in the particular facts and circumstances of the each case. The law of limitation cannot be pressed into service by the Board while exercising its inherent power so as to defeat the right of the petitioner to have his incorrect date of birth recorded in the High School Certificate rectified.

18. The Regional Secretary of the Board has simply rejected the application of the petitioner on the ground of limitation without application of mind to the facts and circumstances of the case. Thus, he failed in discharge the pious obligation to rectify the mistake occurring in the public record which are supposed to maintain correctly.

19. Accordingly, even if the application of the petitioner was beleted the Board ought to have corrected the mistake in exercise of suo-motto jurisdiction. The Regional Secretary of the Board has failed to exercise the jurisdiction so vested in him in law in passing the order dated 21.10.2014....."

15. The opposite party no.2 has taken a hyper technical view and rejected the application of the petitioner only on ground of limitation without appreciating and exercising inherent jurisdiction.

16. The order impugned is **quashed** and the opposite party no.2 is directed to pass a fresh order correcting the date of birth of the petitioner in her High School Certificate and Marksheet in accordance with the report submitted by the opposite party nos.3 and 4 from 15.07.1995 to

21.01.1996 and issue a corrected High School Marksheet and Certificate within a period of four weeks from the date a copy of this order is produced before him.

17. The writ petition stands **allowed**.

(2021)08ILR A322
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.08.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 7346 of 2021

Yogendra Pratap Singh ...Petitioner
Versus
Jitendra Pratap Singh ...Respondent

Counsel for the Petitioner:
Satish Chandra Kashish

Counsel for the Respondent:

Hindu Gains of Learning Act, 1930 - U.P. Zamindari Abolition and Land Reforms Act, 1950-Petitioner claims declaration over his portion of land (to give legal effect)which has been divided in between him and his brother in family settlement- and further injunction sought-Civil Court rejected plaint as not maintainable-Revenue Court has the jurisdiction-if no relief can be granted unless declaration of his tenancy rights -suit is cognizable by Revenue Court-Act, 1930 is a personal law-all personal law with regard to devolution of property becomes immaterial in view of Act of 1950. No illegality in impugned order-W.P. dismissed.

Held, . *With respect to agricultural land, the Act of 1950 is a special Act which would be applicable notwithstanding any other law for the time being in operation. The Act of 1950 for the first time created rights, temporary or permanent, over agricultural land, it had been promulgated for an entirely different purpose as has been mentioned in the "Statement of Objects and Reasons" of the said Act. The Act of 1930 need not have been repealed by the Act of 1950 as in pith and substance, the Act of 1930 dealt with self acquired property through gains of learning by a member of a joint Hindu family even with some aid of joint family funds. The Act of 1930 is personal law. All personal law with regard to devolution of property becomes immaterial in view of the Act of 1950 as the Act of 1950 creates for the first time Bhoomidhari rights*. **(para 24)**

W.P. dismissed. (E-7)

List of Cases cited:

1.Mangal Singh Vs Harkesh AIR 1958 Alld 42

2.Ram Awalamb & ors. Vs Jata Shankar & ors., 1968 RD 470

3. Ram Padarath & ors. Vs IInd Additional District Judge, Sultanpur 1989 RD 21 (FB)

4.Chandrika Misir Vs Bhaiya Lal; AIR 1973 SC 2391

5. Bismillah Vs Janeshwar Prasad & ors., 1990 (1) SCC 207

6. Kamla Prasad Vs Krishna Kant Pathak (2007) 4 SCC 213

7. Mahendr Singh Vs & ors. , 1967 RD 191

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

1. This writ petition has been filed by the petitioner challenging the order dated 04.07.2013 passed in Misc. Case No.110 of 2013:*Yogendra Pratap Singh versus Jeetendra Pratap Singh*, and also the order dated 09.11.2020 passed in Civil Appeal No.56 of 2020.

2. It is the case of the petitioner that his father Late Kaamta Singh was a police

employee who retired in the year 1970. From his earning as well as by taking advance on his G.P.F. account, Kaamta Singh had bought certain land in village Adhar Khera Tahsil Bakshi ka Talab Lucknow and also some land in district Mau. He had inherited some land through family settlement in District Sultanpur also. There is no dispute regarding land situated in Sultanpur as it has been of ancestral stock and divided among the petitioner and his brother Jitendra Pratap Singh equally. The land that was bought by the father of the petitioner in Adhar Khera was fraudulently got registered by Kaamta Singh's brother, that is the petitioner's uncle in his name. The petitioner was educated and working as an Advocate. When consolidation proceedings where initiated in 1996 in village Adhar Khera the petitioner filed objection under Section 9A 2 of the Act and land that had been wrongly got registered in his uncle's name, was registered in the name of the petitioner and his brother. Section 52 publication has been done in Village Aadhar Khera in 2003. The brother of the petitioner was unemployed and looked after farming and the petitioner divided his time between his profession as an Advocate and the farming that was being done at village Aadhar Kheda.

3. It is the case of the petitioner that in 1977 after the retirement of the father of the petitioner he divided his property amongst the petitioner and his brother orally. The respondent no.1 was given land situated in village Teghna District Mau where one huge pond of 6 acres had been got dug out by the petitioner's father which was being used for fish farming. The petitioner was given land situated at village Aadhaar Khera Distt Lucknow. The petitioner and respondent no.1 continued in possession of their share and now have become old therefore, were in agreement that the family settlement that was entered into between the two brothers at the instance of Kamta Singh during his lifetime be given legal and binding colour. Hence the petitioner filed a suit for Declaration and Permanent Injunction before the Civil Judge (Junior Division) Havali Lucknow.

4. It is the petitioner's case that the petitioner had claimed a Declaration on the basis of Hindu Gains of Learning Act 1930 (hereinafter referred to as "the Act of 1930') and not under the U.P. Zamindari Abolition and Land Reforms Act 1950 (hereinin after referred to as "the Act of 1950'). The Munsarim put up a wrong report that the case is cognizable by the Revenue court and not by the Civil court. On the basis of this wrong report, the Civil Judge (Junior Division) Havali, Lucknow got it registered as Miscellaneous Case No.110 of 2013 for the purpose of deciding the question of jurisdiction of the civil court. The Civil Judge (Junior Division) thereafter rejected the suit on the ground of not being maintainable before the civil court by observing that the disputed property, that is, the land of plot no.25 situated at village Aadhaar Kheda district Lucknow which is recorded in the name of the defendant, is an agricultural land. The Plaintiff on the basis of a partition made by his father orally, had prayed for deletion of the name of the defendant from the revenue record and Declaration of Title and recording of entry in plaintiff's name in the revenue records. Since the plaintiff had sought declaration of title over agricultural land which can be granted only by the revenue courts under the U.P.Z.A.&L.R. Act and because such declaration cannot be given by the civil court, the civil court had no jurisdiction. Consequently, the suit was rejected as not maintainable. Aggrieved by the same, the

petitioner filed a Revision under Section 115 C.P.C. before the learned Special Judge/Additional District Judge Lucknow. The Revision was rejected on 27.07.2015. It has been stated that the Additional District Judge wrongly came to the conclusion that the land in question being agricultural land, a declaration of title being sought over it, can only be given by the revenue court.

5. It is the case of the petitioner that the land in question had been acquired by the father of the petitioner under Act of 1930 and therefore the Act of 1950 had no application on it. The petitioner challenged the order passed by the Civil Judge (Junior Divsion) Havali Lucknow, dated 04.07.2013 and also the order dated 27.07.2015 passed by the learned Special Judge/Additional District Judge in a Writ Petition before the High Court bearing No.6339 (M/S) 2015. The Court taking it up as fresh pointed out that against the order passed by the Civil Judge (Junior Divsion) dated 04.07.2013 the petitioner should have filed an Appeal before the District Judge and not a Revision. The petitioner withdrew the writ petition on 29.10.2015. The petitioner thereafter filed Civil Appeal No.56 of 2020. The Appeal has been dismissed by the District Judge on a mechanical observation that the Special Judge/Additional District Judge Lucknow while rejecting the Revision was also exercising the power of an Appellate Court. Once the order dated 4.07.2013 had been affirmed in Revision by a court having coordinate jurisdiction as that of the District Judge, the judgement dated 27.07.2015 would act as *Res Judicata* and the Appeal would not be maintainable. The order dated 04.07.2013 and the order dated 09.11.2020 have been challenged in Writ Petition No. 7346 (MS) of 2021.

6. It has been submitted by the learned counsel for the petitioner Shri Satish Chand Kashish that the petitioners case ought to have been decided by the Civil court in view of the Hindu Gains of Learning Act 1930 and the trial court had wrongly sent the petitioner to the revenue court and has wrongly refused to exercise jurisdiction saying that the land in question over which the petitioner seeks a declaration is agricultural land and therefore the jurisdiction of the civil court is barred under the provisions of the Act of 1950.

7. After giving the learned counsel for the petitioner a hearing at length, the petitioner wanted to argue the matter in person and sought permission from the Court. He was also heard as he said that he was practising on the revenue side before the lower courts for the past 50 years. It was argued by the petitioner in person that the Act of 1950 became enforceable with effect from July 1952 where as the Act of 1930 has been in operation much before Independence and has not been repealed by the U.P. Act of 1950, therefore, being a special Act, and not being specifically overruled, it shall override the provisions of the U.P. Act no. 1 of 1951. In the written submissions filed by the learned counsel for the petitioner Shri Satish Chand Kashish, an extract of a Commentary published by the Eastern Book Company whose Author is Shri Vishwanath Prasad Srivastava, has been filed. The extract refers to judgement rendered in *Mangal Singh versus Harkesh* **AIR 1958 Alld 42**, where it was held that if the property had been acquired with the smallest aid of the joint family fund, then the acquisition would be deemed to be a joint family property. It would be the duty of the person in whose name the deed stood and who said

that it was his separate property to prove that he had not taken the aid of family funds.

Prior to the Act of 1930, this kind of property was taken to be joint family property, but since the passing of the Act of 1930, the property acquired by special skill and knowledge by an individual is deemed to be his exclusive property. The Act of 1930 having not been repealed by the Act of 1950 self acquired property could only become joint family property if the person who acquired it waived the intention of holding it as his exclusive property, and threw it in the common stock with the idea of abandoning all his personal and exclusive claim over it.

8. The petitioner in person had also placed before this court a copy of the Act of 1930. A perusal of Short Title and extract as produced before this Court, shows that it was an Act which was notified to remove doubts as to the rights of a member of a Hindu undivided family in the property acquired by him by means of his learning and to provide a uniform rule as to its dispensation. As defined under Section 2(b) of the said Act, *"gains of learning"* means all acquisition of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of the Act, whether such acquisitions be the ordinary or the extraordinary result of such learning. *"Learning"* has been defined under the Section 2(c) of the Act as education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life. It is the case of the petitioner that the property in question has been acquired by his father through his learning and it being his property he had given it to the petitioner who filed a suit for Declaration.

9. In the written submission that has been filed by Shri Satish Chand Kashish a copy of the extract of the book *"Commentaries on U.P. Zamindari Abolition and Land Reforms Act 1950"* has been filed. A perusal of such extract shows that the petitioner has filed the "Statement of Objects and Reasons" for bringing in the Act of 1950. The principal aim of the Act of 1950 was to remove intermediaries between the cultivator and the State and the aim was to bring about a radical change in the existing land system through a coordinated plan of rural reconstruction to ensure agricultural efficiency and increase food production and to raise the standard of living of the rural masses, and to give opportunities for the full development of the peasants personality. *"The landlord tenant system established by the British for reasons of expediency and administrative convenience, should, with the dawn of political freedom, give place to a new order which restores to the cultivator the rights and the freedom which were his and to the village community the supremacy which it exercised over all the elements of village life".*

10. The Act of 1950 provided for three kinds of tenure for the first time. Bhoomidhari rights would be given to all tenants who paid 10 times of the rent in one instance. The remaining tenants would be called Sirdars with permanent and inheritable rights in land, and the right to use the land for any purpose connected with agriculture, horticulture or Animal Husbandry, and to make any improvements till such time that their rights matured into Bhoomidhari rights. A temporary or minor form of land tenure called Asami was also

created for a small number of non-occupancy tenants, of land in which stable rights cannot be given such as tracts of shifting or unstable cultivation, or a person to whom land is left in future by such Bhumidhar or Sirdars who were incapable of cultivating the land themselves because of physical or mental infirmity. The general body of tenants of Sirdars on whom hereditary rights do not accrue, and of the existing sub-tenants would be given security of tenure for a period of five years after which they could, on payment of 15 times the hereditary rate of the rent of the tenant in chief, acquire Bhoomidhari rights. The Act of 1950 provided for all lands of common utility, such as Abadi sites, pathways, wasteland, forests, fisheries, public wells, tanks and water channels, to be vested in the village community on the Gaon Samaj consisting of all residents of the village as well as landless labourers. Gram Panchayat acting on behalf of the village community was entrusted with powers of land management. This measure was intended to make the village a small republic and a cooperative community to facilitate economic and social development and increase the growth of social responsibility and community spirit. In order to remedy the inefficiency and waste involved in the cultivation of existing uneconomic holdings, the Act of 1950 made a provision for encouragement and rapid growth of cooperative farming.

11. The Act of 1950 received the assent of the President on January 24, 1951 under Article 201 of the Constitution of India and was published on 26.01.1951 in the Uttar Pradesh Gazette extraordinary. The said Act was challenged promptly and the Supreme Court upheld the constitutionality of the Act in the case of *Attar Singh versus State of U.P. and others*, and it became enforcible from July 1952.

12. The learned counsel for the petitioner has argued that since the petitioner intended to get the land which was the self acquired property of his father Kamta Singh divided in terms of family settlement, there were no rights derived under the Act of 1950. The rights to the property acquired by Kamta Singh were governed by the Act of 1930 as they were acquired out of income generated from his employment in the police department. Section 229B of the Act of 1950 would not be applicable and consequently there would not be any bar under Section 331.

13. The relevant extract of Section 331 of the Act of 1950 is being quoted here in below:

"331. Cognizance of suits, etc. under this Act.- (1) Except as provided by or under this Act no court other than a court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application, or proceedings mentioned in Column 3 thereof [,] [or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application:]

[Provided that where a declaration has been made under Section 143 in respect or any holding or part thereof, the provisions of Schedule II insofar as they relate to suits, applications or proceedings under Chapter VIII shall not apply to such holding or part thereof.]

[Explanation.- If the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that

which the revenue court would have granted.]

14. In *Ram Awalamb and others vs. Jata Shankar and others*, **1968 RD 470**, a Full Bench of this Court has observed that *"if the Suit is maintainable for the main relief in the Civil Court, then there is no bar for the Civil Court to grant all possible reliefs flowing from the same cause of action. The determination of the question as to which out of the several reliefs arising from the same cause of action is the main relief will depend on the facts and circumstances of each case."* It has been further clarified and observed that *"where on the basis of a cause of action- (a) the main relief is cognizable by the Revenue Court, only the fact that the ancillary relief claimed are cognizable by the Civil Court would be immaterial of determining the proper forum of the suit;* (b) the main relief is cognizable by the Civil Court, the suit would be cognizable by the Civil Court only and the ancillary reliefs which could be granted by the Revenue Court may also be granted by the Civil Court.'(Emphasis Supplied)

15. In *Ram Padarath and others vs. IInd Additional District Judge, Sultanpur* **1989 RD 21 (FB)**, a Full Bench of this Court after referring to Section 31 of the Specific Relief Act, which makes a specific provision for cancellation of void as well as voidable documents, observed that voidable documents are those whose legal effect cannot be put to an end without they being cancelled by a declaratory decree in this regard by the civil court in a regular suit filed under Section 31 of the Specific Relief Act. A void document however is not required to be cancelled necessarily. Its legal effect, if any, can be put to an end by declaring it to be void and granting some relief based upon such observations instead of canceling it. Once it is held to be void it can be ignored by any court or authority, being of no legal effect or consequence. For such a void document to be declared so, a person may approach the competent civil court. However, if apart from cancellation, some other relief is claimed which is the *"real relief"* and the claim for which provides the proximate ground or reason for approaching the court of law, or when any other relief can be claimed or is involved in the matter cropping up because of the evidence of the void document or instrument, and the *"real relief"* claimed is one which is mentioned in Schedule II of U.P. Zamindari Abolition and Land Reforms Act, the same can be granted by the revenue court only, and the jurisdiction of the civil court to grant such a relief or reliefs is ousted by section 331 of the U.P.Z.A. & L.R. Act. *"The law relating to right, title and interest over agricultural land is contained in U.P. Zamindari Abolition and Land Reforms Act. The said Act being a special Act, enumerates in Schedule II the types of suits etc, the cognizance of which is to be taken by the Revenue Court specified therein. In the Explanation attached to Section 331, it has been specifically mentioned that if the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may be identical to that which the revenue court would have granted."*

16. The Full Bench after considering the phrase *"cause of action"* and the phrase *"any relief"*, as mentioned in Section 331 of the Act, came to the conclusion that the Explanation to Section 331 has enlarged its scope further. The cause of action may determine the form and keeps the

jurisdiction of the revenue courts intact as also the relief of the nature which is mentioned under Schedule II of the U.P.Z.A. & L.R. Act. The Full Bench observed that the reliefs of the nature mentioned in Schedule II of the U.P.Z.A.& L.R. Act can be claimed from the Revenue Court which can take cognizance of such suit or proceeding, notwithstanding that the relief provided in a different language can also be granted by the Civil Court.

17. If no relief can be granted to a person unless the declaration of his tenancy rights is made, in that situation the suit would be cognizable by the revenue court as such a declaration can only be granted by the revenue court. Even in cases where the suit is for injunction and/or possession if he is out of possession, then the suit will be cognizable by the revenue court notwithstanding that any relief for injunction may otherwise be granted by the civil court.

18. The Full Bench observed in Ram Padarath (supra) in Para-19 thus:-

"19. If more than one reliefs are claimed by a particular person, no relief can be granted to that person unless declaration of his tenancy rights is made and in that situation the suit will be cognizable by the revenue court as declaration can be granted by the revenue court. Similarly if a person claims relief of injunction and in the alternative for possession if he is found to be out of possession and his name is not on the record then without declaration that in fact he is the tenant or he is in possession of the tenancy rights no further relief can be granted and the suit is cognizable by the revenue court. In case the suit is for injunction and/or possession if he is out of possession then the suit will be cognizable by the revenue court notwithstanding the relief for injunction is to be granted by the civil court.....The Civil Court would have no Jurisdiction as the case first involved declaration of right as tenure-holder which could be granted by the revenue court only and thereafter relief could have been granted only if he was held to be tenure-holder by succession......"(Emphasis Supplied)

Similarly, in Indrapal vs. Jagannath 1993 ALJ 235, this Court observed in Para-9 as follows:-

"9. Thus, the essence of the matter in deciding whether the suit is cognizable by the civil Court or the revenue court is whether Section 331 of the U.P. Zamindari Abolition and Land Reforms Act is attracted to the facts of the case. If in substance, the main question involved relates to declaration of right or title, then the suit would lie in the revenue court and not in the civil Court....."(Emphasis Supplied)

19. The Full Bench in Ram Padarath (supra) relied upon *Chandrika Misir versus Bhaiya Lal*; **AIR 1973 SC 2391,** which had said in a case arising out of a suit for injunction and in the alternative for possession in respect of agricultural land, that in view of Schedule II of the U.P.Z.A. & L.R. Act, the relief of possession could only be granted by the revenue courts under Section 331 of the Act and thus ousted the jurisdiction of the Civil Court. The Supreme Court observed that the civil court would have no jurisdiction as the case first involves the declaration of rights as a tenure holder which could only be granted by the revenue courts, and thereafter relief could have been granted regarding injunction to protect possession. In paragraph 22, the Full Bench observed that

the forum for action in relation to void documents or regarding agricultural land depends on the *"real cause of action"* with reference to the facts averred. Void documents necessarily do not require cancellation like voidable documents.

20. *Ram Padarath* (supra) has been quoted with approval by the Supreme Court in paragraph 18 of its judgment in *Bismillah versus Janeshwar Prasad and others*, **1990 (1) SCC 207.**

21. In *Kamla Prasad vs. Krishna Kant Pathak* (2007) 4 SCC 213, the Supreme Court observed thus:

"...No doubt there is no relief of declaration of ownership of agricultural land specifically sought in the plaint, but in essence the claim of plaintiff was based on his ownership right of the disputed land, while the plea of defendant was that plaintiff was not owner of the property. Then adjudication of title of land in substance was the main question involved in the suit, although, it was not expressly prayed for in plaint. Therefore, in substance, when the main question involved for adjudication in this case relates to declaration of right or title then suit would lie in revenue court and not in civil court. Therefore, in such matter the jurisdiction of civil court is barred under Section 331 of UPZA & LR Act. This provision of Section 331 is attracted when in substance main question to be determined for resolving dispute between parties relates to declaration of rights or title of agricultural land.…."(Emphasis Supplied)

22. This Court has carefully perused the provisions of the Act of 1930, a copy of which has been annexed to the writ petition. It is evident that the Act was intended to remove doubts as to the rights of a member of a Hindu undivided family property acquired by him by means of his learning. Before the Act of 1930 any property acquired by a member of joint Hindu family either through his own income or through the aid of Joint family funds would become the property of the Hindu joint family. With this Act a uniform rule as to the right of a member of a Hindu undivided family in property acquired by him by means of his own gains of learning was notified. It was immaterial that such learning would have been in whole or in part imparted to him by any member of the joint family, or with the aid of the joint family funds, or with the aid of the funds of any member thereof, or either himself or his family during the time he was acquiring this learning was being maintained or supported wholly or in part by the joint funds of his family or by the funds of any member thereof.

23. No doubt in the plaint filed before the Civil Court the petitioner has mentioned in detail how his father acquired property separate from the Joint Hindu family property which he owned as coparcener in Sultanpur, but there was no quarrel with regard to whether the property situated in district Mau or in District Lucknow was not the self acquired independent property of his father Kamta Singh. Late Kamta Singh having acquired the property out of his own income as an employee of the police department had a right to bequeath such property any person whether belonging to his family or an outsider and the petitioner was not seeking a declaration from the civil court against his collaterals who were coparceners in Joint Hindu family property situated at Sultanpur. It was alleged by the petitioner that Kamta Singh during his life time orally

divided the self acquired property between his two sons. The petitioner and the respondent no.1. The petitioner was given property situated in Lucknow and respondent no.1 was given property situated in Mau. The petitioner alleged that the name of his brother the respondent no.1 had been wrongly entered in the revenue records of the property situated at village Aadhaar Khera in Lucknow. He wanted the name of respondent no. 1 to be expunged from the revenue records and the property situated in Lucknow to be declared as the petitioner's Bhoomidhari and also prayed for permanent injunction restraining the respondent no.1 from interfering in the peaceful possession of the petitioner on the property situated in Lucknow.

Such a prayer as was made in the plaint had nothing at all to do with the Act of 1930 as it was not the case of the petitioner that his father's right to bequeath his self acquired property to his sons was in question. It was the petitioner who sought to base his case upon family settlement (which settlement was seriously disputed by the respondent), entered into between the between him and his brother during the lifetime of his father Kamta Singh. It was simply a case under section 229 B of the Act of 1950. If the petitioner wanted that family Settlement that was entered into in the lifetime of his father be given legal effect to then he could have filed a suit for partition under Section 176 of the Act of 1950. The partition was to be affected between the petitioner and his brother not between the petitioner and his collaterals. This was not a case under the Act of 1930.

24. With respect to agricultural land, the Act of 1950 is a special Act which would be applicable notwithstanding any other law for the time being in operation. The Act of 1950 for the first time created rights, temporary or permanent, over agricultural land, it had been promulgated for an entirely different purpose as has been mentioned in the "Statement of Objects and Reasons" of the said Act. The Act of 1930 need not have been repealed by the Act of 1950 as in pith and substance, the Act of 1930 dealt with self acquired property through gains of learning by a member of a joint Hindu family even with some aid of joint family funds. The Act of 1930 is personal law. All personal law with regard to devolution of property becomes immaterial in view of the Act of 1950 as the Act of 1950 creates for the first time Bhoomidhari rights. The petitioner was asking for a declaration of his Bhoomidhari rights over agricultural land which was not recorded in his name but was recorded in the name of his brother. In *Mahendr Singh versus others* , **1967 RD 191,** it has been held by this court that personal laws like Hindu law are irrelevant for the purpose of determination of Bhoomidhari rights. Special rights were created by the Act of 1950 for the first time and these new rights are wholly governed by the provisions of the Act. By Section 152 of the Act of 1950, the rights of a Bhoomidhar are transferable subject only to the conditions mentioned thereunder. Application of personal laws regarding devolution of joint family property would curtail the right given by Section 152 of the Act. Sections 171 to 173 of the Act of 1950 laid down the special mode of succession which was wholly inconsistent with personal laws.

25. The Civil Judge (Junior Divsion) Havali rightly dismissed the Suit as not maintainable by observing that the petitioner wanted Plot No. 25 which was recorded in the name of respondent no.1 to be recorded in the name of the petitioner as Bhoomidhar with transferable rights. Since

the land in question was agricultural land on which a declaration was sought of ownership, the Suit was found by the Learned trial court to be barred under the provisions of the Act of 1950. I do not find any legal or factual infirmity in the order dated 4.7.2013.

26. The District Judge besides mentioning the merits of the petitioners contention regarding the applicability of the Act of 1930 vis-a-vis the Act of 1950, additionally found that the Revision had been dismissed by a Court of coordinate jurisdiction and the court of District Judge would not sit as appellate court over an order passed in Revision by the Court of Additional District Judge. The question of jurisdiction was a pure question of law and it makes no difference whether the impugned order was assailed in Appeal or Revision. No evidence was to be led, no questions of fact were to be considered. The Additional District Judge in Revision had found that the Suit was filed for declaration and injunction and it was prayed that the name of the defendant be removed from the revenue records over plot no. 25 in village Aadhar Khera and the name of the plaintiff be recorded therein as Sankramaniya Bhoomidhar. Additional District Judge had also noted the argument raised by the learned counsel for the petitioner that the property had been acquired by his father, and therefore the Act of 1930 would be applicable consequently the provisions of the Act of 1950 are not applicable, but had rejected the argument on the ground that the Act of 1950 is a Special Act which has overriding effect over personal law. The petitioner in fact was seeking a declaration of his right title under Section 229B of the Act of 1950 such declaration of title over agricultural land can only be granted by the revenue court as there was a bar under Section 331 of the Act. Even in respect of partition of agricultural land there is a specific provision under Section 176 of the Act.

27. The District Judge in his order dated 09.11.2020 has observed that original jurisdiction is also part of Appellate jurisdiction and is exercised by the same court upon which Revisional jurisdiction is conferred. The District Judge also observed that there was no question of fact that was needed to be determined in the Appeal filed before him, only a question of law relating to jurisdiction of the civil court was involved in the Appeal. The Revisional court had already considered this question of law and being a court of Coordinate jurisdiction the District Judge could not sit in Appeal over such view expressed regarding lack of jurisdiction. I do not find any infirmity in such observations of the District Judge.

28. The petition is ***dismissed*** as devoid of merit. No Order as to costs.

(2021)08ILR A331
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.08.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE DINESH KUMAR SINGH, J.

Misc. Bench No. 10867 of 2021

Abhishek Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anand Mani Tripathi, Himanshu Shukla

Counsel for the Respondents:

C.S.C.

Order refusing personal security on recommendation of Security Committee - challenged-report suggest no threat to Petitioner-Writ Court cannot substitute its decision to the decision of a competent authority-personal enmity would not be a parameter of assesing threat.

W.P. dismissed. (E-7)

List of Cases cited:

1. M.A. Khan Chaman Vs St. of U.P., 2004 SCC Online All 373

2. Hazi Rais Vs St. of U.P.& ors., 2006 SCC OnLine All 621

3.Randeep Singh Surjewala Vs U.O.I. & ors., CWP No.13266 of 2016

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

1. The present petition under Article 226 of the Constitution of India has been filed by the petitioner, impugning the order dated 27th April, 2021, wherein the decision of the High Level Committee dated 16th April, 2021 regarding refusal to provide the petitioner personal security was communicated to the Commissioner of Police, Lucknow and vide communication dated 5th May, 2021 the said decision was communicated to the petitioner.

The petitioner claims to be a practicing lawyer of District Lucknow, conducting mostly criminals as well as public interest litigation cases. It is stated that due to nature of work being performed by the petitioner, he receives continuous threats to his life and property.

2. Initially, the petitioner submitted a representation dated 19th December, 2020 to the Additional Chief Secretary, Home, for providing him personal security. A report, regarding threat perception to the petitioner, was called upon from the Commissionerate Security Committee, Lucknow for consideration by the State Level Security Committee. The Joint Secretary, Home, on the basis of the recommendation of the Commissionerate Security Committee, Lucknow vide letter dated 19th December, 2020, ordered for providing one gunner on State expenses as personal security to the petitioner as an interim measure in anticipation of decision taken by the State Level Security Committee.

3. The aforesaid decision dated 19th December, 2020 for providing personal security to the petitioner, as an interim measure, for six months, provided that the report/recommendation in the prescribed format should be provided by the Commissionerate Security Committee, Lucknow regarding real threat perception to life of the petitioner for consideration by the State Level Security Committee. The Commissionerate Security Committee, Lucknow, after two months i.e. on 13th February, 2021 re-assessed the threat perception to life of the petitioner in light of Government Orders dated 9th May, 2014 and 10th July, 2020 and, it was found that there was no threat perception to life of the petitioner. The report/recommendation was submitted to the State Government on the aforesaid subject matter.

4. The State Level Security Committee, in its meeting dated 17th February, 2021, considered the case of the petitioner along with others and, took decision to continue with the interim security provided to the petitioner for six months vide letter dated 19th December, 2020. However, from perusal of the decision taken in the meeting dated 17th February, 2021, it appears that the

report/recommendation of the Commissionerate Security Committee, Lucknow dated 13th February, 2021 was not taken into consideration and, the decision was purely based on the letter dated 19th December, 2020 issued by the Joint Secretary, Government of Uttar Pradesh. In pursuance of the recommendation dated 17th February, 2021, consequential order dated 12th March, 2021 was issued by the State Government, extending personal security of one police personnel for six months to the petitioner. The State Level Security Committee, in its meeting dated 16th April, 2021, considered the recommendations of the several District Level Committees as well as the recommendations of the Commissionerate Security Committee, Lucknow and, threat perception of 188 citizens residing in the State was considered by the High Level Committee. The petitioner?s name finds place at serial no. 102.

5. This Court, vide order dated 22nd July, 2021 requisitioned the recommendation/decision of the High Level Committee for providing/not providing personal security to persons, whose cases were considered on the basis of the recommendation of the District/Divisional Level Security Committees.

6. In respect of the petitioner, his profession is mentioned as Advocate, Allahabad High Court, Lucknow and, his yearly income is Rs. 4,50,000/-. It is mentioned in the minutes of the meeting that Commissionerate Security Committee, Lucknow in its report dated 12th March, 2021 stated that the ground on which the petitioner requested for providing him security was that he had been appearing in several public interest litigation of general public importance and, he had to travel to the *naxalite* and *dacoit* affected areas for legal/judicial work and, for that purpose, there is persistent threat to his life. However, the Commissionerate Level Security Committee stated that there was no threat perception to the petitioner by a particular person or he was having any enmity with any particular person. He had not lodged any FIR or complaint against any particular person, threatening him of his life and property in District Lucknow and, there was no real threat to him as such. In view of the aforesaid, it has been stated that there is no reasonable basis for continuing with the interim security provided to the petitioner and, in view thereof the decision has been taken by the State Level Security Committee not to extend him security.

7. The petitioner did not disclose correct facts in the writ petition, as mentioned in paragraph-5 of the counter affidavit filed on behalf of the State authorities. It is stated that the petitioner was granted security by the State Government for six months at the expense of 10% vide order dated 23th November, 2020 on an application processed from District Jaunpur, which got expired on 13th May, 2021. Subsequently, the district administration of Jaunpur had extended the security granted to the petitioner till 15th June, 2021 and, in the meantime, the matter had been referred to the Divisional Level Security Committee for consideration for granting him security in the light of the Government Order dated 9th May, 2014. The petitioner was asked to deposit 10% expenses for one month vide letter dated 6th May, 2021.

8. In paragraph-15 of the rejoinder affidavit filed by the petitioner, he admitted

the facts, stated in paragraph-5 of the counter affidavit. However, it was said that the present dispute was not in respect of the security provided by the District Administration, Jaunpur, but the dispute related to the security provided to the petitioner from District Lucknow.

9. Heard Mr. A.M. Tripathi, learned counsel for the petitioner, as well as Mr. Amitabh Rai, learned Additional Chief Standing Counsel, for respondents-State.

10. Learned counsel for the petitioner has submitted that the petitioner was provided security vide order dated 19th December 2020 for a period of six months and, the same was extended for further period of six months vide decision dated 17th February, 2021. However, when the order was still in operation for providing security for six months, in a mala fide manner, the Commissionerate Security Committee, Lucknow vide its recommendation dated 12th March, 2021 recommended for withdrawal of the security and, on the basis of the said recommendation, the State Level Security Committee has passed the impugned order, withdrawing the Security cover from the petitioner. It is further stated that the said decision is arbitrary, illegal as well as mala fide. It is also submitted that the petitioner has been pursuing criminal and public interest litigation cases against the State, therefore, in a mala fide manner the security cover has been withdrawn from him.

11. When the Court asked whether any FIR or police complaint has ever been given by the petitioner of receiving any threat to his life or property, he fairly conceded that no such police complaint or FIR has been registered by him. However, it has further been stated that the impugned order dated 27th April, 2021 suffers from arbitrariness and is liable to be quashed and, the Government may be directed to provide security to the petitioner.

12. On the other hand, Mr. Amitabh Rai, learned Additional Chief Standing Counsel for the State, submits that this Court in Writ Petition No.6509 (M/B) of 2013 (PIL) ?Dr. Nutan Thakur Vs. State of U.P. and others? vide interim order dated 2nd December, 2013 directed the State Government to formulate a policy for providing security to private persons and in pursuance of the said interim order of this Court, the Government took a policy decision for providing personal security to private persons and VIPs. The said policy decision dated 9th December, 2014 has been placed on record as Annexure CA-3 to the counter affidavit.

13. According to the said policy decision, every person or a VIP seeking personal security has to make an application in a prescribed format to the District Magistrate/Senior Superintendent of Police. Threat perception to the life of such person shall be assessed by the District/Divisional Level Security Committee. The District Level Committee would consist of District Magistrate/Senior Superintendent of Police of the District and In-charge of the District Local Intelligence Unit. If the District Level Committee finds real threat perception to life of such person, who has made application, such a person shall be provided personal security for one month at the district level which may be extended for two terms of one month each. After three months, if the District Level Committee considers that such person requires security for further period then, it would submit its report regarding threat

perception of such person to his life to the Divisional Level Security Committee, consisting of Divisional Commissioner, Deputy Inspector General of Police, and Superintendent of Police, District Local Intelligence Unit. If the Divisional Committee, on consideration of the report submitted by the District Level Committee, agrees with the report of the District Level Committee then, it can extend security for another term of three months. After expiry of six months, Divisional Level Committee would consider the threat perception of the said person and, if it considers that the person requires security, considering his threat perception, it would place its recommendation before the State Level Committee at the High Level consisting of Principal Secretary, Home, Director General of Police and Additional Director General of Police (Security). The High Level Committee at State Level, if considers threat perception to the person, can grant the security cover for six months at one time and, thereafter again the District Level and Divisional Level Committee?s recommendations should be called for assessing threat perception of such person.

14. Vide Government Order dated 10th July, 2020, further directions have been issued in respect of providing personal security to a person on the basis of threat perception in continuation of the order dated 9th May, 2014. It is, therefore, submitted that earlier decision for providing six months security to the petitioner was an interim decision and, on every six months, on the basis of threat perception of a person, decision for providing/not providing security is taken. In case of the petitioner, the Commissionerate Level Security Committee has specifically recommended that there is no real threat to the petitioner and, the High Level Security Committee at the State Level has concurred with the recommendation of the Commissionerate Level Security Committee and, therefore, decision has been taken not to extend security cover to the petitioner.

15. It has been further submitted that the petitioner has approached this Court with unclean hands, concealing the material facts of having one security personnel from the District Administration, Jaunpur and this fact has not been denied by him in his rejoinder affidavit. It has been further submitted that if the petitioner?s contention is accepted then every Advocate, practicing on criminal-side, would be required to be given personal security. It is said that there is no real threat perception to the petitioner and, his demand for personal security is for mere status symbol to have security to flaunt his status as VIP in the society. It has been further submitted that the writ petition lacks any merit and substance and, is liable to be dismissed as such.

16. A large number of private persons are being provided personal security. Many would consider it a wastage of tax-payers' money. To a parliamentary question, Minister of State (Home) replied that security for the President, Vice-President and the Prime Minister was provided according to the 'Blue Book'. Though not stated in so many words, it was clear from the context that the security was given ex-officio, that is, by virtue of the offices they held. It was told that Union Ministers, State Chief Ministers and Judges of the Supreme Court and High Courts were provided positional/statutory security cover to facilitate impartial decision-making process. The security arrangements for other political personalities were made after

careful assessment of the threats emanating from terrorists/militants/fundamentalists outfits and organized criminal gangs, and that the mechanics of security arrangements was prescribed in the ?Yellow Book?. The degree of threat varies from individual to individual, depending on factors such as the nature of activities, status, and likely gains for the terrorists, etc. Accordingly, categorized security cover (Z+, Z, Y & X) is provided to them on the basis of gravity of the threat. Thus, threat perception is assessed on the basis of threats emanating from various terrorists, militants, fundamentalists outfits and organized criminal gangs for some work done by the protectees in their public life and, in national interest.

17. A person or political personality cannot claim security on the ground that he faces threats from his enemies because of some private dispute with them. There could not be any dispute about security for the President, Vice-President and Prime Minister, or Union Ministers, State Chief Ministers and Judges of the Supreme Court and High Courts, because they represent the core functioning and authority of the Indian State. There would be other political personalities, who hold public office and might have real threat from the terrorists/militants/fundamentalists outfits and organized criminal gangs for the work done or being done in the interest of nation by such political personality. These persons, on the basis of real threat perception, can claim security at state expense and, if they were to be harmed by such elements, it would affect the prestige of the government and authority of the State and, it would adversely create an impression in the minds of the people that if, the government cannot protect high dignitaries and, the people who work for nation and society, how would it ever protect the common men and, this would lead to the insecurity in the minds of the public in general and diminish the State Authority. It would also make an impact on the decision making process impartially or boldly in detriment to the public and national interest.

18. In a country governed by the rule of law and democratic polity, a class of privileged persons should not be created by the State. India got its written Constitution in 1950 and, as per the preamble, the goal of the Indian Democratic Republic is to secure justice to all citizens (socially and economically and politically) liberty of thought, expression etc. and equality of status and of opportunity. The State cannot be seen as creating a privileged class in the society as it would amount abdication of the very principle of justice and equality enshrined in the preamble of the Constitution. There may be cases where public interest demand to provide personal security but same should be done in a transparent and fair manner and, the State should be able to justify its decision if the same is challenged in the Court of law.

19. In the case of ***M.A. Khan Chaman Vs. State of U.P., 2004 SCC Online All 373,*** it was said that the petitioner, M.A. Khan Chaman was not having a right to enjoy the privilege of security ad infinitum. The Court noted that on flimsily grounds people exercise undue influence and manage to secure gunners and security at State expenses and at taxpayers cost. In fact acquisition of a gunner has begun to be treated as a status symbol. This practice must be brought to an end. It has been further held that the security can be provided to an individual provided it is needed in fact and there is a

threat perception to the life of the applicant or any of his family members.

20. Case of providing security should be decided objectively by the authority taking into account all relevant factors and security should not be provided merely to enhance the status of the applicant. The competent Authority would be required to review the threat perception from time to time. Whether the applicant would be required to pay the expenses of the gunner or not would depend upon the recommendation of the Reviewing/ Assessing Authority.

21. A person is entitled to get security as per the Government Order/policy if he comes within the parameters based upon the real threat perception. In the present case, no specific instance has been mentioned on the basis of which it can be assumed that the petitioner has any threat to his life or to any other member of his family. In paragraph-15 of the said judgment, this Court summarized the law that the security cannot be provided to a person unless it is needed in fact, based on real grave threat to his life.

22. This Court in the case of ***Hazi Rais Vs. State of U.P. and others, 2006 SCC OnLine All 621,*** it was observed that undoubtedly, need to provide security to every individual/citizen by the State is imperative. The State is under obligation to protect the life, liberty and property of its citizens and any apathy in the matter is to be ridiculed. This Court also noted the unhappy reality that the demand for security was not as much for the personal security but had ripened into a status symbol. It is enjoyed not as cathedral but as casino and, therefore, it would be duty of the high powered committed to review the security arrangements in a most objective, bona fide and honest manner.

23. The Madras High Court in the case of N. Jothi Vs. The Home Secretary, Government of Tamil Nadu (2006) in a case of a Member of Rajya Sabha from Tamil Nadu when 'Y' skills of security provided to him was withdrawn on the basis of threat perception assessed by the State Level Security Committee held that the High Court is not expected to sit in appeal over the decision taken by the High Level Committee and, decide to what level security a person should enjoy. Whether there is a threat perception to the applicant or not is to be decided by the Security Committee and, these are the questions to be left to the decision making process of the authorities constituted for this purpose.

24. The Supreme Court in the case of Abhay Singh Vs. State of U.P. (2013) 15 SCC 435, in an appeal from the judgment and order of this Court in the case of Pramod Tiwari Vs. State of U.P. 2009 SCC Online All 2107 wherein the decision of withdrawing 'Z' skill security arrangement in favour of the petitioner was quashed by this Court and, the State Government was directed to consider the claim of the petitioner for providing 'Z' category security to him and family members, considered three questions which are as under:-

?1. Whether the use of beacons, red lights and sirens by persons other than high constitutional functionaries is lawful and constitutional?

2. Whether the provision of security to persons other than the constitutional functionaries without corresponding increase in sanctioned strength and without a specific assessment of threat is lawful and constitutional?

3. Whether the closure of roads for facilitating movement of VIPs is lawful and constitutional??

25. In paragraphs-20 and 21 of Abhay Singh Vs. State of U.P. and others (supra), it was observed as under:-

"20. When we achieved Independence in 1947, India was a baby aiming to grow to become one of the respected members of the world community. The leaders of Independence movement undertook an onerous task of framing the Constitution for the country. They studied the Constitutions of various countries and adopted their best provisions for creating an egalitarian society with the aim of ensuring justice?social, economic and political, various types of freedoms, equality of opportunity and of status and ensuring dignity of every individual.

21. During the drafting of the Constitution, the preliminary notes on the fundamental rights issued by the Constitutional Advisor, B.N. Rau, specifically dealt with the issue of equality using examples from various Constitutions to emphasise its importance. One of the issues highlighted in the note was that if the instinct of power is concentrated in few individuals then naked greed for power will destroy the basics of democratic principles. But, what we have done in the last four decades would shock the most established political systems. The best political and executive practices have been distorted to such an extent that they do not even look like distant cousins of their original forms. The best example of this is the use of symbols of authority including the red lights on the vehicles of public representatives from the lowest to the highest and civil servants of various cadres. The red lights symbolise power and a stark differentiation between those who are allowed to use it and the ones who are not. A large number of those using vehicles with red lights have no respect for the laws of the country and they treat the ordinary citizens with contempt. The use of red lights on the vehicles of public representatives and civil servants has perhaps no parallel in the world democracies."

26. It would be apt to extract paragraph-6 of the judgment rendered by the Supreme Court in the case of Ramveer Upadhyay Vs. R.M. Srivastava and others, (2015) 13 SCC 370:-

"6. However, in our experience, we have hardly seen any security of ?Z? or ?Y? category provided to any ordinary citizen, howsoever grave the threat perception or imminent danger may be to the person concerned. The petitioner, however, has claimed it obviously as a ?privileged class? by virtue of being an ex-Minister which at times, may be justified even to an ex-Minister or any other dignitary, considering the nature and function of the duties which he had discharged, which could facilitate the assessment of his threat perception even after laying down the office. But what exactly is his threat perception and whether the same is grave in nature, obviously will have to be left to be decided by the authorities including the authorities of the State or the Centre which may include even the Intelligence Bureau or any other authority concerned which is entitled to assess the threat perception of an individual. But insofar as the court of law is concerned, it would obviously be in a predicament to come to any conclusion as to whether the threat perception alleged by a person claiming security is grave or otherwise which would hold him entitled to the security of a greater degree, since this is clearly a question of factual nature to be dealt with by the authorities entrusted with the duty to provide security after assessing

the need and genuineness of the threat to any individual."

27. In the case of *Ramveer Upadhyay Vs. R.M. Srivastava and others* (supra) ?Z? category security of a Minister in the State of Uttar Pradesh had been downgraded after he ceased to be the Minister. The Supreme Court also observed that irrespective of a reference to ordinary citizens in the 'Yellow Book', they hardly ever got such security irrespective of the threat perception or imminent danger. A society governed by rule of law does not make any difference between the Minister or ordinary person and under Article 21 both are the same.

28. As per a report, 2,556 MLAs and MPs from 22 States are accused in various cases. If former MPs and MLAs from these States are included, the number rises to 4,442. Only convicted persons have been barred from contesting elections for six years. The Supreme Court has ordered political parties to publish the entire criminal history of their candidates for Assembly and Lok Sabha elections along with reasons that goaded them to field suspected criminals over decent people, but not barred them. Thus, the political personalities with criminal cases against them could theoretically be provided with security.

29. As a matter of principle, private individuals should not be given security at State cost unless there are compelling transparent reasons, which warrant such protection, especially if the threat is linked to some public or national service they have rendered and, the security should be granted to such persons until the threat abates. But, if the threat perception is not real, it would not be proper for the Government to grant security at the cost of taxpayers money and to create a privileged class. In a democratic country governed by rule of law and written Constitution providing security at State expense ought not to become an act of patronage to create a coterie of ?obliged? and ?loyal? persons. The limited public resources must be used carefully for welfare schemes and not in creating a privileged class. From a report of Bureau of Police Research and Development (BPR&D), police think tank of the Ministry of Home Affairs (MHA), more than 20,000 additional policemen than the sanctioned strength were deployed in VIP protection duty in the year 2019. As per the report, Data on Police Organizations, 2019, as many as 66,043 policemen were deployed to protect 19,467 Ministers, Members of Parliament, Judges, Bureaucrats and other personalities and, thus number is growing up in every year.

30. In the case of Rajinder Saini Vs. State of Punjab and others, C.W.P. No.19453 of 2015, relying upon the judgment in the case of Ramveer Upadhyay Vs. R.M. Srivastava and others (supra), it was observed that the politicians and holders of party offices just to show their might were seeking security and, the same could not be provided merely on asking. If there is actual threat then only concerned authority can consider the case and make recommendation to the Government at their own level for providing security. The Court cannot determine as to whether the petitioner has any threat perception and required security urgently.

31. In the case of ***Randeep Singh Surjewala Vs. Union of India and others, CWP No.13266 of 2016,*** the Punjab and Haryana High Court denied inclusion of Surjewala?s name as a categorized

protectee in the Central list in Delhi as there was no specific input regarding threat perception to him, either from any terrorist, militant, outfit or fundamentalist groups.

32. This Court, while exercising writ jurisdiction under Article 226 of the Constitution of India, cannot substitute its decision to the decision of the competent Authority in respect of threat perception of the petitioner to his life and property. From the facts as emanate from the record, it is evident that the petitioner does not face any real threat to his life or property. He has been asking for security as authority of symbol to flaunt his status a VIP. This practice, creating a privileged class on State expense and taxpayers money, is to be deprecated. It is, therefore, provided that the threat perception has to be real and the Security Committee has to assess the threat perception, taking into consideration the reports from Intelligence Unit, the concerned police station and past record of the applicant. The security should be provided only to those who face real threat to their life for having done some work in the interest of the society or the nation from terrorist/naxalite or organized gangs and not otherwise. A personal enmity with other would not come within the parameters for assessing the threat perception of the applicant for providing him security.

33. In view of the aforesaid discussions, we find that the present writ petition lacks merit. It is dismissed accordingly. Interim order, if any, stands vacated.

34. Let a copy of this judgment be sent to the Chief Secretary of the Government of Uttar Pradesh, Principal Secretary/Additional Chief Secretary, Department of Home, State of Uttar Pradesh and Director General of Police, Uttar Pradesh for its compliance and taking decision, accordingly, for providing security to an individual.

(2021)08ILR A340
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.08.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SAURABH LAVANIA, J.

Misc. Bench No. 11051 of 2021

Neelam Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shobhit Mohan Shukla

Counsel for the Respondents:
C.S.C., Atul Kumar Dwivedi, Rohit Tripathi

Election result declared-Petitioner submitted an application before A.R.O./R.O. - non application of mind by the officer-discretionary jurisdiction under Article 226 cannot be interfered-as it has effect of compromising the fairness and sanctity of election process.

W.P. dismissed. (E-7)

List of Cases cited:

1. Smt. Ram Kanti Vs D.M., Hamirpur & ors, 1995 (2) U.P.L.B.E.C. 771

2. Sunita Patel Vs St. of U.P. & ors. (Civil Misc. Writ Petition No. 29629 of 2000),2006(1) U.P.L.B.E.C. 372

3. Pancham & ors. Vs St. of U.P. & ors, Writ Petition No. 5562 (MB) of 2005

4.Ram Achal Vs St. of U.P. & ors, Writ-C No. 12685 of 2021

5. Smt. Tara Devi Vs St. of U.P. & ors.,2011 (1) ADJ 287

6. St.of Mah. & ors. v, Prabhu, (1994) 2 SCC 481

7. A.M. Allison & H.B. Brig Vs B.L. Sen & ors., AIR 1957 SC 227

8. Gadde Venkateshwara Rao Vs Govt. of A.P. & ors, AIR 1966 SC 828

9. M.C. Mehta Vs U.O.I. & ors., (1999) 6 SCC 237

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

1. By means of this writ petition the petitioner has challenged a decision/letter dated 06.05.2021 issued by the opposite party no. 2, i.e., the State Election Commission and another order dated 08.05.2021 issued by the District Election Officer/District Magistrate, Amethi.

2. The facts of the case, in brief, are that the petitioner contested the election for Member, Zila Panchayat for Ward No. 28, Amethi. The opposite party no. 6 herein also contested for the same office. The elections were held, votes were counted and as per the result, the petitioner had secured 3149 votes, whereas the opposite party no. 6 had secured only 3046 votes, therefore, a certificate of election was issued to the petitioner on 04.05.2021. On 04.05.2021 itself, before the petitioner could take oath, the opposite party no. 6 submitted a representation to the Assistant Returning Officer, copy of which is annexed as Annexure No. CA-3 to the counter affidavit of opposite party no. 6 stating that two booths bearing number 79 and 80 which were part of ward no. 28 and in which voting had taken place and the votes polled therein which had been counted were not included in Form-50 while calculating the number of votes polled by the respective candidates. It is said that at that time the opposite party no. 6 was not aware that the same error had been committed in respect to the votes polled and counted at booth nos. 120, 121, 134, 138 and 150 which were also part of ward no. 28 and that the votes polled and counted in respect to these booths were erroneously included in Form-50 of adjoining ward no. 29 of which they were not a part. Likewise Booth no. 100 which was part of ward no. 29, the votes polled and counted in respect thereof were included in Form no. 50 pertaining to ward no. 28, i.e., the ward of rival private parties herein. The Assistant Returning officer rejected the said application of the opposite party no. 6.

3. We have perused the order of the Assistant Returning Officer passed on the application of the petitioner. On a bare reading, it is apparent that the A.R.O./R.O., Amethi misread the application of the petitioner as if he was complaining about inclusion of Booth nos. 79 and 80 in ward no. 28 which in fact were part of ward no. 29, whereas, in fact, the opposite party no. 6 had submitted just the opposite in his application. After misreading it he opined that ward nos. 79 and 80 were part of ward no. 29 and that is how counting had been done, which was factually incorrect.

4. Being aggrieved the opposite party no. 6 approached the opposite party no. 2, i.e., the State Election Commission, which, on 06.05.2021, passed an order, a copy of which is also annexed as part of Annexure CA-4 to the counter affidavit of opposite

party no. 6, by which, the Election Commission ordered the District Magistrate/District Returning Officer (Panchayat and Nagariya Nikay), Amethi, to get the facts inquired and to take action in accordance with Rules. Thereafter the matter was got inquired and as is evident from Annexure-1, which is an order passed by the District Returning Officer, Zilla Panchayat, Amethi, dated 8 May 2021, it was found that in fact ward nos. 79, 80, 120, 121, 134, 138 and 150 were part of ward no. 28 for which the petitioner and opposite party no. 6 had contested for the office of Member Zila Panchayat, but, erroneously, the votes polled and counted in respect of these booths were not entered in Form-50 pertaining to ward no. 28, instead, they were included in Form-50 pertaining to ward no. 29, in which they did not fall. Likewise the votes pertaining to Booth number 100 were counted for ward no. 28, though, the said booth fell in ward no. 29. After inclusion of the votes cast at aforesaid omitted booths to the votes pertaining to ward no. 28 it was found that the petitioner Neelam Yadav had polled 3329 votes, whereas, the opposite party no. 6, Smt. Krishna Devi had polled 3557 votes. There was a difference of 2367 in the valid votes as considered earlier and the one which were actually polled. Accordingly, based on this exercise, modified result of election was declared and Form-50 was also modified on the same terms. The opposite party no. 6 was declared elected. The certificate of election issued to the petitioner erroneously, was cancelled. It is an admitted fact that the opposite party no. 6 has taken oath as a consequence thereof.

5. Contention of the learned counsel for the petitioner was that once the result had been declared on 4.5.2021 the returning officer became *functus officio*, therefore, he could not have cancelled the certificate of election issued in favour of the petitioner nor could he have issued it in favour of the opposite party no. 6. He could not have recalled, reviewed or cancelled the certificate of election already issued, that too, without any opportunity of hearing. In this regard he relied upon various decisions rendered by coordinate benches of this Court reported in ***1995 (2) U.P.L.B.E.C. 771, Smt. Ram Kanti v. District Magistrate, Hamirpur & ors.; 2006(1) U.P.L.B.E.C. 372, Sunita Patel v. State of U.P. & ors. (Civil Misc. Writ Petition No. 29629 of 2000);*** other decisions rendered in ***Writ Petition No. 5562 (MB) of 2005, Pancham & ors. V. State of U.P. & ors.; Writ-C No. 12685 of 2021, Ram Achal v. State of U.P. & ors.,*** wherein, it has been held that once the result of election is declared, then, the returning officer and the Election Commission become *functus officio* and cease to have jurisdiction over the elections. They cannot cancel the declaration of result or direct fresh poll and it is the Election Tribunal alone which is competent to deal with the dispute arising out of or in connection with the election. The election commences from the initial notification and culminates in the declaration of a return of a candidate. Election process, thus, comes to an end on the final declaration of returned candidates. Learned counsel also relied upon Article 243-O of the Constitution of India in support of his contention.

6. Learned counsel for the petitioner placed heavy reliance upon a document annexed as Annexure S.A.-2 with its affidavit dated 05.05.2021 by the Election Commission to contend that the election process was over and the same was denotified on 6.5.2021 as per the Election

Commission itself, therefore, the cancellation of the certificate of election issued to the petitioner on 8.5.2021 is erroneous in law and without jurisdiction.

7. On the other hand Dr. L.P. Mishra, learned counsel for the opposite party no. 6 contended that the election at hand is a 3-tier election involving election to the Gram Panchayat, Kshetra Panchayat and Zila Panchayat, therefore, the process of election does not come to an end till the elections to the office of the Chairman, Zila Parishad are held. He submitted that on 4.5.2021 when the result was erroneously declared without taking into consideration the votes poled on booth no. 79, 80, 120, 121, 134, 138 and 150 which fell in Ward No. 28, the opposite party no. 6 submitted an application to the A.R.O./R.O., but he misread the application and passed an absurd order. Had the A.R.O./R.O. applied his mind to the facts of the case, this situation would not have arisen. He submitted that sanctity of elections is to be maintained and all endeavour should be made to ensure free and fair election. Nobody should get elected by default or merely because the concerned official committed an error. It would be a death knell for democracy, if this is permitted. He submitted that the votes were not only polled on the aforesaid booths, but, were also counted. The error occurred in not including these votes in Form-50 which is the final Form prepared containing the result of elections and is referable to Schedule-12. He relied upon a Division Bench judgment of this Court reported in ***2011 (1) ADJ 287, Smt. Tara Devi v. State of U.P. & ors.***, wherein, the earlier decisions which have been relied by the petitioner's counsel , have been considered and according to him it has been held that formal declaration of result under Rule 54 will abide by Rule 56 of the Rules 1994. In other words, when declaration of result under Rule 54 is formal one, declaration of result is subject to Rule 56 which is final one. It has been held that it is an admitted position that election starts with notification and finishes with denotification. Scope of election petition arises thereafter, but , during this period Election Commission is the final authority at the entire process. Therefore, after formal declaration of result by the returning officer, if he is called upon by the other authorities under Rule 56 to remove the defects which are either minor or formal or inadvertent and he removes the same, neither he can be said to have become *functus officio* nor can it be said to be outside the scope and jurisdiction of the Election Commission or any authority thereof.

8. Dr. Mishra further submitted that even otherwise the error is apparent on the face of the record and there is no denial of it. In this context he invited attention of the Court to para-15 of counter affidavit of opposite party no. 6, wherein, a specific averment has been made about the fact that certain booths, already referred hereinabove, were part of Ward-28 and not Ward-29, but, the votes pertaining to said booths were counted in Ward-29 erroneously. The polling booth lists relating to election of Member of Zila Panchayat of Ward No. 28 and 29 have also been annexed as Annexure C.A.6-A and C.A.6-B. In this context he submitted that in the index the said annexure had incorrectly been mentioned as relating to Ward-29. He submitted that these averments in para-15 have not been specifically denied in the rejoinder affidavit. He invited our attention to para-20 thereof. He further contended that the error being unrebutted this court

would not, by interfering in the matter, revive an illegality. The requirement of free and fair election is paramount, therefore, this Court should not interfere in the matter. He also submitted that the impugned order has not affected the result of election of members of Ward No. 29 which remains as it is.

9. Sri Rohit Tripathi, learned counsel appearing for the Election Commission submitted that the error had in fact occurred which was apparent as was found in the inquiry, therefore, the said error has been rectified. The Election Commission is bound to ensure free and fair election as such this is not a matter where the Court should interfere.

10. We specifically asked Sri Tripathi as to whether there is any provision for denotification of elections ? This question was put by us to other counsels also, but none of them could place before us any provision in the Kshetriya Panchayat and Zila Panchayat Adhiniyam 1961 or Rules made thereunder regarding denotification of elections. When we invited attention of Sri Tripathi to the document annexed by the Election Commission and relied by the petitioner to contend that elections were denotified on 06.05.2021, he contended that there is no provision for denotification and the said document was issued only for the reason that as the voting having taken place the Model Code of Conduct have come to an end. He further submitted that though the said order is not happily worded, but, this was the intent of the Election Commission.

11. We also asked Sri Tripathi as to when was the result of the Election declared in terms of Rule 54 of the U.P. Kshetriya Panchayat and Zila Panchayat (Election of Members) Rules 1994 and when was the report of the result sent to the Election Commission and received by it, he submitted that he would have to seek instructions. After seeking instructions he came back and informed that no intimation about the initial result in which the petitioner Smt. Neelam Yadav was declared elected, was ever provided by the District Magistrate. Information about final result in which the opposite party no. 6 was declared elected was uploaded on the Election Commission's website on 09.05.2021 at 12:42 PM. He, however, also submitted that the District Magistrates/Returning Officers on their own upload the results on the website of the Election Commission.

12. Sri Tripathi also relied upon judgment of the Division Bench in Tara Devi's case (supra). He referred to the averments made in the counter affidavit of the Election Commission to contend that the Election Commission on receipt of a representation from opposite party no. 6 on 06.05.2021 ordered an inquiry in the matter, in response to which the District Magistrate by means of his letter dated 06.05.2021 directed the A.D.M. (Finance & Revenue)/Deputy Electoral Officer, Amethi to conduct an inquiry and furnish a report. In compliance of the said direction the A.D.M. (Finance and Revenue) submitted an inquiry report by means of letter dated 08.05.2021. In the said report it was specifically mentioned that votes polled at Poling Center 79, 80, 120, 121 (Part), 134 (Addl. Room No. 1), 138 (Room No. 1), 158 (Room No. 1) were left out in the final tabulation for ward No. 28, therefore, keeping in view the abovenoted mistake it was decided that appropriate decision be taken for the purpose of rectifying the error, consequently an amended Form-50

was prepared and on the basis of same, certificate issued in favour of petitioner was cancelled, and fresh certificate was issued in favour of opposite party no. 6 who had polled higher votes than the petitioner. It was a bona fide decision in order to ensure that the sanctity of the electoral process is maintained in terms of the tone and tenor of the constitutional mandate of conducting free and fair election. The error being apparent and it having been rectified this Court should not interfere in the matter under Article 226 of the Constitution of India.

13. We have also been informed by Sri Tripathi that proceedings have been ordered against the A.R.O./R.O. who had rejected the representation of the opposite party no. 6 on 4.5.2021 on erroneous grounds as it had the effect of adversely affecting the sanctity of elections and its result.

14. It is a case where votes cast and counted in respect of Booth Nos. 120, 121, 134,138 and 150 which were part of Ward No. 28, were not included in the final tabulation of votes in Form 50 pertaining to the said ward, instead, they were erroneously mentioned in Form-50 pertaining to Ward No. 29. There is no denial of this fact by the petitioners in the pleadings. Likewise, votes polled and counted in respect of Booth No. 100 of Ward No. 29 were erroneously included in Form-50 pertaining to Ward No. 28. It is this error which has been rectified by the impugned action. Based on this exercise the opposite party no. 6 has been declared elected and has taken oath and the certificate of election issued earlier in favour of the petitioner on the basis of incorrect entries in the final tabulation chart has been cancelled.

15. We confronted learned counsel for the petitioner as to whether he had rebutted the specific finding of fact in the impugned order and specific assertion in para-15 of the counter affidavit of opposite party no. 6 that the booths in question were part of Ward No. 28, but, the votes polled and counted in respect thereof were not included in the final Form-50 pertaining to Ward No. 28, which contains the final result, instead, they were included in Form-50 of Ward No. 29, the learned counsel could not give any satisfactory reply. He stated that he had not been given an opportunity by the concerned official to put his version. When we asked as to why he has not availed the opportunity before this Court as there is documentary proof annexed as C.A.-6 to the counter affidavit of opposite party no. 6 containing the list of booths of the two wards, i.e., ward No. 28 and 29 corroborating the finding of fact in the impugned order and the assertion of the opposite party no. 6, he did not have any reply. We have perused para-20 of the rejoinder affidavit as also other paragraphs therein and have also perused the contents of the writ petition, but we did not find any averment that the aforesaid facts as mentioned in the impugned order or in the counter affidavit of opposite party no. 6 were incorrect nor any proof to show that it was so. The reply in para-20 of the rejoinder affidavit merely contains a bald denial and is apparently evasive.

16. The legal position, no doubt, is that ordinarily there would be no interference in an election matter after an election result has been declared, however, we find that on 4.5.2021 itself the petitioner had submitted an application before the A.R.O./R.O. pointing out the error, but, the said officer did not apply his mind to the facts before him. Had he done so, this

situation would not have arisen. It is also a question before us that should we ignore an apparent illegality which has not been rebutted by the petitioner in spite of opportunity before us, and thereby should we revive an illegality by interfering with the order on the grounds asserted by the petitioner's counsel. We have to keep in mind that we are exercising equitable discretionary jurisdiction under Article 226 of the Constitution of India and if a fact is apparent and the impugned order has done substantial justice in the matter by rectifying the error, which is apparent and remains unrebutted, then, the High Court under Article 226 of the Constitution of India would not interfere, as, in doing so it would revive another illegality. We are of the considered opinion that purely on facts we are not inclined to interfere with the impugned order as it rectifies an apparent and unrebutted error. Secondly because in doing so we would be reviving an illegality, one which is far more grave than the one being alleged by the petitioner, as, it has the effect of compromising the fairness and sanctity of the election process. Had it been an arguable and triable case based on the averments made on behalf of the petitioner and the arguments advanced, then, we may have interfered in the matter, but, when the facts go undisputed, then the result is irresistible and it has to be in favour of substantial justice which has been rendered by the impugned order.

17. In taking this view we are supported by the decision of Hon'ble the Supreme Court reported in ***(1994) 2 SCC 481, State of Maharashtra & ors. v, Prabhu,*** wherein while noticing the distinction between writs issued as a matter of right such as *habeas corpus* and those issued in exercise of discretion such as certiorari and mandamus it was held that where the Government or any authority passes an order which is contrary to Rules or law, it becomes amenable to correction by the Courts in exercise of writ jurisdiction, but, one of the principles inherent in it is that the exercise of power should be for the sake of justice. One of the yardstick for it is if the quashing of the order results in greater harm to the society, then the Court may restrain from exercising the power. Similar view has been taken in other decisions of the Supreme Court, such as, in the case of ***A.M. Allison and H.B. Brig v. B.L. Sen & ors., AIR 1957 SC 227.*** It was a case where the order of the Deputy Commissioner Sri Shiv Sagar was alleged to be without jurisdiction, yet the Supreme Court upheld the decisioin of the High Court in declining to exercise jurisdiction in the matter under Article 226 of the Constitution of India as substantial justice had been done. We may also refer to the decision reported in ***AIR 1966 SC 828, Gadde Venkateshwara Rao v. Government of Andhra Pradesh & ors.;*** wherein, Hon'ble the Supreme Court affirmed the decision of the High Court in refusing to exercise its extraordinary discretionary power in the circumstances of the case, as, if the High Court had quashed the said order, it would have restored an illegal order. This decision has been followed in *M.C. Mehta v. Union of India & ors., (1999) 6 SCC 237.* We accordingly decline to exercise our extraordinary discretionary and equitable jurisdiction in the matter and dismiss this writ petition.

(2021)08ILR A347
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.07.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

Misc. Single No. 14479 of 2021

Hamidullah & Ors. ...Petitioners
Versus
Laxmi Prasad & Ors. ...Respondents

Counsel for the Petitioners:
Mohd. Mustafizul Haq, Deepti Gupta

Counsel for the Respondents:

Joint Tenancy-ammendment application by Plaintiff-one of the deceased died - defendant jointly filed objection without impleading deceased's legal heir-ammendment of plaintiff rejected-objection filed is illegal--proceeding u/s 21(1) (a) could not continue-order rejecting ammendment is inconsequential and non-maintainable-subsequent substitution was entertained-such order is bad in the eye of law. Impugned order and consequential proceedings quashed.

W.P. disposed. (E-7)

Held, *It may be relevant to note that the consequence of abatement does not follow as a result of death of the landlord or a tenant in the proceedings instituted under the Rent Control Act. Therefore, the overriding effect of the Act by virtue of Section 38 to the extent of inconsistency with CPC makes the application of Section 34(4) of the Act as indispensable, therefore, bringing on record the legal representatives or the legal heirs of the deceased party for continuity of the proceeding becomes a pre-requisite.***(para 9)**

List of Cases cited:

1. Ajeet Gupta Vs Smt. Mukteshwari Nigam & ors., 1984 LCD pg. 68

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Sri Q.M. Haque learned counsel for the petitioners and Ms. Deepti Gupta learned counsel for the opposite parties.

2. This is a petition filed under Article 227 of the Constitution of India assailing the order passed by the revisional court below on 19.3.2021 whereby the application i.e. 30Ka/2 for substitution of the legal heirs of one of the respondents in the revision who was defendant no. 6 in the miscellaneous case filed under Section 21(1)(a) of the U.P. Act No. 13 of 1972(hereinafter referred to as the Act) has been allowed under Order 22 Rule 4 C.P.C.

3. Facts in brief are that a Misc. Case No.1/2016 for eviction of tenants under Section 21(1)(a) of the Act was filed before the court below impleading six defendants. The defendant no. 1 was the original tenant whereas the defendant nos. 2 to 6 were the legal heirs of the deceased original joint tenant Samiullah who was the real brother of the defendant no. 1. The tenancy originally was admittedly joint. Thus, all the co-defendants were joint tenants of the shop in dispute. A written statement jointly filed on 5.2.2016 by all the defendants is also on record. Thereafter, an application for amendment i.e. Ka-3 was filed by the plaintiffs. In response to this application, all the defendants are stated to have filed their objections jointly on 7.3.2018 as is evident from paragraph 7 of the present petition. The amendment application came to be rejected by order dated 16.10.2018 which is contained as anneuxre 6 but at the

relevant point of time one of the defendants namely defendant no. 6(Smt. Ammunnisa) had died.

4. The petitioners have mentioned the date of death of the defendant no. 6 as 1.1.2018 in paragraph 10 of the petition and the same date is mentioned in paragraph 4 of the objections filed against the substitution application preferred by the landlords at the revisional stage under Order 22 Rule 4 C.P.C. The substitution application filed by the landlord in the revision arisen out of order dated 16.10.2018 also mentions the date of death of defendant no. 6 as 1.1.2018.

5. In the light of the facts on record, if the date of death of the defendant no. 6(Ammunnisa) mentioned as 1.1.2018 is taken to be correct, the objections filed against the amendment application jointly on behalf of the defendants on 7.3.2018 emerges to be false. Thus, the legal heirs of the defendant no. 6 in the objections filed against the application for amendment cannot be presumed to have been represented by any of the defendant nos. 1 to 5 unless authorized.

6. The amendment application was also rejected after the death of the defendant no. 6 meaning thereby that the proceedings under Section 21(1)(a) were continued contrary to the mandate of Section 34(4) of the Act, which is extracted below :-

"34(4) Where any party to any proceeding for the determination of standard rent of or for eviction from a building dies during the pendency of the proceeding, such proceeding May be continued after bringing on the record:

(a) in the case of the landlord or tenant, his heir or; legal representatives;

(b) in the case of an unauthorised occupant, any person claiming under him or found in occupation of the building"

7. Bare reading of the aforesaid provision makes it clear that the proceedings under the Act can be continued only after bringing on record the legal heirs or legal representatives of the deceased landlord or tenant. Even if it is assumed that the defendants were joint tenants but upon the death of any of them, the heirs would inherit the tenancy in their individual capacity, thefore, the proceedings were liable to be continued either by bringing the legal representatives of the deceased tenant on record or by substituting the legal heirs in the plaint. Thus, the continuity of proceedings upon the death of defendant no. 6 after 1.1.2018 from a close scrutiny of the record, is clearly vitiated for having proceeded against a dead person whose legal representatives/legal heirs were not brought on record. In the result, the proceedings under Section 21(1)(a) of the Act could not be continued. The position of law is supported under a judgment reported in **1984 LCD pg. 68(Ajeet Gupta versus Smt. Mukteshwari Nigam and others).**

8. Once the proceedings under Section 21(1)(a) of the Act could not continue, the order passed by the court below rejecting the amendment application on 16.10.2018 was inconsequential and any proceeding arising therefrom i.e. the revision in the present case was equally non-maintainable and that too by impleading a dead person as opposite party. The substitution application which even otherwise was not maintainable under Order 22 Rule 4 C.P.C. in the revision was

erroneously entertained by the revisional court. Hence, the order passed on the substitution application impugned herein this petition is equally bad in the eye of law.

9. It may be relevant to note that the consequence of abatement does not follow as a result of death of the landlord or a tenant in the proceedings instituted under the Rent Control Act. Therefore, the overriding effect of the Act by virtue of Section 38 to the extent of inconsistency with CPC makes the application of Section 34(4) of the Act as indispensable, therefore, bringing on record the legal representatives or the legal heirs of the deceased party for continuity of the proceeding becomes a pre-requisite.

10. The thirty days period of limitation stipulated under Rule 25 of the Rules applicable in this behalf is statutorily prescribed and for this purpose the provisions of Limitation Act are open to be taken aid of in the event of delay.

11. Having regard to the facts and circumstances of the present case, this Court is of the considered opinion that not only that the order rejecting the amendment application filed by the plaintiffs in Misc. Case No. 1 of 2016 by order dated 16.10.2018 is non-est but the consequential proceedings of Revision No. 83 of 2018 are also bad in the eye of law being non-maintainable. The proceedings after the death of defendant no. 6 ought not to have proceeded without bringing on record her legal representative/legal heirs.

12. It is thus open to the plaintiffs to make an appropriate application for bringing on record the legal heirs/legal representatives of the defendant no. 6 in the pending proceeding under Section 21(1)(a) of the Act i.e. in Misc. Case No. 1 of 2016 and if any such application is filed within one month from the date of uploading this order, the competent court shall consider the said application and pass necessary order after affording opportunity to both the parties. The amendment application shall also be treated to be pending for the aforesaid reasons and opportunity to file objections may be granted afresh so that all the parties may have an opportunity of filing their objections and setting out their defence. The amendment application as well as the proceedings pending under Section 21(1)(a) of the Act may be brought to its logical conclusion expeditiously. The order dated 16.10.2018 along-with the consequential proceedings before the revisional court are hereby set aside/quashed.

13. The petition is accordingly disposed of.

(2021)08ILR A349
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.07.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE RAVI NATH TILHARI, J.

Misc. Bench No. 15087 of 2021

Popai ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Kaushal Kishore, Mohammad Salman

Counsel for the Respondents:
C.S.C., Mohan Singh

Petitioner applied for grant of fisheries lese -approval granted on 18.07.2016 and the same got registered on 14.03.2017-granted lease for 5 years-Rule 57 (12) of Uttar Pradesh revenue Code rules, 2016 was substituted on 20.10.2016 and period of lease ws extended from 5 years to 10 years. Claim for changing the period for lesse from 5 years to 10 years claiming it on the basis of date of registration-rejected-date of registration cannot be relevant date to determine period of lease-it is a consequential action to the approval-Rule 57 has prospective effect-claim rightly rejected.

W.P. dismissed. (E-7)

List of Cases cited:

1. Ashok Service Centre Vs St. of Orissa, reported in (1983) 2 SCC 82

2.Prahlad Sharma Vs St. of U.P. & ors., reported in (2004) 4 SCC 113

3.Vijayadevi Navalkishore Bhartia Vs Land Acquisition officer [2003 (5) SCC 83]

4.Sant Lal Gupta & ors. Vs Modern Co-operative Group Housing Society Ltd. & ors. [(2010) 13 SCC 336

5.Kumari Sushila Saxena Vs Sub Registrar, Shahjahanpur & ors., [1997 (1) AWC 346]

6.Smt. Jota Devi Vs DDC [2013 (31) LCD 615]

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

1. Heard Sri Kaushal Kishore, learned counsel for the petitioner and learned Standing Counsel for the State-opposite party nos. 1 to 3 and Sri Mohan Singh, learned counsel for the opposite party no. 4.

2. This writ petition has been filed with the following main relief:-

"i. issue a writ, order or direction in the nature of mandamus commanding/directing the opposite parties concerned to mandate for conferring the benefit of enjoyment of Fisheries lease from five years to ten years to the petitioner considering the date of registration as accrual of rights in favour of petitioner alongwith social justice in the light of notification dated October 20, 2016 substituted earlier Notification."

3. Facts of the case are that the petitioner was granted lease of fishing rights in pond bearing Gata No. 2041 admeasuring 1.520 hectares situated at village- Kushfar, Pargana- Dariyabad, Tehsil Ram Sanehighat, District Barabanki, which was approved by the Sub-Divisional Magistrate on 18.07.2016. The lease deed in RC form 15 was executed for a period of five years w.e.f. 18.07.2016 upto 17.07.2021 and was registered on 14.03.2017.

4. Rule 57 (12) of the Uttar Pradesh Revenue Code Rules, 2016 *(hereinafter referred to as 'the Rules, 2016')* was substituted vide notification No. 1364/1-1-2016-20(8)-2016 dated 20.10.2016 published in the Uttar Pradesh gazette on the same date, by which it was provided that every such lease (fisheries lease) shall be executed for a period of ten years and the same shall not be renewed or extended. The petitioner filed an application requesting the Sub Divisional Officer concerned to change the period of lease from five years to ten years in view of substituted Rule 57(12), as his lease was registered on 14.03.2017. Prior to this substitution, the period of lease was only five years. Petitioner was granted lease for a period of five years as the lease was granted under sub-Rule 12, as it was

existing on that date i.e. prior to its substitution.

5. The petitioner's counsel submits that the date of registration of the petitioner's lease being 14.03.2017 i.e. after the amendment of sub-Rule (12) of Rule 57, the petitioner is entitled to continue for a period of ten years, as it is the date of registration which is relevant and not the date of approval of fishery lease by the Sub Divisional Officer. He further submits that in the case of one Hanuman Prasad, the lease has been granted for ten years, although, in his case also, the lease deed was registered after the amended Rule 57(12) came into force, for which benefit the petitioner is also entitled.

6. Learned Standing Counsel submits that the amendment came into force on 20.10.2016, whereas the lease was granted under the unamended Rule, under which the period of lease was five years. He further pointed out that in the case of Hanuman Prasad, approval by the Sub Divisional Officer was granted on 02.11.2016, after the amended Rule 57(12) came into force.

7. We have considered the submissions advanced by learned counsel for the parties and perused the material on record.

8. There is no dispute that the lease was granted on 18.07.2016 for a period of five years and it was registered on 14.03.2017. The only question is applicability of substituted Rule 57 (12) of the Rules, 2016 to a lease approved before the commencement of substituted Rule but lease deed registered after it.

9. The management of village tanks is provided by Section 61 of the Uttar Pradesh Revenue Code, 2006, which provides as under:-

61. Management of village tanks.- *Where a tank in any village is entrusted or deemed to be entrusted to any Gram Panchayat under section 59, then, notwithstanding anything contained in any contract or grant or any law for the time being in force, its management by such Gram Panchayat shall be regulated by the following conditions, namely:-*

(a) where the area of the tank measures 0.5 acre or less, it shall be reserved for public use by the inhabitants of the village;

(b) where the area of the tank exceeds 0.5 acres, the Bhumi Prabandhak Samiti shall, with the previous approval of the Sub-Divisional Officer, let it out in the manner prescribed.

Explanation. - For the purpose of this section, the term ''tank', includes talab, pond, pokhar and other land covered with water.

10. As per Section 61(b), where the area of the tank exceeds 0.5 acre, the Bhumi Prabandhak Samiti shall, with the previous approval of the Sub-Divisional Officer, let it out in the manner prescribed. The manner is prescribed under Rules, 2016. Rule 58 relates to the lease of bigger tanks which exceeds 5 acre. Sub-Rule (2) applies the provisions of Rule 57 *mutatis mutandis.*

11. Rule 58 of the Rules, 2016 reads as under:-

"58. Lease of bigger Tanks (Section 61)- *(1) Where the area of a tank referred to in section 61(b) exceeds 5 acres, the Samiti shall let it out with the prior approval of the Sub-Divisional Officer in the following order of preference:-*

(a) Co-operative Societies of fishermen residing in the concerned village registered under the U.P. Cooperative Societies Act, 1965 and recognized by the Fisheries Department.

(b) Co-operative Societies of fishermen residing in the concerned Nyaya Panchayat Circle registered and recognized as above.

(c) Co-operative Societies of fishermen residing in the concerned Development Block registered and recognized as above.

(d) Co-operative Societies of fishermen residing in the district concerned registered and recognized as above.

(e) Co-operative Societies of fishermen residing in the State of Uttar Pradesh and registered and recognized as above.

(f) Co-operative Societies of members of Scheduled Castes or Scheduled Tribes registered and recognized as above.

(g) Other Co-operative Societies registered and recognized as above.

(2) In all other respects, the provisions of rule 57 shall mutatis mutandis apply to the leases of tanks covered by this rule. Subject to the condition that, if, there is only one Co-operative Society eligible for the lease aforesaid, the lease shall be granted on the annual rent of the amount fixed by the State Government from time to time which shall not be less than Rs. 4000/- per acre."

12. Rule 57 of the Rules, 2016 is also being reproduced as under:-

"57. Lease of smaller Tanks (Section 61).-

(1) Where the area of a tank referred to in section 61(b) exceeds 0.5 acre but does not exceeds 5 acres, the Samiti shall let out the same for fishing purposes or for growing Singhara with the prior approval of the SubDivisional Officer in accordance with the following procedure.

(2) For the purposes of letting such tanks, a camp shall be organized at the Tahsil level, about which wide publicity shall be given by publishing the date, time and place of the camp in at least one Hindi newspaper having wide circulation in the area.

(3) The Chairman, the Secretary and an officer not below the rank of Naib Tahsildar shall be present at such camp meetings. If, more than one Gram Panchayats are involved, the Chairmen and Secretaries of all the Samitees 30 concerned shall attend such meetings.

(4) With the help of the representative of the fishermen community, to be appointed by the Collector for each Tahsil, the Secretary shall prepare a list of eligible persons who may be allotted the tank under reference, in accordance with the order of preference specified in sub-rule (5).

(5) The eligibility list of prospective lessees shall be prepared in accordance with the following order of preference:-

(a) Fishermen residing in the concerned Gram Panchayat;

(b) Members of the S.C.,S.T., Other Backward Classes or persons of General category living below poverty line residing in the Gram Panchayat.

(c) Fishermen residing in the concerned Nyaya Panchayat Circle;

(d) Fishermen residing in the concerned Development Block :

Explanation: For the purposes of this rule and rule 58, the expression "Fishermen' means any person belonging to the community of Kewat, Mallah, Nishad, Bind, Dheemar, Kashyap, Vatham,

Raikwar, Manjhee, Godia, Kahar, Tureha or Turaha or any other person traditionally engaged in the fishing profession.

(6) The persons referred to in any of the preceding clause of sub-rule (5) shall be entitled to the lease of such tank to the exclusion of those specified in the succeeding clauses.

(7) If the list of eligible persons prepared under subrule (4) consists of more than one person, then an auction shall be held on the spot in which only those shall be allowed to participate whose names are included in such 31 list. If there is only one person eligible for the lease aforesaid, the lease shall be granted on the annual rent of the amount fix by the State Government from time to time which shall not be less than Rs. 1000/- and shall not exceed Rs.2000/- per acre.

(8) The provisions of sections 189 and 190 of the Code shall apply to every auction under this rule.

(9) When the amount of the highest bid has been deposited, the eligibility List, the Bid Sheet and a report about the deposit of the bid amount duly signed by the Chairman, Secretary and the revenue officer referred to in sub-rule (3) shall be forwarded to the Sub-Divisional Officer for his approval.

(10) If the Sub-Divisional Officer is satisfied that the decision to let the tank is in accordance with the provisions of these rules, he shall accord his approval and shall return the papers to the Samiti.

(11) If the Sub-Divisional Officer approves the proposal, the papers shall be returned to the Samiti and a Deed of Lease shall be executed in R.C. Form-15 which shall be registered under the Registration Act, 1908.

(12) Every such lease shall be executed for a period of five years and the same shall not be renewed or extended.

(13) The lessee may use the tank allotted to him for the purpose of fishing or producing other aquatic produce or vegetables.

(14) If during the period of lease, the lessee commits any breach of the terms and conditions of such lease, the Sub-Divisional Officer may cancel the lease after issuing a show cause notice to the lessee.

(15) During the period of lease the rights of the local residents to use the tank for purposes of washing clothes, watering the cattle, digging out earth for purposes of pottery or the likes small remain undisturbed."

13. Rule 57 (12) as quoted above is as amended on 20.10.2016. This sub-Rule (12) as it existed prior to such amendment, is also being reproduced hereinafter:-

"57.(12) Every such lease shall be executed for a period of five years and the same shall not be renewed or extended."

14. The use of the expression 'mutatis mutandis' implies applicability of such provision as made applicable with necessary changes in the points of details. In ***Ashok Service Centre Vs. State of Orissa, reported in (1983) 2 SCC 82,*** the Hon'ble Supreme Court has held that the expression "mutatis mutandis' is a phrase of practical occurrence, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like. In ***Prahlad Sharma Vs. State of U.P. and others, reported in (2004) 4 SCC 113,*** the Hon'ble Supreme Court has held that, "The expression "mutatis mutandis" itself implies applicability of any provision with necessary changes in points of detail. The

rules which are adopted, make the principles embodied in the rules applicable and not the details pertaining to particular authority or things of that nature. Therefore, while applying Rule 57 to the lease of bigger tanks by virtue of Rule 58 (2), the procedure under Rule 57 shall be applicable with necessary changes in points of detail, such as, the area as mentioned therein shall be read as the area of bigger tanks.

15. The manner as prescribed for lease of fisheries is that the samiti i.e. the Land Management Committee, shall let out the tank with the prior approval of the sub-Divisional Officer. The procedure as prescribed is that a camp shall be organized at the Tahsil level, about which wide publicity shall be given by publishing the date, time and place of the camp in at least one Hindi newspaper having wide circulation in that area. The Chairman, the Secretary and an Officer not below the rank of Naib Tehsildar shall be present at such camp, meetings. With the help of the representatives of the fishermen community, to be appointed by the Collector for each Tehsil, the Secretary shall prepare a list of eligible persons in accordance with the order of preference as given in sub Rule (5). The persons in the eligibility list shall be entitled to the lease of Tank to the exclusion of those specified in the succeeding Clauses of the list, meaning thereby, that the persons standing in the order of preference under Clause (a) shall be given preference over the persons in clause (b) and so on. If the list of eligible persons consists of more than one person under the same clause then an auction shall be held in which only those persons whose names are included in the list shall be allowed to participate and if there is only one person eligible for the lease, the lease shall be granted to that person on annual rent of the amount fixed by the State Government from time to time, which shall neither be less nor more than the statutory amount. In the case of lease of bigger tanks, the annual rent of the amount shall not be less than Rs. 4000/- per acre. If the auction is held, and the amount of the highest bid has been deposited, the eligibility list, the bid sheet and a report about the deposit of the bid amount duly signed by the Chairman, Secretary and the Revenue Officer shall be forwarded to the sub-Divisional Officer, for his approval and if the Sub-Divisional Officer is satisfied that the decision to let the tank is in accordance with the provisions of Rule 57, he shall accord his approval and shall return the papers to the *samiti* for a deed of lease to be executed in RC Form 15 which shall be registered under the Registration Act, 1908.

16. Section 61 read with Rule 57, thus provides for the resolution by the Land Management Committee for grant of fishery rights to be passed as per the procedure prescribed which is to be forwarded to the sub Divisional Officer for his approval, who shall accord his approval after being satisfied that the procedure has been followed in accordance with the provisions of the Rules. The "Approval' means an act of confirming, ratifying, assenting, sanctioning or consenting to some act or thing done by another. In ***Vijayadevi Navalkishore Bhartia vs. Land Acquisition officer [2003 (5) SCC 83]***, with respect to approval, Hon'ble Apex Court held that Black's Law Dictionary, 6th Edition, defines 'approval' to mean an act of confirming, ratifying, assenting, sanctioning or consenting to some act or thing done by another. In the context of an administrative act, the word 'approval' does

not mean anything more than either confirming, ratifying, assenting, sanctioning or consenting. In ***Sant Lal Gupta & Ors vs Modern Co-operative Group Housing Society Ltd. and Ors [(2010) 13 SCC 336],*** also the Hon'ble Supreme Court held that the very act of approval means, the act of passing judgment, the use of discretion, and determining as an adjudication there from unless limited by the context of the Statute. If a statute provides for the approval of the higher authority, the order cannot be given effect to unless it is approved and the same remains inconsequential and unenforceable.

17. Therefore, the proposal of the Land Management Committee to let out the tank for fisheries cannot be given effect to unless it is accorded approval by the Sub-Divisional Officer who has to satisfy that the decision to let out is in accordance with the provisions of the Rules, which includes sub-Rule (12) of Rule 57 i.e. that the proposal to let out is for the statutory period prescribed at the time of grant of approval and not otherwise. After such approval is accorded, the lease deed is to be executed in RC Form 15. The lease deed is to be in consonance with the approval and not contrary to it.

18. Considering the Scheme of the Code, 2006 in granting fishery lease, it is the date of approval by the Sub-Divisional Officer which is of utmost importance and relevance as the Sub-Divisional Officer has to satisfy himself about the resolution of the *samiti* to let out the tank to be in accordance with the provisions of Rules as on the date of consideration to accord approval or not. The relevance of the date of approval is also fortified by the fact that Rule 59 which provides for appeal to the Collector, prescribes thirty days period for filing appeal from the date of approval by the Sub-Divisional Officer.

19. So far as the registration of a document is concerned, in ***Kumari Sushila Saxena vs. Sub Registrar, Shahjahanpur and Ors. [1997 (1) AWC 346],*** it has been held that registration is merely a notification of the factum of execution of a document evidencing the event of transaction affecting the title qua in person or property. The same principle has been reiterated in ***Smt. Jota Devi vs. DDC [2013 (31) LCD 615]*** also.

20. In our considered view, the registration of a document cannot affect nor change, the terms and conditions of the document registered which had the approval of the Sub-Divisional Officer, and therefore the date of registration cannot be the relevant date to determine the period of lease. The registration of lease deed in RC Form 15 evidences letting out of tank, in question in favour of the person concerned and subject to the terms and conditions mentioned in RC Form 15. It is an action which is merely consequential to the approval by the Sub Divisional Magistrate.

21. Most importantly, sub-Rule (12) of Rule 57 as substituted, is prospective w.e.f. 20.10.2016 and therefore it shall apply to leases granted after the date of commencement of substituted Sub Rule (12) i.e. w.e.f. 20.10.2016. The applicability of substituted Rule has not been made dependent upon the date of registration of lease deed. It has come into effect from a particular date i.e. 20.10.2016. The substituted sub-Rule (12) does not provide that it shall apply to all the existing leases neither it extends the period of existing lease from five years to ten years nor confers any power on the

authorities to extend the period of lease from five years to ten years.

22. The submission of the petitioner's counsel based on grant of lease for ten years to Hanuman Prasad also does not advance the petitioner's case any further as in paragraph 8 of the petition, the petitioner has admitted that in the case of Hanuman Prasad, the date of approval is after the date of commencement of the substituted Rule 57 (12) of the Rules, 2016, which was granted for ten years.

23. We therefore, do not find any merit in the writ petition, which is accordingly **dismissed.**

(2021)08ILR A356
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.08.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE DINESH KUMAR SINGH, J.

Misc. Bench No. 15664 of 2020

M/S Geo Miller & Co. Pvt. Ltd. ...Petitioner
Versus
U.P. Jal Nigam, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Agendra Sinha, S.D. Singh

Counsel for the Respondents:
Rishabh Kapoor, Raj Kumar Singh, Sudhir Kumar Pandey

NMCG is ultimate authority to review, appove and monitor the overall execution and implementation of tender-Public interest would outweigh private interest of the Petitioner-no interference with award of contract in Judicial Review.

W.P. dismissed.(E-7)

List of Cases cited:

1. M.C. Mehta Vs U.O.I., 1987(4) SCC 463, (1988) 1 SCC 471, (2015) 2 SCC 764

2. Shagun Mahila Udyogik Sahakari Sanstha Maryadit Vs St. of Mah. & Ors: (2011) 9 SCC 340

3. Raunaq International Ltd., Vs I.VsR. Construction Ltd., & ors.,(1999) 1 SCC 492

4. Jasbhai Motibhai Desai Vs Roshan Kumar, : (1976) 1 SCC 761

5. P. Chitharanja Menon & ors. Vs A. Balakrishnan & ors., (1977) 3 SCC 255

6. Amarjeet Singh & ors. Vs Devi Ratan & ors., (2010) 1 SCC 417

7. Air India Ltd. Vs Cochin International Airport Ltd., & ors. (2000) 2 SCC 617

8. Jagdish Mandal Vs St. of Orissa & ors., (2007) 14 SCC 517

9. Siemens Aktiengeselischaft & Siemens Ltd.Vs Delhi Metro Rail Corporation Limited & ors., (2014) 11 SCC 288

10. Commissioner of Police & anr., Vs Umesh Kumar (2020) 10 SCC 488

11. Punjab Electricity Board & ors. Vs Malkiat Singh: (2005) 9 SCC 22

12. Bharat Coking Coal Ltd., Vs AMR Dev Prabha: (2020) 16 SCC 759

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

1. According to Hindu Mythology, *Bhagiratha*, a legendary king of the *Ikshvaku* dynasty, brought the River *Ganga* to Earth from heavens because only she could bestow *nirvana* to *Bhagiratha's* ancestors who were cursed by Sage *Kapila*.

After years of great penance, River *Ganga* descended on Earth and Lord *Shiva* agreed to channelize her flow. Therefore, River *Ganga* flowed from Lord *Shiva's* hair. The place where the sacred river originated is known as *Gangotri* in present times, and since the river originated from Lord Shiva's *Jata* (hair) it is also called *Jatashankari*.

2. River Ganga is called by several names, including *Jahnavi, Shubhra, Sapteshwari, Nikita, Bhagirathi, Alaknanda,* and *Vishnupadi.*

3. It is believed that it flows from all the three worlds - Heaven/*Swarga*, Earth/*Prithvi*, and Hell/*Patala*. In Hinduism, the holy River *Ganga* is personified and personalized as Goddess *Ganga*. People believe that bathing in the pious *Ganga* can help wash all sins. It is also believed that a mere touch of the river can help attain *moksha* (salvation) and so the ashes of the dead persons are immersed in the sacred river so that the dead attains moksha *(gange tav darshanarth mukti)*. There is no match to the everlasting divinity of holy river *Ganga*.

4. It is lifeline of India because it provides water to 40% of India's population. It is a source of irrigation for a wide variety of crops. Its basin has fertile soil that largely influences the agricultural economies of India and its neighboring country of Bangladesh. It also supports fishing industries, making it an agricultural and professional necessity for the livelihood of Indians.

5. Varanasi, Haridwar, Gangotri, Prayagraj, and Rishikesh are the prime religious destinations that have great religious significance for Hindus located at the Banks of river Ganga. Kumbh Mela is organized in Prayagraj and Haridwar. Ganga Arti takes place in twilight everyday at Rishikesh, Haridwar and Varanasi.

6. Adventure tourism is also organized in Rishikesh, such as river rafting, kayaking, and body surfing etc. The bathing ghats of Ganga are popular tourist attraction. Travellers often visit these ghats to bathe and witness the funeral rites and *Ganga Arti*.

7. Several yoga retreats have been established on the banks of River *Ganga* because of its calm and peaceful atmosphere. River *Ganga* is worshiped as *Ganga Maa* or *Mother Ganges*.

8. It is the longest river in India and it flows around 2525 kms from the Himalayan Mountains to Bay of Bengal. It has the second greatest water discharge in the world, and its basin is the most heavily populated in the world with over 400 million people living in it. The course of river begins in Himalayan Mountains where the *Bhagirathi* River flows out of the *Gangotri* glacier in Uttarakhand. The glacier is located at an elevation of 12,769 feet. In long stream, the *Bhagirathi* and *Alaknanda* rivers join. As the river Ganga flows out of the *Himalayas*, it creates a narrow, rugged canyon. From Rishikesh, it begins to flow onto the Indo-Gangetic Plain. As river *Ganga* then flows farther downstream, it changes its direction several times and is joined by many other tributary rivers such as *Yamuna, Ramganga, Tamsa*, and *Gandaki* Rivers. River *Ganga* flows out of India and into Bangladesh, its main branch is known as *Padma* River. Before entering the Bay of Bengal, the river creates the world's largest delta, Ganges Delta. This region is a highly fertile sediment-laden area that covers 23,000

square miles. Its overall length of drainage size is based on what tributary rivers are included. Its drainage basin is estimated to be about 4,16,990 square miles.

9. River *Ganga* basin has been inhabited by humans since ancient times. The first region *Harappan* civilization, who moved into the Ganges River basin from the Indus River basin around the 2nd millennium B.C.E. Later, the Gangetic plain became the center of the *Maurya* Empire and then the *Mughal* Empire. *Megasthenes* in his work *Indica* has discussed the importance and significance of river *Ganga*.

10. Despite being the lifeline of the nation, having been worshiped, providing sustenance to large population, over the time river has become highly polluted. According to the studies, it is one of the most polluted river in the world. Pollution of River Ganga is caused by both human and industrial waste due to rapid industrialization as well as religious events. Waste and raw sewage of population living in the river *Ganga* basin (400 Millions) is dumped into the river. Many people bath and use the river to clean their laundry. Studies have described bacteria level near Varanasi at least 3000 times higher than what has been prescribed as safe by the World Health Organization.

11. Industrial practices, population growth and harmful religious activities are plausibly responsible for high level pollution of the river. Tanneries, Chemical plants, Textile mills, distilleries, slaughter houses etc., along with river dumping their untreated and intoxicated water into the river are responsible for very high pollution and for poor health of river *Ganga*. Its water contains high level of intoxicated substances like Chromium Sulphate, Arsenic, Cadmium, Mercury and Sulphuric Acid. Even religious practices such as offering foods and other items to rive *Ganga* which are regularly thrown into the river as well as religious events also add to the pollution level of the river.

12. In the late 1980s, Rajiv Gandhi, India's the then Prime Minister began the Ganga Action Plan (GAP) to clean up the river Ganga. The plan shut down many highly polluting industrial plants along the river and funds were allotted for the construction of wastewater treatment plants However, efforts have fallen short as the plants are not large enough to handle the waste coming from such a large population. Many of the polluting industrial plants are also continuing to dump their hazardous waste into the river.

13. The future of this nation to large extent will be depending on health and well being of this river. It is, therefore, imperative that every effort should be made to revive the river and make it pollution free. Prime Minister, Narendra Modi after getting elected from Varanasi Parliamentary seat in May, 2014 said " It's my destiny to serve Maa Ganga"

14. In 2014, the Government has come out with a Flagship Programme 'Namami Gange', an Integrated Conservation Mission, to accomplish twin objectives of effective abatement of pollution, conservation and rejuvenation of National River "Ganga'. It is being operated under the Department of Water Resources, River Development and Ganga Rejuvenation, Ministry of Jal Shakti. The programme is being implemented by the National Mission for Clean Ganga (NMCG), and its state counterpart

organizations i.e., State Program Management Groups (SPMGs). NMCG is the implementation wing of National Ganga Council set up in 2016; which replaced the National Ganga River Basin Authority (NRGBA). Budget outlay is Rs.20,000-crore, centrally-funded, non-lapsable corpus and consists of nearly 288 projects. The main pillars of the programmes are:

(i) Sewerage Treatment Infrastructure & Industrial Effluent Monitoring,
(ii) River-Front Development & River-Surface Cleaning,
(iii) Bio-Diversity & Afforestation,
(iv) Public Awareness.

15. The government's Namami Gange Programme has revitalized India's efforts in rejuvenating river *Ganga*. Critical sewage infrastructure in 20 pollution hotspots along with the river and cleaning of its tributaries is underway. River *Gomti* is one of the tributaries of river *Ganga*. River *Gomti* is very highly polluted.

16. Several strategies are being evolved and implemented under the Mission to see that the river is rejuvenated and becomes pollution free. National Mission for Clean Ganga (NMCG) is the implementing agency of Namami Ganges Programme. NMCG is treated as an authority with statutory powers under Environment Protection Act, 1986. It has been given bureaucratic autonomy and regulatory powers to execute the mission in coordination with respective State Governments. In five years, Rs.20,000 crore have been sanctioned which is five times the amount committed in the past 35 years. There is 100 per cent central funding of key projects. The mission has four major parts:-

(i) Nirmal Ganga;
(ii) Aviral Ganga;
(iii) Jan Ganga and
(iv) Gyan Ganga.

17. The focus is on rejuvenating the entire main strem of river *Ganga* rather than a few cities on its banks. There is emphasis on regenerating and conserving the aquatic and riparian biodiversity of the river basin. Seven IITs had prepared a detailed basin management plan and plenty of fieldwork, including estimating the amount of sewage generated by major urban and rural centres alongwith its banks. So far the NMCG has sanctioned a total of 333 projects at a cost of Rs 29,578 crore, of which 142 projects have been completed.

18. The NMCG is an authority constituted in accordance with the provisions of Section 3 of the Environmental (Protection) Act, 1986 vide notification No.S.O.3187(E) dated 07.10.2016 *inter alia* to take measures for prevention, control and abatement of environmental pollution in river Ganga and to ensure continuous adequate flow of water so as to rejuvenate river Ganga. It is a nodal agency for implementation of the provisions of the above notification and for effective abatement of pollution and rejuvenation, protection and management of river Ganga and its tributries.

19. NMCG is under the administrative control of Ministry of Jal Shakti, Government of India. It is a Central Government Authority constituted for the purpose of executing projects such as cleaning of river Ganga undertaken on mission mode by the Central Government

in view of the concerns on the subject of pollution in river Ganga and its tributaries including those expressed by the Supreme Court **(M.C. Mehta vs Union of India, 1987(4) SCC 463, (1988) 1 SCC 471, (2015) 2 SCC 764)** and in orders passed by the National Green Tribunal.

20. In order to expedite implementation of the project in all earnestness and in transparent manner, keeping with spirit of the orders passed by the Supreme Court and taking into consideration the public interest involved and the obligation of the Government to provide a clean and healthy environment, the State missions have been set up in various States and executing agencies have been identified for execution of the projects. NMCG has provided substantial funding for these projects up to an extent of 100 per cent central funding and has also imposed conditions amongst others to keep overall control over the nodal missions in the State. The sewerage works in the State of Uttar Pradesh are being executed through U.P. Jal Nigam, a State owned corporation. The executing agency is required to take such steps for award of contracts and its implementation thereof, as may be deemed necessary including issuance of tenders subject to certain conditions specified by NMCG.

21. It is stated that overall control on such processes including for award and implementation thereafter rests with NMCG.

22. River Gomti is one of the tributaries of river Ganga. River Gomti is highly polluted in Lucknow city and it smells and looklike a big sewer drainage in City Lucknow. Untreated sewerage and waste flows directly into river Gomti in Lucknow. To make river Gomti clean so that its flow into river Ganga is pollution free, a tender for project of construction of sewerage network of STP (Lucknow) was sanctioned by NMCG in favour of U.P. State Ganga Conservation Programme Management Society, Government of U.P. This Society is within the State Mission for clean *Ganga*, which is an executing arm of the State Ganga Committee, constituted vide notification dated 07.10.2016. State mission for clean *Ganga* is an implementing agency for the project based on their proposal submitted to NMCG and sanctioned by executing committee of NMCG subject to several terms and conditions. The project is to be executed through U.P. Jal Nigam (respondent No.1), an agency of State Government.

23. NMCG generally funds the following category of projects:-

(i) projects funded through externally aided agencies including World Bank; and

(ii) projects funded under National Ganga Plan (NGP)

24. The project in question at Lucknow was sanctioned in March, 2019 under NGP under Namami Gange Programme with 100 per cent central funding.

25. Tenders for the above works were accordingly invited for the execution of the project work. Tenders were invited on 30.01.2020 vide notification No.358/M-13/16. NMCG has sanctioned estimated cost of Rs.213.91 Crores on 06.05.2020 with 100 per cent NMCG funding for the pollution, abatement works for river *Gomti* at Lucknow with STP.

26. It is also one of the conditions that procurement of goods and services shall be

made strictly as per National Ganga River Basin Authority (NGRBA) Programme Framework and various guild-lines of NMCG. Union Cabinet while approving Namami Gange Programme decided that the programme will be executed in accordance with NGBRA Programme Framework.

27. For the said sanctioned work, U.P. Jal Nigam invited bids from qualified, capable and experienced bidders for Survey, Investigation, Design, Supply, Construction, Installation, Testing & Commissioning for pollution abatement works of river *Gomti* at Daulatganj, Lucknow including all appurtenant structures and allied works including 15 years of operation and management as per the scope of the bid document vide Tender Notice No.358M-B/16 dated 30.01.22020. The work is to be executed within 18 months. One of the qualifications of the bidder for sound financial capabilities, is that the bidder must possess a financial net worth minimum equivalent to INR 1784.89 lakhs in each of the last three financial years ending on 31.03.2020 and bidder should demonstrate the banker's certificate that it has available cash credit facility minimum equivalent to INR 1189.93 lakhs as on the date of submission of the bids. Tenders were invited on two bids system i.e. (i) Technical cum Financial Capacity and pre-qualification evaluation bid; and (ii) Financial bid.

28. Subsequently, NMCG sanctioned revised Administrative Approval and Expenditure Sanction (AA&ES) for the pollution abatement works of river *Gomti* at Lucknow.

29. NGRBA framework procurement manual (chapter number-4 clause 4.2), which has been placed with the counter affidavit filed by Union of India provides that all contracts of value more than US $1 million equivalent (Rs.7.4 Crores) are subject to prior review by the funding agency i.e. NMCG in the instant case. Accordingly, the procurement for this project is also under prior review and approval by NMCG.

30. Eight bidders namely, (i) Geo Miller and Co. Pvt. Ltd.,; (ii) HNB Engineers Pvt. Ltd; (iii) Maha Shree Infrastructure; (iv) MHS Infratech Pvt. Ltd.; (v) M/s Ashoka Buildcon Ltd.; (vi) M/s JSP Projects Pvt. Ltd.; (vii) M/s. K.B. Srivastava; and (viii) R.K. Engineers Sales Ltd., submitted their bids in response to the aforesaid tender notice. However, by corrigendum notice dated 29.07.2020, General Manager, U.P. Jal Nigam, the Executing Agency without taking approval from the NMCG, the funding agency, cancelled the tender without assigning any reason. This action of the Executive Agency would cause unwarranted delay in implementation and execution of the project within the time frame provided by the National Green Tribunal and the Supreme Court and would severely affect the clean *Ganga* Mission much against public and national interest as such.

31. Bidders upon learning about the cancellation of the tendering process, represented before the NMCG which in turn vide letter dated 31.07.2020 issued instructions to U.P. Jal Nigam not to give effect to the cancellation order. The NMCG noted that delay in matters of tendering and indecisions or improper decisions by the Executive Agencies/State missions adversely affect the programmes of these high priority projects.

32. It is further said that timelines are fixed by the National Green Tribunal and the Supreme Court and State must do everything possible earlier to these timeline and expedite action at every stage. The Project Director of U.P. Jal Nigam was directed to submit the technical evaluation reports of the bidders. The Executing Agency was directed to proceed further only after getting instructions/clearance from the NMCG.

33. It is important to note that the Technical Evaluation Committee headed by the Chief Engineer of U.P. Jal Nigam had found three bidders to be technically qualified excluding the petitioner and four others, namely;

(i) M/s R.K. Engineers Sales Ltd;
(ii) M/s KB Srivastava;
(iii) Ashoka Buildcon Pvt. Ltd.

34. Minutes of the meeting of the Technical Evaluation Committee dated 20.07.2020 have been placed on record as Annexure CA-6 of the counter affidavit filed on behalf of the U.P. Jal Nigam. However, Tender Sanctioning Committee headed by the Managing Director of U.P. Jal Nigam in its meeting dated 27.07.2020, found that only one bidder i.e. Ashoka Buildcon Pvt. Ltd., was qualified and in that view of the matter a Corrigendum dated 29.07.2020 was issued canceling the tender process.

35. The NMCG reviewed the recommendation of the technical evaluation committee and evaluated the technical bids of all eight bidders including the petitioner's bid herein and found two more bidders namely (i) M/s R.K. Engineers Sales Ltd; (ii) M/s KB Srivastava; besides Ashoka Buildcon Pvt Ltd., to be technically qualified and their bids responsive as was found by the Technical Evaluation Committee head by the Chief Engineer.

36. The petitioner's bid was again not found responsive at the level of hte NMCG as it was not technically qualified. In view of the aforesaid, the NMCG having overall control and supervision of the project and being 100 % funding agency, vide letter dated 25.08.2020 directed the U.P. Jal Nigam to open the financial bids of three bidders, who were found technically qualified by the Technical Evaluation Committee and, later on by the NMCG itself.

37. In pursuance of the aforesaid direction issued by the NMCG, U.P.Jal Nigam issued notice dated 03.09.2020 for opening of the financial bids. In the financial bids, respondent no.4 was found to be eligible and, therefore, Letter of Award dated 17.09.2020 has been issued in its favour.

38. The present writ petition has been filed by the petitioner, whose bid was not found responsive as having not met the technical qualification criteria, first by the Technical Evaluation Committee headed by the Chief Manager, secondly by Tender Sanction Committee headed by the Managing Director of U.P. Jal Nigam and, thirdly by the NMCG praying for *inter alia* following reliefs:-

"(a) Issue a writ of certiorari or any other writ/order/direction of similar nature seeking the quashing of letter/decision dated 2.09.2020 issued by the Chief Engineer, U.P. Jal Nigam Respondent No.2; and

(b) Issue a writ of certiorari or any other writ/order/direction of similar

nature whereby quashing the order/message dated 03.09.2020 (Annexure No.13) issued by the respondent No.1 and 2 for allegedly revoking the cancellation order dated 29.7.2020 and notifying the Petitioner as it was declared "Not qualified";

..

(d) Issue a writ of certiorari or any other writ /order/direction of similar nature whereby quashing the document dated 7.9.2020 (P-16) uploaded on the website of the Respondent No.1 whereby three Bidders have been declared as qualified and the Petitioner so there declared not qualified;

....

(h) Issue a writ of mandamus or any other writ, order or direction of the similar nature whereby commanding the Respondent Nos.1 and 2 to open the price bid of the petitioner herein with respect to e-tender notice no.358/M-13/16, dated 30.1.2020 and award the contract to the Petitioner if the price Bid of the Petitioner is lowest one, as per the procedure and rules;

....."

39. Heard Mr. S.D. Singh, learned counsel, assisted by Mr. Agendra Sinha, Advocate appearing for the petitioner, Mr. Raghvendra Kumar Singh, learned Advocate General, assisted by Mr. Rishabh Kapoor, Advocate appearing for respondent nos. 1 and 2-U.P.Jal Nigam, Mr. J.N. Mathur, learned Senior Advocate, assisted by Mr. Amrit Khare and Mr. Ruchir, Advocates, appearing for respondent no. 3-Union of India, Mr. S.B. Pandey, learned Assistant Solicitor General, assisted by Mr. Raj Kumar Singh, Advocate also made submissions on behalf of respondent no. 3-Union of India and, Mr. Sudhir Kumar Pandey, appearing for respondent no. 4-M/s R.K. Engineers Sales Limited.

40. Mr. S.D. Singh, learned counsel for the petitioner has submitted that once the decision was taken by the competent authority to cancel the tender, which was in fact cancelled vide corrigendum dated 29.07.2020, the same could not have been revived by NMCG and fresh bids ought to have been invited for implementing the project/scope of the tendering process. He has further submitted that there was no authority vested in the NMCG to interfere with the tendering process or the decision taken by the owner i.e. U.P. Jal Nigam, which is defined under the tender document itself and, therefore, the decision of the NMCG to re-evaluate the technical bids of the tenderers was without jurisdiction. He has also submitted that the decision of the NMCG to declare two more bidders i.e. (i) M/s R.K. Engineers Sales Ltd; (ii) M/s KB Srivastava; to be qualified is null and void as being without jurisdiction and powers of the NMCG. It is submitted that direction of the NMCG to the U.P. Jal Nigam, the owner to open the financial bids of only three bidders was again without jurisdiction and thus, Letter of Intent issued in favour of respondent No.4 dated 17.09.2020 is illegal, arbitrary and unjustified and is liable to the set aside.

41. Mr. S.D. Singh, learned counsel for the petitioner has placed reliance on Clause 6.2 of the Bid Document, under which rights of respondent No.1 being owner of the project in question has been defined, which reads as under:-

"6.2 Owner's Right to Accept or Reject and Waive Irregularities:- the owner reserves the right to

1. accept the bid;

2. reject the bid;

3. annul the bidding process and reject all bids;

4. annul the bidding process and commence a new process; and

5. Waive irregularities, minor informalities, or minor non-conformities which do not constitute material deviations in the submitted bids from the bidding documents, at any time prior to the award of the contract without incurring any liability to the affected Bidder or Bidders and without any obligation to inform the affected bidder or bidders of the grounds for the Owner's actions.

b. Nothing in ITB section 6.2(a) is intended to permit the owner to refuse to provide reasons for rejection to an unsuccessful bidder."

42. Mr. S.D. Singh, learned counsel for the petitioner has, therefore, submitted that after the tendering process was cancelled vide corrigendum dated 29.07.2020, the only course of action available to the owner was to commence fresh tendering process. There is nothing in the tendering document under which respondent No.1 i.e. U.P. Jal Nigam is vested with the power to revoke the decision of canceling the tendering process and, therefore, decision to proceed with canceled tender, is totally illegal and contrary to the terms and conditions of the tender document itself. The said decision is without any right or authority and, therefore, void ab initio.

43. With the cancellation of the tender, all the processes came to an end. Respondent No. 1 does not have any other option but to return the bids to all the bidders and invite fresh bids. Bids submitted in response to the tender which stood cancelled, could not be considered at all and all the bids technically become redundant and infructuous.

44. However, it has been stated in para 25 of the writ petition that for any reasons, if this court finds and arrives at a conclusion that the bids could have been opened and reconsidered even after corrigendum notice dated 29.07.2020, petitioner's right needs to be protected and, the declaration of the petitioner as not being qualified is required to be quashed.

45. It has been further submitted that the respondent authorities are obligated and duty bound to follow U.P. Procurement Manual and Manual for Procurement of Works, 2019 of the Government of India, Ministry of Finance, Department of Expenditure which contains basic principles and guidelines for any tendering process. Learned counsel has placed reliance on Clause 14.34 of the U.P. Procurement Manual to submit that procuring entity would not be entitled to open any bids or proposals after taking a decision to cancel the procurement and, is required to return such unopened bids or proposals. A procurement process, once canceled, cannot be reopened and the only option is to start a new procurement process, if so required. He has also placed reliance on Clause 5.6.8 of the manual for procurement of work, 2019 of Government of India issued by Ministry of Finance, Department of Expenditure.

46. In view of the aforesaid submissions, he has submitted that the decision to open the financial bids of three bidders and on that basis impugned L.O.I. dated 17.09.2020 issued in favour of respondent No.4 are illegal, arbitrary and in the teeth of the tender document itself and, therefore, the same is liable to be quashed and the executing agency be directed to adopt afresh tendering process to finalize the work in favour of the successful bidder.

47. Mr. Raghvendra Singh, learned Advocate General assisted by Mr. Rishabh Kapoor appearing for respondent No.1 and 2, U.P. Jal Nigam has made preliminary submissions regarding maintainability of the writ petition on behalf of the petitioner and has submitted that the petitioner was not found eligible and technically qualified by the Technical Evaluation Committee and Tender Sanctioning Committee headed by the Chief Engineer and Managing Director respectively *inter alia* for the following reasons:

(i) Effluent norms not stated as required;

(ii) Required design inlet norms not taken in design; and

(iii) Cash Credit facility not verified by the Bank.

Since, the petitioner has not challenged its disqualification and, it appears that he would not have any objection if the tender was awarded to Ashoka Buildcon Pvt. Ltd., the only bidder, which was found eligible by the Tender Sanctioning Committee headed by the Managing Director, he is not entitled to challenge the decision of the NMCG for qualifying two more bidders and directing respondent No.1 to open and evaluate financial bids of technically qualified bidders. Once the petitioner has not challenged its disqualification, the writ petition on its behalf for finalizing the tender in favour of respondent No.4 and issuing L.O.I. in its favour is not maintainable.

In support of this submission, he has placed reliance on the judgment of the Supreme Court in the case of **Shagun Mahila Udyogik Sahakari Sanstha Maryadit vs State of Maharashtra & Ors: (2011) 9 SCC 340**. He has also placed reliance on the judgment of the Supreme Court in the case of **Raunaq International Ltd., vs I.V.R. Construction Ltd., and Ors:(1999) 1 SCC 492.**

48. Learned Advocate General has also submitted that once the petitioner has not challenged his disqualification, he cannot be said to be a 'person aggrieved' to maintain the writ petition under Article 226 of the Constitution of India. The petitioner is not prejudiced in any manner inasmuch as he has not been found technically qualified. The 'person aggrieved' is one who has suffered some legal injury and only such a person would have right to approach this Court. He in support of this submission has placed reliance on the judgment of the Supreme court in the case of **Jasbhai Motibhai Desai vs Roshan Kumar, : (1976) 1 SCC 761.**

49. Next submission of the learned Advocate General is that the petitioner has not challenged the order dated 25.08.2020 taken by the NMCG in pursuance of which financial bids of three technical qualified bidders were opened. Orders dated 02.09.2020 and 03.09.2020 are consequential orders to the order dated 25.08.2020. Since the petitioner has not challenged the main order dated 25.08.2020, the writ petition would not be maintainable to challenge the consequential orders. In support of the aforesaid submission, he has placed reliance on two judgments in the cases of **P. Chitharanja Menon and Ors vs A. Balakrishnan and Ors: (1977) 3 SCC 255** and **Amarjeet Singh and Ors vs Devi Ratan and Ors : (2010) 1 SCC 417.**

50. Mr. Raghvendra Singh, learned Advocate General has also submitted that in commercial matters even if some defects are found in decision making process, the

Court should exercise its jurisdiction under Article 226 of the Constitution of India only in furtherance of public interest. He has further submitted that even if it is assumed that the decision of revocation of the cancellation vide order dated 02.09.2020 is defective because of some procedural aberration in decision making process, this Court should exercise its discretion in furtherance of public interest and not otherwise.

51. The present work is of very large public interest inasmuch as untreated sewage, waste and drainage water is being flown into river *Gomti*, one of the main tributaries of river *Ganga* and the water of river *Gomti* is injurious not only to humans but also to biodiversity and, any delay would not only increase the cost but also to have adverse impact on the National Mission for Clean *Ganga*. He has, therefore, submitted that looking at the large public and national interest involved and the fact that the delay would adversely affect the ambitious mission of clean *Ganga* and prevention of abatement of pollution in river *Gomti*, this Court may not interfere with the decision of the competent authority to award the contract in favour of the technically qualified bidder, which is just, fair and reasonable. He has placed reliance of the judgment of the Supreme Court in the case of **Air India Ltd.** vs **Cochin International Airport Ltd., & Ors: (2000) 2 SCC 617.**

52. It has further been submitted that entering into a contract is a commercial transaction and evaluation of tenders and awarding contracts are commercial functions. If the award of contract is bonafide and in the public interest, the Court should not interfere in exercise of powers of judicial review even, if there is a procedural aberration or error in assessment or prejudicial to a particular tenderer. The Court is required to balance the public interest viz-a-viz private interest and private interest cannot be protected at the cost of the public and national interest while deciding a contractual dispute. To buttress this submission, he has placed reliance upon the judgment in the case of **Jagdish Mandal** vs. **State of Orissa & Ors : (2007) 14 SCC 517.**

53. Learned Advocate General has further submitted that it is a well established principle that in contractual matters the Court should not exercise the power of judicial review, if there is no arbitrariness or favoritism while awarding the contract. In support of the aforesaid submissions, he has placed reliance upon the judgment of **Siemens Aktiengeselischaft and Siemens Limited** vs **Delhi Metro Rail Corporation Limited and Ors: (2014) 11 SCC 288.**

54. Mr. J.N. Mathur, learned Senior Advocate assisted by Mr. Amrit Khare has submitted that NMCG is an authority constituted in accordance with the provisions of Sub-section 3 of the Section 3 of the Environmental (Protection) Act, 1986 vide Notification No.S.O. 3187 (E) dated 07.10.2016. The NMCG is an approving authority for planning, financing, execution and implementation of projects for prevention, control and abatement of pollution in river *Ganga* in terms of said notification. Even in terms of Administrative Approval and Expenditure Sanctioned (AA&ES) dated 02.03.2019, overall financial and administrative control is vested with the NMCG for clean *Ganga* mission. The U.P. Jal Nigam has been selected as Executing Agency for the projects in the State of Uttar Pradesh to be

undertaken by the NMCG. However, the NMCG retains right to issue directions to the U.P. Jal Nigam and, also right to seek compliance of all observations made by it. Under notification dated 07.10.2016, the NMCG is an ultimate authority to review, approve, monitor the overall execution and implementation of the tender in question and, it is the final authority to take all decision in respect of tenders floated by U.P. Jal Nigam.

55. When the NMCG received complainants regarding abrupt decision taken by respondent No.1 on 29.07.2020 to cancel the tender process, it directed respondent No.1 to submit its report on the complaints made by bidders along with Technical Evaluation Report of all the bidders and directed the U.P. Jal Nigam to proceed further only after getting instructions from the NMCG.

56. It has been submitted that the petitioner has not challenged the decision of the U.P. Jal Nigam to disqualify the petitioner in the technical evaluation stage itself and, there is no challenge to said decision of the U.P. Jal Nigam or NMCG and, therefore, the writ petition is not maintainable. It has been further submitted that in sum and substance in pursuance of the Corrigendum dated 29.07.2020 vide which the tender had been cancelled, re-advertisement could have been issued and, the petitioner would have another chance of being selected, if found qualified. He has, therefore, submitted that mere chance of selection does not entail a vested right in an interested person. He has placed reliance upon two judgments in the cases of **Commissioner of Police & Anr.** vs **Umesh Kumar (2020) 10 SCC 488** and **Punjab Electricity Board and Ors** vs. **Malkiat Singh: (2005) 9 SCC 22.**

57. It has further been submitted that the NMCG is an expert body created for the purposes as mentioned in the notification dated 07.10.2016. This expert body has evaluated the entire tendering process by U.P. Jal Nigam and, after taking into account the commercial and technical evaluation involved in the project, decision has been taken to open the financial bids of three technically qualified bidders. The petitioner was not found technically qualified by U.P. Jal Nigam or by the NMCG. The impugned decision was taken by the NMCG in pubic interest and same should not be interfered with by this Court in exercise of powers of judicial review under Article 226 of the Constitution of India. He has placed reliance on the judgment of the Supreme Court in the case of **Bharat Coking Coal Ltd., vs AMR Dev Prabha: (2020) 16 SCC 759.**

58. Mr. S.B. Pandey, learned Assistant Solicitor General assisted by Mr. Raj Kumar Singh, learned counsel appearing for respondent No.3 and Mr. Sudhir Kumar Pandey, learned counsel appearing for respondent No.4 have made similar arguments advanced by learned Advocate General and Mr. J.N. Mathur, learned Senior Advocate. Learned counsel for respondent No.4 has submitted that as per the notification dated 02.03.2019 placed along with the supplementary affidavit filed on behalf of respondent No.1, U.P. Jal Nigam is an executing agency for the projects to take up the I&D and STP works pertaining to pollution abatement of river *Gomti* on DBOT model. The condition on Administrative Approval and Expenditure Sanction for the project specifically stipulates that executing agency shall comply with all the observations of NMCG. He, therefore, has submitted that overall control having been

vested in the NMCG, it was well within its power to call for a report from the U.P. Jal Nigam about the technical evaluation of the bidders and having been found three bidders technically qualified, direction was issued for opening their financial bids. Respondent No.4 having being found eligible and financial bid most competitive, L.O.I. has been issued in its favour. It is, therefore, submitted that since the decision making process was fair, transparent and reasonable, this Court may not interfere with the decision taken by the competent authority for awarding contract.

59. We have considered the submissions of the learned counsel for the parties and gone through the record.

60. The questions, which arise for consideration in the present case are:-

"(i) Whether NMCG does not have any authority to give directions to U.P. Jal Nigam to not give effect to the Corrigendum dated 29.07.2020, cancelling the tendering process and examination of the technical bids of all eight bidders including the petitioner by the NMCG itself and then direction vide letter dated 25.08.2020 to U.P. Jal Nigam to open financial bids of three bidders who were found technically qualified and proceed with finalization of the tender?

(ii) Whether writ petition on behalf of the petitioner who has not challenged his disqualification, is maintainable? And

(iii) Whether public interest in the present case would outweigh some aberrations, if any, in the tendering process looking into the cause for which tender has been invited particularly when there is no allegation of favoritism or arbitrariness?"

61. The main thrust of the submission of Mr. S.D. Singh, learned counsel appearing for the petitioner is that under Clause 15 of the NIT document, it is the U.P. Jal Nigam, which has exclusive right to accept or reject any or all the bids. NIT does not recognize any role of the NMCG in tendering process. Complete authority and autonomy has been given to U.P. Jal Nigam as 'owner' in this regard. The NMCG does not have any supervisory or controlling power or authority in respect of the tendering process. Clause 6.3 of the NIT, which provides that effectiveness of the contract shall be as of the date of the owner's signing contract subject to the final approval by the NMCG, does not empower the NMCG to revive the cancelled tendering process. Power of cancellation and acceptance is exclusively vested in the U.P. Jal Nigam. Final approval by the NMCG does not mean that the NMCG is vested with the power to re-valuate the technical and financial bids, which is in the exclusive domain of the owner i.e. U.P. Jal Nigam. Power to award the contract is vested in the owner only.

Re:-Question No.(i)

62. NMCG is the authority constituted vide Notification No. S.O.3187(E) dated 07.10.2016 of the Ministry of Water Resources, River Development and *Ganga* Rejuvenation under the provisions of Environment (Protection) Act, 1986 for planning, financing, execution and implementation of projects for prevention, control and abatement of pollution in river *Ganga*. Under the notification dated 02.03.2019 issued by Government of India, National Mission for Clean Ganga, Ministry of Water Resources, River Development and Ganga Rejuvenation for Administrative Approval and Expenditure Sanction for the

project in question i.e. Interception and Diversion of sewage plants at Lucknow at an estimated cost of Rs.298.12 crores, U.P. Jal Nigam has been chosen as an executing agency for the project. The executing agency is duty bound to comply with all observations of the funding agency i.e. NMCG before bidding and during implementation. It is important to note that under the statutory notification dated 07.10.2016 issued under Section 3(3) of the Environment (Protection) Act, 1986, the NMCG is empowered to issue directions to any person or authority, which it may consider necessary, for proper and prompt execution of the projects or cancel such projects or stop release of funds etc.

63. Relevant part of the said notification is extracted hereunder:-

"(f) approve the planning, financing and execution of programmes for abatement of pollution in the River Ganga including augmentation of sewerage and effluent treatment infrastructure, catchment area treatment, protection of flood plains, creating public awareness, conservation of aquatic and riparian life and biodiversity and such other measures for promoting environmentally sustainable river rejuvenation;

(g) Coordination, monitoring and review of the implementation of various programmes or activities taken up for prevention, control and abatement of pollution and protection and management in the river Ganga and its tributaries;

(k) Issue such directions to any person or authority, as it may consider necessary, for proper and prompt execution of the projects or cancel such projects or stop release of funds or direct refund of amount already and assign the same to any other person or authority or board or corporation for prompt execution thereof.

(m) Take such other measures which may be necessary for achievement of prevention, control and abatement of pollution, rejuvenation and protection and management in river Ganga and its tributaries."

64. In view of the aforesaid, we find that under the said Statutory notification itself, the NMCG is the ultimate authority to review, approve and monitor the overall execution and implementation of the tender in question. It is also empowered to give its observation before bidding and during implementation and, the executing agency is obliged to comply with all such observations and directions.

65. We find force in the submission of Mr. J.N. Mathur, learned Senior Advocate appearing for respondent No.3 that vide notification dated 07.10.2016, NMCG has been vested with wide range of powers for issuing directions, which it may consider necessary for proper and prompt execution of the projects etc, and this power would include the power to issue directions to the executing agency i.e. U.P. Jal Nigam during the course of tendering process and, thereafter for proper implementation of the project.

66. We, therefore, do not find much substance in the submission of the learned counsel for the petitioner that the NMCG does not have power to revive the tendering process, which was cancelled by U.P. Jal Nigam vide Corrigendum dated 29.07.2020 inasmuch as overall control and supervision is vested with the NMCG and even final contract is subject to the approval of the NMCG. We hold that the NMCG was well within the power to direct the U.P. Jal

Nigam not to give effect to Corrigendum dated 29.07.2020 and further direction to open the financial bids of three technically qualified bidders and proceed with the tendering process.

67. The project in question is funded 100% by the Central Government Agency i.e. the NMCG. Clause 5.6.8 of the Manual for Procurement of Works, 2019 issued by the Ministry of Finance, Department of Expenditure provides that the bidding process can be rejected or fresh bidding can be ordered only on the following grounds:-

"(a) If the quantity and quality of requirements have changed substantially or there is an un-rectifiable infirmity in the bidding process;

(b) when none of the lenders is substantially responsive to the requirements of the Procurement Documents;

(c) none of the technical Proposals meets the minimum technical qualifying score;

(d) If effective competition is locking. However, lack of competition shall not be determined solely on the basis of the number of Bidders. (Please refer to para above also regarding receipt of a single offer;

(e) the Bids'/Proposals' prices are substantially higher than the updated cost estimate or available budget;

(f) If the bidder, whose bid has been found to be the lowest evaluated bid withdraws or whose bid has been accepted, fails to sign the procurement contract as may be required, or fails to provide the security as may be required for the performance of the contract or otherwise withdraws from the procurement process. Provided that the procuring entity, on being satisfied that it is not a case of cartelization and the integrity of the procurement process has been maintained, may, for cogent reasons to be recorded in writing, offer the next successful bidder, and if the offer is accepted, award the contract to the next successful bidder at the price bid of the first successful bidder."

68. In the present case, Tender Evaluation Committee headed by the Chief Engineer found three bidders, out of eight bidders, technically qualified and they were held to be responsive bidders. However, Tender Sanctioning Committee headed by the Managing Director found only one bidder i.e. M/s Ashoka Buildcon Ltd., technically qualified and had cancelled the bidding process by Corrigendum dated 29.07.2020 on the sole ground that only one bidder was found technically qualified.

69. We find that such a course of action by the Executing Agency is against the provisions of 5.6.8 of the Manual for Procurement of Works, 2019 inasmuch as tendering process could have been cancelled *inter alia* on the ground that none of the tenders is substantially responsive to the requirement of the procurement document. Here even Tender Sanctioning Committee found one bidder substantially responsive and, therefore, cancellation of the tendering process vide Corrigendum dated 29.07.2020 is against the provisions of Manual for Procurement of Works, 2019 issued by Ministry of Finance, Department of Expenditure. U.P. Procurement Manual (Procurement of Goods) will not have relevance in the present case inasmuch as the project is fully funded by the Central Government and not by the State Government at all.

70. Exercising its powers vested under the statutory notification dated 07.10.2016 read with notification dated

02.03.2019 issued by Government of India, the NMCG was well within the power to direct the Executing Agency not to give effect to the Corrigendum dated 29.07.2020 for cancelling the project and to avoid delay in execution of the project of vital importance to abate and reduce the pollution level in river *Gomti*, which is one of the main tributaries of river *Ganga*, had decided to examine the technical bids itself and found three bidders technically qualified and, therefore, issued directions to the Executing Agency to open the financial bids of three responsive bidders and proceed for finalization of the tendering process.

71. We hold that the course of action adopted by the NMCG is well within its power and does not call for any interference by this Court.

72. In view of the aforesaid discussion, question No.1 is answered accordingly.

Re:- Question No.(ii)

73. Technical bids of eight bidders were scrutinized at the level of the Committee headed by the Chief Engineer on 26.07.2020, in which three bidders were found eligible. The decision of the Tender Sanctioning Committee headed by the Chief Engineer was subject to approval of the Committee headed by the Managing Director. However, the Committee headed by the Managing Director found only one bidder technically qualified. The bidders who had participated in the tendering process made complaints to the NMCG in respect of Corrigendum dated 29.07.2020, whereby the tendering process was cancelled by the U.P. Jal Nigam. During examination of the technical bid of the petitioner, details of cash credit facility was not provided by the petitioner as per one of the tender conditions. Technical Committee wrote a letter dated 09.06.2020 to Punjab National Bank to verify the cash credit limit available with the petitioner, but no response was ever given by the Bank. The petitioner did not fulfil the technical criteria and he was not found technically qualified either by the Committee headed by the Chief Engineer or by the Managing Director and the NMCG itself. The petitioner has not challenged the decision regarding his disqualification. The petitioner has challenged the decision of the NMCG giving direction for not giving effect to Corrigendum dated 29.07.2020 and, the award of the contract in favour of respondent No.4.

74. We are of the view that once the petitioner has not challenged his disqualification or he is not aggrieved by his disqualification, he has no *locus standi* to challenge the grant of contract to respondent No.4.

75. The Supreme Court in the case of **Raunaq International Ltd., vs I.V.R. Construction Ltd., and Ors (supra)** has held that award of tender cannot be stayed at the instance of a party, which does not fulfil the requisite criteria itself.

It would be apposite to extract para 27 of the aforesaid judgment:-

"27. In the present case, however, the relaxation was permissible under the terms of the tender. The relaxation which the Board has granted to M/s Raunaq International Ltd. is on valid principles looking at the expertise of the tenderer and his past experience although it does not exactly tally with the prescribed criteria. What is more relevant, M/s I.V.R. Construction Ltd. who have challenged this

award of tender themselves do not fulfil the requisite criteria. They do not possess the prescribed experience qualification. Therefore, any judicial relief at the instance of a party which does not fulfil the requisite criteria seems to be misplaced. Even if the criteria can be relaxed both for M/s Raunaq International Ltd. and M/s I.V.R. Construction Ltd., it is clear that the offer of M/s Raunaq International Ltd. is lower and it is on this ground that the Board has accepted the offer of M/s Raunaq International Ltd. We fail to see how the award of tender can be stayed at the instance of a party which does not fulfil the requisite criteria itself and whose offer is higher than the offer which has been accepted. It is also obvious that by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two thermal power units, each of 210 MW, is held up on account of this dispute. Shortages of power have become notorious. They also seriously affect industrial development and the resulting job opportunities for a large number of people. In the present case, there is no overwhelming public interest in stopping the project. There is no allegation whatsoever of any mala fides or collateral reasons for granting the contract to M/s Raunaq International Ltd."

76. Once the petitioner has not challenged his disqualification or it is not aggrieved by the decision to disqualify it, it cannot said to be a person 'aggrieved' when the contract has been awarded in favour of respondent No.4, who has been found to be technically qualified firstly, by the Committee headed by the Chief Engineer of the U.P. Jal Nigam, then by the NMCG itself. If the petitioner is not a person aggrieved, he has no right to maintain the writ petition under Article 226 of the Constitution of India as he is not prejudiced in any manner by awarding the contract to respondent No.4.

77. A person aggrieved has been defined by the Supreme Court in the case of **Jasbhai Motibhai Desai vs Roshan Kumar (supra).**

Relevant para of the aforesaid judgment is reproduced hereunder:-

"13. This takes us to the further question: Who is an "aggrieved person" and what are the qualifications requisite for such a status? The expression "aggrieved person" denotes an elastic, and to an extent, an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. At best, its features can be described in a broad tentative manner. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him. English courts have sometimes put a restricted and sometimes a wide construction on the expression "aggrieved person". However, some general tests have been devised to ascertain whether an applicant is eligible for this category so as to have the necessary locus standi or "standing" to invoke certiorari jurisdiction."

78. The petitioner has not challenged the decision of U.P. Jal Nigam to disqualify him and qualify only one bidder i.e. M/s Ashoka Buildcon Ltd. It appears that the petitioner would not have any grievance, if the tender was awarded to M/s Ashoka Buildcon Ltd. Once the petitioner was

satisfied with the decision of the Technical Evaluation Committee and the Committee headed by Managing Director, U.P. Jal Nigam, he cannot later on challenge the decision to award contract in favour of respondent No.4.

79. We find that the writ petition by the petitioner is not maintainable on this ground alone.

80. Even otherwise, if the tendering process was cancelled and fresh bids would have been invited, the petitioner would have only a chance of being selected, if he would have met the qualifying criteria. Mere chance of selection does not entail a vested right in an interested person as held in the decisions of the Supreme Court in the cases of **Commissioner of Police & Anr.** vs **Umesh Kumar (supra)** and **Punjab Electricity Board and Ors** vs. **Malkiat Singh (supra).**

Re:- Question No.(iii)

81. Award of a contract, whether it is by a private party or public body or the State, is essentially a commercial transaction. Paramount considerations in arriving at commercial decision, are commercial considerations. However, the State, its corporations and its instrumentalities are bound to adhere to the norms and procedure laid down by them and cannot depart from them arbitrarily. The decision may not be amenable to judicial review, but the Court can examine the decision making process and interfere with it, if it is found to be vitiated by malafide, unreasonableness or arbitrariness. The Supreme Court in the case of **Air India Ltd. vs Cochin International Airport Ltd., & others (supra)** in para 7 has held as under:-

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India: (1979) 3 SCC 489; Fertilizer Corporation Kamgar Union v. Union of India (1981) 1 SCC 568; CCE v. Dunlop India Ltd. (1985) 1 SCC 260, Tata Cellular v. Union of India (1994) 6 SCC 651, Ramniklal N. Bhutta v. State of Maharashtra (1997) 1 SCC 134 and Raunaq Internation Ltd. vs I.V.R. Construction Ltd.(1999) 1 SCC 492. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is

found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

82. We find that there has been no arbitrariness or malafide or illegality in the finalization of the tender in favour of respondent No.4. Even otherwise, we do not find sufficient ground to exercise our jurisdiction of judicial review under Article 226 of the Constitution of India to interfere with the award of the contract in favour of respondent No.4.

83. Mission *Namami Gange* has huge public importance. Delay in implementing the project would not only escalate the cost but also obstruct the objective of reducing and abating the pollution level in river *Gomti*, which has been referred to as a stinking drainage in Lucknow City.

84. Looking at the large public interest involved, even if it is assumed that there has been some technical and procedural aberration in awarding the contract in favour of respondent No.4 but since, same has been without any malafide or arbitrariness, public interest would demand that such aberration is to be ignored.

85. We find that the decision taken by the NMCG is bonafide in public interest. Cancelling the tendering process vide Corrigendum dated 29.07.2020 was a procedural aberration, which has been corrected by the NMCG vide order dated 25.08.2020.

86. The Supreme Court in the case of **Jagdish Mandal vs. State of Orissa & Ors (supra) in para 22 has held as under:-**

"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay

relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

87. This writ petition has been filed on technical grounds without there being serious allegation about arbitrariness or favoritism. Even, otherwise on the facts, we do not find that there has been any arbitrariness or favoritism in awarding the contract in favour of respondent No.4.

88. The Supreme Court in the cases of **Siemens Aktiengeselischaft and Siemens Limited** vs **Delhi Metro Rail Corporation Limited and Ors (supra)** while dealing with the power of judicial review in tender matters has held as under:-

"23.There is no gainsaying that in any challenge to the award of contact before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bonafide with no perceptible injury to public interest."

89. In view of the aforesaid discussion, we hold that public interest would outweigh private interest of the petitioner, if any, and, therefore, this Court in exercising of its power of judicial review vested under Article 226 of the Constitution of India, would not like to interfere with the award of contract which has huge public importance. We, therefore, in view of the aforesaid discussion, answer question No.3 accordingly.

90. Thus, considering the facts and circumstances of the case and submissions of learned counsels for the petitioner and respondents, we do not find any ground to interfere with the tendering process and award of contract.

91. In view of the aforesaid, this writ petition is ***dismissed***. No costs.

92. The respondents are directed to proceed with the execution of the work in all earnestness and promptness so that pollution in river *Gomti* is controlled and abated, consequently pollution in river *Ganga* would also get abated, which is the

main objective of 'Namami Gange Mission'.

(2021)08ILR A376
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.08.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 16656 of 2021
&
Misc. Single No. 16658 of 2021

Shiv Narain Agarwal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sharad Pathak, Pawan Kumar Pandey

Counsel for the Respondents:
C.S.C., Anjali Divedi

List of membership of the general body/ the electoral college -finalized-by Deputy Registrar-by removing 23 persons-opportunity of hearing to only one Petitioner-further observation made that committee of management has become non-est-observation is in excess of jurisdiction-further election schedule fixed by the Deputy Registrar without going into bye laws of the societies-violation of Section 25 (2) of the Societies Registration Act-impugned order set aside.

W.P. allowed.(E-7)

List of Cases cited:

1. Vishwabandhu Gupta Vs Returning Officer [1990 (8) LCD 553]

2. Banwari Lal Kanchhal Vs Dr. Bhartendu Agarwal & 8 ors. [2019 SCC online Allahabad 4739]

3. Committee of Mangement Moti Lal Memorial Society Vs St. of U.P. & ors. [2020 SCC online Allahabad 761]

4. Jagdambika Prasad Pandey Vs St. of U.P. & ors. [2019 SCC online Allahabad 4195]

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

(Oral)

1. Writ petition No.16656(MS) of 2021 [Shiv Narain Agarwal vs. State of U.P. and Others and Writ Petition No.16658 (MS) of 2021 [Anoop Kumar and 17 Others vs. State of U.P. and Others have been filed by members of general body of the society registered as Sarvajanik Vidyalaya Parishad, Haidergarh, District - Barabanki challenging order dated 14.7.2021 by which the Deputy Registrar Societies, Firms and Chits, Ayodhya Mandal, Ayodhya has finalized the list of membership of the general body/ the electoral college for holding the elections of the Committee of management of the society along with the election schedule. The elections as per the order impugned are due to be held on 07.8.2021.

2. In Writ Petition no.16658 (MS) of 2021 and order dated 19.11.2016 has also been challenged which has been passed by the Deputy Registrar under Section 25, Sub Clause 2 of the Societies Registration Act issuing a provisional list of members of general body along with it and inviting objections thereon. Since both these writ petitions related to challenge being made to the order dated 14.7.2021 on the day when Writ Petition No.16658 (MS) of 2021 was taken up as fresh the learned counsel for the petitioner had made the request that Writ Petition No.16656 (MS) of 2021 had been listed as fresh in another Court. Both

these writ petitions relate to the same cause of action and the request was made that they should be heard together. The matter was sent to the Hon'ble Senior Judge for nomination of a Bench on the administrative side. The Hon'ble Senior Judge nominated me to hear both the writ petitions together.

3. These writ petitions have therefore come up as fresh petition in the additional cause list by second notice today.

4. It is the case of the petitioners that Shri Sarvajanik Vidyalaya Parishad, Haidergarh, District - Barabanki, (hereinafter referred to as Society) was registered in 1955 through the efforts of Bibi Ram Dulari widow of Late Hazari Lal Agarwal who had donated her land through a registered gift-deed for establishment of an educational institution namely Sarvajanik Vidyalaya, Haidergarh, Barabanki. The Registration of Society has been renewed from time to time and it was lastly renewed on 29.10.2015 for 5 years with effect from 10.10.2015 to 09.10.2020.

5. A dispute arose regarding office bearers of the society in the year 1990 and a writ petition was filed thereafter which was disposed of by this Court on 21.12.1990 with the direction to the Dy. Registrar to hold the elections of the office bearers of the society after considering all objections of the members. The undisputed elections were held thereafter on 15.01.1991.

6. As per the byelaws of the society filed as Annexure-3 to the writ petition, the term of the Committee of Management would be three years. This Committee of Management was to be elected in a two stage process of election. In the first stage the general body, i.e., Sarvajanik Vidyalaya Parishad would elect a 31 member Committee called the Vishesh Samiti. The Vishesh Samiti would thereafter elect from amongst its members seven office bearers of the Samiti and 5 more members as members of the Committee of management of the Society. These 12 members would then co-opt three more members from amongst the 'Vishesh Samiti' members. A total of 12 such members co-opting three others would constitute a 15 members Committee of Management for the Society. The office bearers of the society as per the byelaws would be one President, two Vice Presidents, One Manager, One Secretary, One Joint Secretary and a Treasurer. A total of 7 officer bearers plus 5 other persons who would separately act as Committee of Management for the School, the Sarvajanik Vidyalaya. Hence, the first stage would be the election of 31 members, and the second stage would be the election of the office bearers, i.e, 7 members + 5 members + 3 more co-opted members.

7. It has been argued by the learned counsel for the petitioner that elections were held every three years by the Committee of management of the Society and there was no dispute raised by any person. In 2010, the opposite party no.3 issued a notice to the Manager of the Society to submit yearwise list of members of the Managing Committee, the Balance Sheet, the list of General Body as per the category of members mentioned in the byelaws, and other details regarding receipt of membership fee. In pursuance of notice, the opposite party no.6 furnished all relevant documents. The opposite party no.3 registered the Committee of Management for the year 2010-2011 of 15 members on the basis of a list of 77 members of the General Body. At the time

of submission of lists for the General Body in 2010-2011 and 2011-2012 there was no requirement of list of members of the General Body being also registered, as Section 4 B of the Societies Registration Act came into effect only in October, 2013.

8. In 2011 opposite party no.8 along with 5 other persons sought some information from opposite party no.3 regarding membership and the holding of the elections. The opposite party no.3 issued notice and the opposite party no.6 replied. In 2013 opposite party no.8 again submitted a representation for cancellation of registered list of members and requested that the matter be referred to the Prescribed Authority under Section 25(1) of the Societies Registration Act. This is how the dispute with regard to the elections and genuineness of office bearers and list of membership of the General Body came about.

9. The opposite party no.3 in the order dated 19.11.2016 after taking into consideration the representation made by the opposite party no.8 and the replies submitted by the opposite party no.6 somehow came to the conclusion that the elections were not held within time every 3 years with effect from 1994. He declared the Committee of management as defunct with effect from 15.01.1994 in exercise of power under Section 25 (2) of the Act and declared a provisional list of 163 members of the General Body/ Electoral College for proposed elections to be held by him or his nominee thereafter. Objections were invited to the said provisional list.

10. In pursuance of the order dated 19.11.2016, the opposite party no.7 and 9 filed a detailed application, along with affidavits of some such members in the office of the opposite party no.3. The opposite party no.3 issued a notice to the opposite party no.6 to submit his reply. After detailed correspondence in between opposite party no.8 and 9 and opposite party no.6 and 7, without providing any opportunity to the petitioners herein. The opposite party no.3 passed the impugned order dated 14.7.2021 finalized a list of 89 General Body members.

11. It has been submitted by the learned counsel for the petitioners in Writ Petition No.16656 that these 16 petitioners' names were included in the tentative list of 163 persons issued by Deputy Treasurer by his order dated 19.11.2016. There was no reason for the petitioners to believe that their names would be removed from the list that was finalized on 14.7.2020. The petitioners' names were excluded without giving them an opportunity of hearing.

12. Only Shiv Narain Agarwal the petitioner no.1 in Writ petition No.16656 (MS) of 2021 was heard. He filed a detailed list of members giving the names and addresses and parentage of such members under his own signature. The representation was ignored saying that the signature was illegible.

13. It has been pointed out that in the said list the name of petitioner no.3 and petitioner no.7 have been removed showing them as dead. Both these persons are alive. The list also includes the name of one dead person, Ram Naresh Mishra son of Kripa Shankar Mishra at Sl No.37. This shows that the entire exercise was done without application of mind. The name of one Shri Manoj Kumar Pandey who is an Assistant Teacher has been shown at Sl no.48 who could not be included as a member in view of the provisions of regulation 5 of the

Regulations in Chapter III under the Intermediate Education Act.

14. In Writ petition no.16658 of 2021 the petitioners who are 18 in number have challenged the orders dated 19.11.2016 and 14.7.2021, on the ground that the names of the petitioners were removed without giving them opportunity of hearing only on the basis of a false conclusion drawn by the Dy. Registrar, exceeding his jurisdiction under Section 25 Sub Clause (2) of the Act, that all elections held after 15.01.1994 were non-est as they were held by a Committee of Management that had become time barred. It has been held in orders impugned that all members including the petitioners herein who had been inducted after 1994 by such Committee of Management cannot be said to be validly inducted members and therefore they have been removed from the list of General Body.

15. It has been argued by the learned counsel for the petitioner that no doubt the Deputy Registrar has the power to scrutinize the membership list submitted from time to time by the Committee of Management under Section 4 B of the Act which was introduced in October, 2013, however, Section 4 B of the Act provides certain parameters like examination of Proceedings Register of the General Body, and that of the Committee of Management, the Agenda Register, the Membership Register, the Membership Fee Register, pass book of the societies' account in the bank; to come to a conclusion whether membership fee has been duly deposited by such members who were included as members of the Society and that Agenda notice was duly circulated and proceedings held thereafter for induction of such members in accordance with the byelaws of the society. There was no examination of the documents as mentioned in the parameters given under Section 4 B of the Act. No notice was issued to any of the petitioners to explain their case. Straightaway orders impugned have been passed.

16. Shri Virendra Mishra appearing for the opposite party no.7 and 9 and Shri Shashank Singh, Advocate appearing for the opposite party no.6, the Manager of the Institution, Shri Purushottam Narayan Agarwal, have argued that the writ petitions are not maintainable and ought to be dismissed because by the order dated 14.7.2021 list of electoral college has been finalized and election schedule has been published. Reference has been made by the learned counsel for the opposite party to judgments of this Court in ***Sheetla Prasad Tiwari and Others vs. State of U.P. and Others [2018 (36) LCD 93; and to Shri Satyaveer Singh and Others vs. State of U.P. and Others [2015 (33) LCD 1857].*** On the basis of these judgments, it has been argued that in other such judgments also this Court had held that if writ petitions are allowed to be filed by rival committees of management or their members at the drop of a hat, challenging the process of elections, the statutory remedy of filing a petition under Section 25 (1) of the Act would become redundant. With regard to the membership and disputes arising therefrom, the learned counsel for the opposite parties as pointed out from the judgments cited that it has been held that disputes involving questions of facts can be best adjudicated in a Civil Court by filing the civil suit.

17. It has also been argued by the learned counsel for the opposite parties that these writ petitions have been filed at the instance of all the Manager of the

Institution and are proxy petitions as the Manager had not been able to procure an authorization from the Committee of Management through a valid resolution for challenging these orders passed by the Dy. Registrar. Several other points have been argued by the learned counsel for the opposite parties on the merits of the case saying that all such matters are disputed questions of fact which this Court should not look into the writ jurisdiction.

18. However, it has been fairly admitted by Shri Virendra Mishra that as per the byelaws of the Society, election process is required to be held in two stages. Initially the Vishesh Samiti of 31 members is to be elected by the Sarvajanik Vidyalaya Parishad the General Body such 31 members are then to elect 5 + 7 members who are in turn authorized to co-opt 3 other members from the 'Vishesh Samiti' to act as the Committee of Management of the Society. In the orders impugned, however, Dy. Registrar has published an election schedule directing holding of elections of the Committee of Mangement straightaway by the General Body which General Body has included members who were ineligible as they were either dead or working as employees in the institution.

19. It has also been fairly admitted by Shri Virendra Mishra that while holding the petitioners to be ineligible to participate in the elections and declaring their membership as non-est, the Dy. Registrar did not provide any opportunity of hearing to any of them except petitioner no.1 of Writ petition no.16656 (MS) of 2021.

20. Learned counsel for the petitioner Shri Sharad Pathak has placed reliance upon two judgments of the Division Bench of this Court in ***Vishwabandhu Gupta vs. Returning Officer [1990 (8) LCD 553] and Banwari Lal Kanchhal vs. Dr. Bhartendu Agarwal and Others [2019 SCC online Allahabad 4739]*** to argue that there is no constitutional bar for entertaining writ petitions challenging the election process of Societies registered under the Societies Registration Act.

21. Learned counsel has pointed out that if the orders which are challenged are vitiated due to violation of principle of natural justice and also due to exercise of jurisdiction far in excess of what has been given under the Act by the Dy. Registrar then this Court has interfered in writ jurisdiction.

22. The learned counsel for the petitioner has pointed out judgments of this Court in ***Committee of Mangement Moti Lal Memorial Society vs. State of U.P. and Others [2020 SCC online Allahabad 761] and Jagdambika Prasad Pandey vs. State of U.P. and Others [2019 SCC online Allahabad 4195]*** to buttress his arguments.

23. This Court having considered the judgments cited by the parties and also facts of the case finds that in Writ Petition No.16656 (MS) of 2021 16 petitioners have approached this Court saying that their names have been removed from the membership list only because that their father's names and their addresses could not be clearly made out by the Registrar despite such a clear and legible list being submitted by the petitioner no.1. In this case there is a violation of the principles of natural justice depriving the removed members from all opportunity. It has been argued that no opportunity of hearing was given to petitioner no.2 to 16 to explain their case which argument has not been denied by the learned counsel for the respondents. The

petitioner no.1 was not asked to submit a fresh clear and legible list if the first one was illegible.

24. Writ Petition No.16658 (MS) of 2021 has been filed by 18 petitioners whose names have been removed from the membership list of the General Body/ Electoral College only because the Deputy Registrar was of the opinion that they were inducted by the Committee of Management subsequent to 1994 which Committee of Management had been declared defunct by the Deputy Registrar by the order dated 19.11. 2016.

25. This Court finds from a perusal of the orders impugned and from the arguments raised by the learned counsel for the parties that although there is a direction for removal of names of 23 persons from the General Body, only Shiv Narain Agarwal petitioner no.1, was heard. No notice was issued to all the petitioners individually to place their case before the Deputy Registrar regarding their proposed removal. There was a violation of the principles of natural justice and denial of opportunity of hearing by the Deputy Registrar in passing the orders impugned.

26. Also, the Deputy Registrar by the orders impugned has held that the Committee of Management that came in 1994 had become defunct because no elections were held in time after 1994 and that subsequent elections were hence non-est. Such observations of the Deputy Registrar are in excess of his jurisdiction under Section 25 sub-clause (2) of the Societies Registration Act.

27. The Deputy Registrar moreover in passing order impugned dated 4.7.2021 has fixed an election schedule for conducting of election of the Society without going into the byelaws of the Society wherein elections have been provided in two stages. The General Body initially elects a 31 member body by the name of Vishesh Samiti. The Vishesh Samiti then elects 5 members to work as Committee of Management of the institution, and 7 members as Office Bearers of the Society. These 12 members taken together, induct three members from the 'Vishesh Samiti' for constituting the Committee of Management of the Society. On the other hand in the election schedule declared by Annexure 1 the Dy. Registrar has directed holding of elections in one step only. Such a blatant disregard of the byelaws by the Deputy Registrar is in violation of the provision of Section 25 (2) of the Societies Registration Act which specifically provides that elections should be conducted by either the Deputy Registrar or his nominee strictly in accordance with the byelaws of the Society concerned.

28. Since the learned counsel for the parties are in agreement that the Order dated 14.7.2021 vitiates the entire election process because it has been passed ignoring the byelaws, the order dated 14.7.2021 is set-aside.

29. With regard to Annexure-2, Deputy Registrar has held that all the elections that have been held after 1991 are void. Such an order exceeds the jurisdiction of the Registrar under Section 25(2) of the Act. It is settled law that a Committee of Management does not become defunct only because elections were not held within time, and such Committee of Mangement can conduct an election even after the due date if there is no order passed by the Deputy Registrar in the meantime under Section 25(2).

30. Such an order being passed in ignorance of law and in excess of jurisdiction is also liable to be quashed, and hence quashed.

31. The matter is remitted to the Deputy Registrar to give proper opportunity of hearing to all concerned by issuing notice in the newspapers, if need be, and asking for objections if any and then to pass appropriate orders in accordance with law within a period of three months from the date a copy of this order is produced before him.

32. The writ petition stands allowed.

33. Shri Ved Prakash Nag who appears for the State- respondents is directed to inform of the orders passed today to the Deputy Registrar as it has been submitted by the learned counsel for the parties that election as per the orders impugned that have been quashed today is due to be held tomorrow.

(2021)08ILR A382
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.08.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 16858 of 2021

State of U.P. & Ors. ...Petitioners
Versus
Gvk Emri (Up) Pvt. Ltd. & Anr. ...Respondents

Counsel for the Petitioners:
Sudeep Kumar, C.S.C., Mohit Jauhari

Counsel for the Respondents:

Arbitral Tribunal order challenged-as far as relates to the determination of fee and administrative expenses payable to each arbitrators-Section 11(14) and the Fourth schedule of Arbitration & Conciliation Act, 1996 are applicable to even Arbitral Tribunal appointed by the parties in terms of their contract/agreement. Impugned orders set aside.

Held, under Section 2 (d) of the Act the Arbitral Tribunal is defined either as a sole arbitrator or a Panel of arbitrators and the language used in Sub Section (14) of Section 11 is for "determination of Fees of the Arbitral Tribunal". Had the Legislature intended that the Fee as mentioned in the Fourth Schedule was to be given to each of the members of the Arbitral Tribunal individually, in case it was a multi member body, then it would have clarified the same by appending another note to the Fourth Schedule by saying that in the event the Tribunal is a multi member body each of its its members would be getting the Fee as mentioned in the Schedule. **(para 38)**

W.P. allowed. (E-7)

List of Cases cited:

1. Delhi State Industrial Infrastructure Development Corporation Limited Vs Bawana Infra & Development Private Ltd. , 2018 SCC Online Delhi, 9241

2. U.O.I. Vs Singh Builders Syndicate reported 2009 (4) SCC 523

3.n State of Bihar & ors. Vs Bihar State Sugarcane Corporation Ltd. & ors. decided on 05.03.2020 in C.W.J.C. Nos.14355 of 2019 and 23934 of 2018, reported in MANU/BH/0720/2020,

4. Punjab State Power Corporation Ltd. Vs U.O.I. & ors. Civil Writ Petition No.3962 of 2017 decided on 21.07.2017

5. Bengal Immunity Co. Ltd. Vs St. of Bihar [AIR 1955 SC 661

6. Parayankandiyal Eravath Kanapravan Kalliani Amma Vs K. Devi [(1996) 4 SCC 76 : AIR 1996 SC 1963]

7. Bengal Immunity Co. Ltd. Vs St. of Bihar [AIR 1955 SC 661]

8. Goodyear India Ltd. Vs St. of Har. [(1990) 2 SCC 71 : 1990 SCC (Tax) 223 : AIR 1990 SC 781]

9. District Mining Officer Vs Tata Iron & Steel Co. [(2001) 7 SCC 358

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

(ORAL)

1. Heard Shri Sudeep Seth, learned Senior Counsel assisted by Shri Sudeep Kumar and Shri Mohit Jauhari, for the petitioners and Shri Gaurav Mehrotra alongwith Mr. Tushar Mittal appearing for the respondents.

2. The petitioners have challenged two orders of the Arbitral Tribunal dated 23.06.2021 filed as Annexures-1 and 2 to the writ petition, in so far as they relate to the determination of Fee and Administrative expenses payable to each of the Arbitrators in the arbitration proceedings between GVK EMRI (U.P.) Private Limited and State of U.P. and its assigns and they pray that a direction be issued determining the Fee and expenses of the Arbitrators which are appropriate in the matter.

3. It has been submitted by the learned counsel for the petitioners that as per the Agreement dated 21.12.2011 between the petitioners and the respondents, on a dispute arising between the parties. They can invoke the arbitration clause under Article 18 (2) of the contract. From the Amended statement of Claim filed by the claimants on 24.09.2020 a sum of Rs.197,40,15,637/- (One hundred and Ninety Seven Crores thirty four lacs fifteen thousand and six hundred and thirty seven) had been prayed whereas the petitioners who are the respondents in the Arbitration proceedings filed a counter claim on 16.01.2021 wherein a sum of Rs.230,45,74,000/- (Two Hundred and Thirty crores Forty Five Lacs and Seventy Four Thousand) was prayed as a counter claim against the claimant. It was agreed between the parties that one Arbitrator shall be appointed by each of the parties and a third Arbitrator shall be appointed by the two Arbitrators on their own, consequently, the Arbitral Tribunal consisted of three Hon'ble retired Judges of this Court. In the preliminary hearing held for the purpose of determination of fee and administrative expenses, the Fee has been determined by the Arbitral Tribunal @ 0.125% of the Total Sum in Dispute with claim and the counter claim taken separately and additionally a fee @ 10% of the said amount has been determined towards Secretarial and Administrative expenses in connection with the Arbitration proceedings (to be shared equally by the parties). As per the orders passed by the Tribunal which are impugned in this petition, the parties have been directed to pay Rs.56,34,735/- (Fifty Six Lacs Thirty Four Thousand Seven Hundred and Thirty Five) which includes the amount of Rs.51,22,487/- (Fifty One Lacs Twenty Two Thousand Four Hundred and Eighty Seven) towards fee of the Arbitration individually and Rs.5,12,248/- (Five Lacs Twelve Thousand Two Hundred and Forty Eight) towards Secretarial and Administrative expenses to each of such Arbitrators.

4. Learned Senior Counsel Shri Sudeep Seth appearing for the petitioners has pointed out that the order passed by the

Tribunal for determining its Fee dated 23.06.2021 is clearly based on erroneous premises. He has read out Annexure No.1 detailing the determination of fee, and pointed out that the Arbitral Tribunal has referred to Sub Section (14) of Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as Act) as amended from time to time, and thereafter observed that Sub Section (14) of Section 11 refers to determination of fee of the Tribunal, in case Rules have been framed in this regard by the High Court. The High Court having not framed any Rules under Sub Section (14) of Section 11 of the Act, therefore, it was open for the Tribunal to ignore the Fourth Schedule altogether.

5. Learned counsel for the petitioners has read out from the Act itself Section 11 thereof, which is a part of Chapter-III which relates to composition of Arbitral Tribunal and has referred to Section 11 (2) thereafter which says that subject to Sub Section (6) the parties are free to adopt any Procedure for appointing the Arbitrator or the Arbitrators. Sub Section (6) relates to Arbitral Tribunal being appointed either by the Supreme Court or by the High Court in case of failure of the parties to appoint one.

6. Learned counsel for the petitioners has pointed out that it is clear from the language of the Act itself that it applies to all kinds of Arbitral Tribunals and the Procedure adopted for their appointment as a whole, either by agreement between the parties or on the failure of such agreement between the parties. In all such cases, Sub Section (14) of Section 11 would apply. Learned counsel for the petitioners has read out Sub Section 14 of Section 11 which is applicable today (as amended Sub Section 14 is yet to be notified). It is quoted hereinbelow:-

"(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation: For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitration (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution".

7. It has been submitted by the learned counsel for the petitioners that the Explanation to Sub Section (14) would not apply in the case of the petitioners as it is not international commercial arbitration and it is also not a case where the parties have agreed amongst themselves about the fee of the Arbitration Tribunal. Therefore, the exclusionary Clause as given in the Explanation would not come in the way for the application of Sub Section (14) of Section 11 of the Act to the Arbitration proceedings between the parties.

8. Learned counsel for the petitioners has read out the observations made by the learned Tribunal that the cases cited by the learned counsel for the State respondents are not applicable to the facts of the case and then pointed out the judgments that were cited by the petitioners in their arguments.

9. The first such judgment is of Single Judge decision of the High Court of Delhi in **Delhi State Industrial Infrastructure Development Corporation Limited Vs. Bawana Infra and Development Private Limited** (hereinafter referred to as Bawana

Infra judgment), the said judgment is reported in 2018 SCC Online Delhi, 9241. The writ petition was filed before the Delhi High Court primarily seeking an interpretation of the Fourth Schedule that was introduced by way of Amendment Act, 2015. The question was "whether the term, "Total Sum in Dispute" would mean the amount of claim and also counter claim taken separately rather than cumulatively." The Delhi High Court considered Law Commissions 246th Report wherein the mischief sought to be removed by way of introduction of the Fourth Schedule in the Act was dealt with. One of the main complaints against the Arbitration in India was the high cost associated with the same including Fee of the Arbitration Tribunal fixed unilaterally and disproportionately, by several Arbitrators. The Commission believed that if Arbitration was really to become a cost effective solution for dispute resolution in the domestic context, there should be devised some mechanism to rationalize the Fee structure for arbitration. It referred to a judgment rendered by the Supreme Court in **Union of India Vs. Singh Builders Syndicate reported 2009 (4) SCC 523**, where it was observed that:-

"The cost of arbitration can be high if the Arbitral Tribunal consists of retired Judges and there is no doubt or prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judges are Arbitrator. The large number of sitting and charging of very high Fees per sitting with several additions, without any ceiling, have many time resulted in cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the Award."

10. Several observations made in Paragraph nos.10, 11 and 12 of the said judgment rendered by the Supreme Court in Union of India Vs. Singh Builders Syndicate (Supra) were considered by the Delhi High Court as also Law Commission's Report. The mechanism derived for the purpose of rationalizing of Fee structure for arbitration after much deliberation by the Legislature was thereafter introduced in the Fourth Schedule relating to Section 11 of the Act. It was observed that the Fee Structure as set up in the Fourth Schedule was based on the Fee by the Delhi High Court International Arbitration Center (D.I.A.C.) which specifically provided that "Sum in Dispute" shall include the counter claim made by the party. Therefore the intent of the Legislature and the objective sought to be achieved clearly pointed out to the conclusion that "Sum in Dispute" would be a cumulative value of the claim and the counter claim and not each of them treated separately. The Delhi High Court observed in Paragraph-14 that even in the general parlance "Sum in Dispute" shall include both claim and counter claim amounts. If the Legislature intended to have the Arbitral Tribunal exceed the ceiling limit by charging separate Fee for the claim and counter claim amounts it would be provided so in the Fourth Schedule.

11. Learned Counsel for the petitioners has also pointed out the judgment rendered by a Single Judge of the Patna High Court in **State of Bihar and others Vs. Bihar State Sugarcane Corporation Limited and Others** decided on 05.03.2020 in C.W.J.C. Nos.14355 of 2019 and 23934 of 2018, reported in MANU/BH/0720/2020, where, while referring to the Fourth Schedule relatable to Sub Section (14) of Section 11 a reference was made to the judgment rendered in Bawana Infra (Supra). The Patna High Court came to the conclusion that the high

costs are seriously hampering the growth of Arbitration as an effective alternate dispute resolution process. It referred to the judgment rendered in Union of India Vs. Singh Builders Syndicate Limited (Supra) also and then observed in Paragraph-12 of the report as follows:-

"12. This Court further finds that a conjoint reading of the provisions contained in Section 11(14), Section 38 and Fourth Schedule of the Arbitration and Conciliation Act, 1996 along with the 246th Law Commission Report, which has addressed the issue of fees of arbitrators and has suggested a model schedule of fees as a mechanism to rationalize the fee structure, leading to coming into being of the Arbitration and Conciliation (Amendment) Act, 2015, which has been passed with a view to make the arbitral process cost effective and has thus inserted Schedule Fourth to the Act, providing therein a model fee schedule for domestic arbitration, for the purposes of determination of fees of the arbitral tribunal, would definitely demonstrate that the intention of the legislature was/is to provide a upper cap to the fee of the arbitrator in order to make the arbitral process cost effective. In case, the legislature intended to permit the arbitrator(s) of the arbitral tribunal to fix a fee exceeding the ceiling amount by charging a base amount and a percentage of the claim amount, which would be subject to ceiling separately, it would have provided so in the "Fourth Schedule". Now coming back to the phrase used in the "Fourth Schedule", with regard to the "sum in dispute", it would be appropriate to reproduce the model fees prescribed for claim above Rs. 20,00,00,000/- , herein below:-

"Rs. 19,87,500 plus 0.5 per cent of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000".

It is apparent from a bare reading of the phrase "with a ceiling of Rs. 30,00,000/-", that the same cannot be considered as a modifying phrase at the end, which would only refer to the ceiling being applicable to "plus 0.5% of the claim amount over and above Rs. 20,00,00,000". Thus, it would be seen that the afore-said provision is to be read conjunctively and not in a disjointed manner inasmuch as doing so would defeat the intention of the legislature, resulting in exorbitant amount of fees being fixed by the learned arbitrators."

In Paragraph-14 of the said judgment the Patna High Court has observed as under:-

"Para-14. Having considered the aforesaid aspect of the matter as also the law laid down by the Hon'ble Courts, as referred to hereinabove in the preceding paragraphs, apart from taking into account the 246th Law Commission Report and the 2015 amendment made in the Arbitration and Conciliation Act, 1996, this Court is of the considered view that a sound interpretation of the "Fourth Schedule", especially keeping in mind the legislative intent as also taking into cognizance the plain and simple understanding of the aforementioned provision in simple English language used for the purposes of defining the model fee, as far as sum in dispute being above Rs. 20,00,00,000/- is concerned, can only have one meaning i.e. - "the ceiling of Rs. 30,00,000/- has to applied to the summation of the base amount and the percentage of claim added together, however, in cases, where the arbitral tribunal consists of a sole arbitrator he would be entitled to an additional amount of 25% of the maximum amount which, in any case, cannot be more than a sum of Rs. 7,50,000/- (25% of Rs. 30,00,000/-). It further held that the sum in

dispute, as referred to in Schedule Fourth to the Arbitration and Conciliation Act, 1996 shall include both claim and counter claim amounts, as has also been held by the Hon'ble Delhi High Court in the case of Bawana Infra Private Ltd. (supra). It is needless to state that the "Fourth Schedule to the Arbitration and Conciliation Act, 1996, is not mandatory determining the fee structure where the fee structure has been agreed to in the agreement between the parties. Moreover, since no rules have been framed by the Hon'ble Patna High Court, providing for the fee schedule for domestic arbitration, the aforesaid "Fourth Schedule, to the Arbitration and Conciliation Act, 1996 shall govern the field regarding determination of fee of the arbitral tribunal."

12. Learned counsel for the petitioners has also referred to a Division Bench judgment of the Punjab and Haryana High Court rendered in the case of **Punjab State Power Corporation Limited Vs. Union of India and Others Civil Writ Petition No.3962 of 2017 decided on 21.07.2017,** wherein a similar dispute was being considered and one of the issues that was raised was regarding the interpretation made by the Arbitral Tribunal about the fees admissible to them. The Arbitral Tribunal had held that a model fee prescribed would be admissible to all its members whereas the petitioners stated that the Arbitral Tribunal would be entitled to a composite fee in terms of the Fourth Schedule and the members of the Tribunal cannot be treated as separate individuals for the applicability of the Schedule. Both the petitioners and the Union of India (it was the respondent) had supported this contention. The Punjab and Haryana High Court observed that the observation of the Arbitral Tribunal was clearly erroneous. It observed that the note appended to the Fourth Schedule cannot be interpreted so as to mean that each member of the Tribunal shall be entitled to fee as admissible to the sole Arbitrator. It meant only that "in the eventuality of Arbitral Tribunal consisting of a *solitary member, it would entitle him to an additional fee of 25% of the Model Fee, but if it is a multi member body then they would be entitled to composite fee as set up in the Fourth Schedule."*

13. Learned counsel for the petitioners has pointed out from the order impugned filed as Annexure-1 that after referring to arguments regarding the judgments of different High Courts being cited before it the Arbitral Tribunal observed that they are inapplicable to the facts of the case. It has not been stated as to how the facts of the case before the Arbitral Tribunal were different, in so far as the issues involved were regarding the applicability of Sub Section (14) of Section 11 and the Fourth Schedule for determining the fee of the Arbitral Tribunal, and whether such fee would be on the basis of claim and counter claim being treated separately or in a cumulative manner. It also involved the question whether such fee would be payable individually to each of the members of the Arbitral Tribunal or it would be a composite fee for all of them to be divided amongst themselves later on.

14. It has been pointed out by the learned Senior counsel that after observing that the judgment in Bawana (supra) would not apply the Arbitral Tribunal strangely referred to one of the Paragraphs of the said judgment to come to the conclusion that Section 38 of the Act would apply in the absence of Rules framed under Section 11 (14) of the Act being framed by the High Court. The Tribunal thereafter observed

that it was of the view that the fee of the Arbitrators in the case before it had to be determined with reference to Section 31, Section 31 (A) and Section 38 (1) of the Act.

15. Learned counsel for the petitioners has taken this Court through Chapter-VI of the Act of which Section 31 and Section 31-A are a part. It relates to the making of Arbitral Award and termination of the proceedings. Section 31 relates to Form and Contents of Arbitral Award, and it also relates to Interim Arbitral Award, and Final Arbitral Award and the rate of interest etc. Under Section 31 (A), the Regime for Costs has been given (which Section was inserted w.e.f. 23.10.2015) and it relates to a "cost" to be awarded at the time of conclusion of arbitration either to the claimant or to the respondent of such arbitration proceedings. It does not relate to the determination of fee of Arbitral Tribunal. Such "Cost" in the Explanation appended to Section 31 (A) would be reasonable and would also take into account the Fee and expenses of the Arbitrators, the Court and the witnesses, Legal Fee and Expenses, Administration Fee, and other Expenses also. The intention of the Legislature was clear that if the Courts or the Arbitration Tribunal decides impose to "Cost" the factors given under Section 31-A would be considered for the determination of the same. Learned counsel for the petitioners has pointed out that the "Costs" are different from "Fee" the phrase *"determination of fee"* has been used only in Sub Section (14) of Section 11, which relates to Chapter-III and the mode and manner of appointment of Arbitrators and does not relate at all to "Costs" as has been wrongly presumed by the Arbitral Tribunal.

16. Similarly, Section 38 in Chapter-X of the Act relates to deposit that have to be made by the parties to the arbitration proceedings only in terms of the "Costs" that would be later imposed after termination of arbitration proceedings. Sub Section-1 of Section 38 clearly says that the Arbitral Tribunal may fix the amount of the deposit, or the supplementary deposit, as the case may be as advance for the purpose of "Costs" referred to in Sub Section (8) of Section 31 which it expects will be incurred in respect of claim submitted to it. The First Proviso to Section 38 (1) says that where apart from claim, the counter claim has been submitted to the Arbitral Tribunal it may fix separate amount of deposit for the claim and counter claim.

17. It has been argued by the learned counsel for the petitioners that the Proviso is only with respect to the payment of "Costs" to take into account the claim and counter claim separately, not with respect to determination of Fees, but Arbitral Tribunal has erroneously assumed that "Costs" would include the "fee" and Section 38 relates to separate deposit for claim and counter claim, therefore, the "fees" should also be determined separately for claim and counter claim.

18. It has been submitted that the learned Tribunal has assumed that provisions with regard to "Costs" are the same as for "fees". This is apparent from the Paragraph-17 of the order which says that *"keeping in view the Costs should remain reasonable" this Tribunal decides that the fee payable to each member of the Arbitral Tribunal would be 0.125% of the total sum in dispute that is the claim and counter claim put together. In addition to this, each of the Arbitrators was also be paid 10% of the fee payable to him towards Secretarial and Administrative expenses in connection with the arbitration*

proceedings." The Fee as determined was to be shared by the parties equally.

19. In Annexure-2 to the writ petition which is also an order dated 23.06.2021 and challenged in this writ petition. The Tribunal has observed as under:-

" By order passed separately the Tribunal has today allowed claimant's application dated 19.03.2021, seeking amendment in statement of claim. The claimants shall incorporate the allowed amendment within a week of this order and shall supply its copy to the respondents. An amended copy of the Statement of Claim shall be placed on record of the Tribunal as mentioned in the said order.

The respondents have been allowed three weeks time from the date of this order to file additional Statement of Defence, if any.

By a separate detailed order this Tribunal has also decided that the fee payable to each of the member of this Tribunal would be 0.125% of the total sum in dispute i.e. claim and counter claim put together. Each of the arbitrator shall further be paid 10% of arbitration fee towards secretarial and administrative expenses. The fee so payable shall be borne by parties in the ratio of 50% each.

At present the total value of the claim of the claimant, including the amendment presently allowed, is Rs. 197,34,15,637/- (Rupees One Hundred Ninety Seven Crore Thirty Four Lac Fifteen Thousand Six Hundred Thirty Seven Only) and the value of the counter claim is Rs. 230,45,74,000/- (Rupees Two Hundred Thirty Crore Forty Five Lac Seventy Four Thousand Only). The total sum in dispute is Rs. 409,79,89,637/- (Rupees Four Hundred Nine Crore Seventy Nine Lac Eighty Nine Thousand Six Hundred Thirty Seven Only) on which 0.125% plus 10% of the said sum comes to Rs. 51,22,487/- + 5,12,248/- = Rs. 56,34,735/- (Rupees Fifty Six Lac Thirty Four Thousand Seven Hundred Thirty Five Only). shall be deposited by or before the date of issues, third similar installment of Rupees 14 Lac shall be paid by or before the commencement of evidence and the last installment of full remaining amount shall be deposited by or before the time of final argument.

Signed copies of the orders passed separately today have been supplied to the parties.

The matter shall now be taken up on 18.07.2021 at 2pm for identifying issues arising for determination of the case."

20. It is an order that says that the fee be deposited in installments and the first installment of an amount of Rs.14 lacs (divided between the parties in equal shares) be deposited with each of the Arbitrators within a fortnight of the order. Similarly, the second installment of Rs.14 lacs should be deposited by or before the date of issues, and the third similar installment should be paid before the commencement of evidence and the last installment of the remaining amount be deposited by or before time of final argument.

21. It has been argued that the learned Tribunal has taken the cue from Section 38 of the Act in making such order for deposit of Fee in advance. Fee is differently treated from "Cost" it is only for the cost to be determined at the termination of arbitration proceedings which are likely to be incurred by the parties, that a provision has been made in the Act under Section 38, for it to be deposited in advance.

22. In sum and substance, the arguments raised by the learned Senior

counsel for the petitioners is that the learned Tribunal has committed the error of misreading different Sections of the Act relating to different Chapters cumulatively as applicable to Section 11 of the Act which relates to appointment of Arbitral Tribunal and determination of Fee thereof.

23. Shri Gaurav Mehrotra, who has filed his Power on behalf of the respondents today, has supported the arguments made by the learned Senior Counsel in so far as the the applicability of the various judgments of different High Courts are concerned, as according to him such judgments are clearly applicable to the facts of the case before the learned Tribunal and the learned Tribunal has erroneously ignored the observations made in them saying that they do not apply to the case before them.

24. It has been pointed out further by Shri Gaurav Mehrotra that he had argued before the Tribunal that the Fourth Schedule relates to fee that is payable to each of the members of the Arbitral Tribunal individually on the basis of the Note appended to the Fourth Schedule which says that in the event the Arbitral Tribunal is a sole Arbitrator, he would be entitled to an additional amount of 25% of the fee payable as per the Schedule itself. It has been argued by Shri Gaurav Mehrotra that he still believes that each of the members of the Arbitral Tribunal shall be entitled to separate fee as determined as per the Fourth Schedule and it should not be paid in a composite manner to the entire Tribunal, as it would mean that when the Arbitral Tribunal consists of more than one member i.e., either two or five members, then an amount of Rs.30 lacs would be distributed amongst such three or five members proportionately which would be an unreasonably low amount whereas if the Arbitral Tribunal consists of only one member or sole Arbitrator, he would be entitled to the entire Fees of Rs.30 lacs + 25% over and above, as additional amount.

25. It has been argued also by Shri Gaurav Mehrotra, that he supports the arguments made by the learned Senior Counsel with regard to the applicability of Sub Section (14) of Section 11 for the determination of Fee of the Arbitral Tribunal as Section 11 is a part of the Chapter-III which deals with the appointment of Arbitrator. Shri Gaurav Mehrotra has argued that "Sum in Dispute" has been held by both Punjab and Haryana High Court and Delhi High Court to mean the claim and counter claim taken cumulatively and not separately, and the learned Tribunal has erroneously interpreted the Section 38 relating to "Costs" as applicable to Section 11 also.

26. He has pointed out from Annexure-1 to the writ petition that the basic premise for determination of Fee by the orders impugned by the learned Tribunal has been that for Fourth Schedule referred to Sub Section (14) of Section 11 which comes into operation only when the Arbitral Tribunal is constituted on an application of a party to the High Court or the Supreme Court, and that it does not apply to the cases where the Tribunal come into existence without intervention of the Court under Section 11 of the Act. Such premise has led to the super structure of the entire order become vitiated. The counsel for the respondents has also pointed out Paragraphs 12, 13, and 14 of the order impugned wherein reference has been made to Section 31, 31-A and Section 38 and says that all these sections relate to determination of "Costs" after termination

of Arbitration proceedings and it has been specifically stated in the Act that such "Costs" would be part of the Arbitration Award. He has referred to Sub Section (1) of Section 31-A, the language of which clearly specifies that the "Regime of the Costs" would be applicable notwithstanding anything contained in the Civil Procedure 1908, and the Arbitral Tribunal shall have the discretion to determine whether "Cost" is payable by one party to another, the amount of such 'costs', and when such 'costs' are to be paid. Such costs as are referred under Section 38 are relatable to an eventuality where the arbitration proceedings are concluded in favour of either of the claimant or the respondent, to compensate them for the trouble of having undergone the protracted procedure of Arbitration to get their rights determined.

27. Shri Gaurav Mehrotra, has referred to the first Proviso under Section 38 (1) where the deposits are to be made by the claimants and the respondents on their claim and counter claim separately for such costs as the Tribunal expects would be incurred in respect of the claims submitted to it. The Proviso appended to such section refers to costs being determined separately for claim and counter claim. It does not relate to "fee" which has to be determined on the cumulative amount of claim and counter claim.

28. In this case, the claim of the respondents was approximately Rs.198 crores and counter claim of the petitioners was approximately Rs.230 crores, the Tribunal has wrongly calculated the "Sum in Dispute" amounting to more than Rs.409 crores. Because of this wrong assumption, the entire Fee structure determined by the learned Tribunal has become arbitrary.

29. This Court having heard both the counsel for the petitioners as well as for the respondents, finds that the counsel for both the parties are in agreement with regard to the basic premise on which the orders impugned have been passed being erroneous, vitiating the entire order with the Vice of arbitrariness.

30. This Court has also carefully gone through the judgments rendered by the Delhi High Court, Patna High Court and the Punjab and Haryana High Court. Although such judgments have only persuasive value and cannot be said to be binding precedings, this Court cannot ignore the observations made therein on the basis of 246th Report of the Law Commission which related to the Amendment Act of 2015. The mischief that was to be sought to be avoided was that of exorbitant costs of Arbitration, arbitrarily fixed by the Arbitral Tribunal which consisted of retired High Court and Supreme Court Judges sometimes. The arbitration proceedings were to be made an attractive proposition for Alternate dispute resolution. The observations made by the Hon'ble Supreme Court in Union of India Vs. Singh Builders Syndicate (Supra) cannot be ignored by this Court.

31. In a Seven Judges Constitution Bench judgment rendered in **Bengal Immunity Co. Ltd. v. State of Bihar [AIR 1955 SC 661**], the Supreme Court observed in Paragraph-23 that it is a sound rule of construction of statute firmly established in England as far as back as 1584 when Heydon's case was decided that for the sure and true interpretation of all statutes in general (Be they penal or beneficial, restrictive or enlarging of the Common law), four things are to be discerned and considered:-

(1) what was the Common law before the making of the Act;

(2) what was the mischief and defect for which the common law did not provide;

(3) what remedy Parliament has resolved and appointed to cure the disease of the commonwealth; and

(4) the true reason of the remedy;

and then the office of all the judges is always to make such construction as shall:

(a) suppress the mischief and advance the remedy; and

(b) suppress subtle inventions and evasions for the continuance of the mischief pro privato commodo (for private benefit); and

(c) add force and life to the cure and remedy according to the true intent of the makers of the Act pro publico (for the public good).?

32. In **Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd., (2004) 1 SCC 702** :The Division Bench of the Supreme Court was considering the Order XVIII Rule 4 of the CPC as amended in 2002. With regard to the mode of "Examination-in-Chief" in every case and whether any discretion has to be drawn between the appealable and non-appealable cases. It considering whether the "Examination-in-Chief" on affidavit can be said to be sufficiently good replacement for oral tendering of evidence in Court and whether such mode of taking of evidence can cause prejudice to the other party, the Court considered the provisions of Rule 4 and Rule 5 of Order XVIII and observed that both are required to be read harmoniously, Keeping in mind the mischief sought to be reapprised by the amendment. As the amendments were made by the Parliament consciously and keeping in mind the experience from the past. The Supreme Court observed that "Examination-in-Chief" of witnesses would include the Evidence in Chief, cross-examination or re-examination. Rule 4 of Order XVIII speaks of "Examination-in-Chief". The unamended rule provided for the manner for which evidence is to be taken. Such "Examination-in-Chief" of a witness in every case shall be on affidavit. The said provisions has been made to curtail the time taken by the Court in examining the Witness-in-Chief. The rule 4 of Order XVIII does not make any distinction between appealable and non-appealable cases so far as mode of recording evidence is concerned. Such a difference is to be found only in Rules 5 and 13 of Order XVIII of the Code.

The Supreme Court observed that whereas under the unamended rule, the entire evidence was required to be adduced in court, now the Examination-in-Chief of a witness including the party to a suit is to be tendered on affidavit. The expression ?in every case? is significant. What thus remains viz. cross-examination or re-examination in the appealable cases will have to be considered in the manner laid down in the rules, subject to the other sub-rules of Rule 4.

Rule 5 of Order 18 speaks of the other formalities which are required to be complied with. In the cases, however, where an appeal is not allowed, the procedures laid down in Rule 5 are not required to be followed.

33. The Supreme Court observed in Paragraphs 21, 22 and 23 of Ameer Trading Corporation (Supra), thus:-

"21. In a situation of this nature, the doctrine of suppression of mischief rule as adumbrated in Heydon's case [(1584) 3

Co Rep 7a : 76 ER 637] shall apply. Such an amendment was made by Parliament consciously and, thus, full effect thereto must be given.

22. In Halsbury's Laws of England, Vol. 44(1), 4th Reissue, para 1474, pp. 906-07, it is stated:

?Parliament intends that an enactment shall remedy a particular mischief and it is therefore presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should find a construction which applies the remedy provided by it in such a way as to suppress that mischief. The doctrine originates in Heydon's case [(1584) 3 Co Rep 7a : 76 ER 637] where the Barons of the Exchequer resolved that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

(1) what was the common law before the making of the Act;

(2) what was the mischief and defect for which the common law did not provide;

(3) what remedy Parliament has resolved and appointed to cure the disease of the commonwealth; and

(4) the true reason of the remedy;

and then the office of all the judges is always to make such construction as shall:

(a) suppress the mischief and advance the remedy; and

(b) suppress subtle inventions and evasions for the continuance of the mischief pro privato commodo (for private benefit); and

(c) add force and life to the cure and remedy according to the true intent of the makers of the Act pro publico (for the public good).?

23. Heydon's rule has been applied by this Court in a large number of cases in order to suppress the mischief which was intended to be remedied as against the literal rule which could have otherwise covered the field. (See for example, Parayankandiyal Eravath Kanapravan Kalliani Amma v. K. Devi [(1996) 4 SCC 76 : AIR 1996 SC 1963] ; ***Bengal Immunity Co. Ltd. v. State of Bihar [AIR 1955 SC 661] and Goodyear India Ltd. v. State of Haryana [(1990) 2 SCC 71 : 1990 SCC (Tax) 223 : AIR 1990 SC 781])."***

34. The Supreme Court after referring to several of its judgments relating to amendment in Act carried out after experience was gathered from the past, referred to judgment rendered in **District Mining Officer v. Tata Iron & Steel Co. [(2001) 7 SCC 358** : and the observation made therein:-

?The legislation is primarily directed to the problems before the legislature based on information derived from past and present experience. It may also be designed by use of general words to cover similar problems arising in future. But, from the very nature of things, it is impossible to anticipate fully the varied situations arising in future in which the application of the legislation in hand may be called for and words chosen to communicate such indefinite referents are bound to be in many cases, lacking in clarity and precision and thus giving rise to controversial questions of construction. The process of construction combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or

object which comprehends the mischief and its remedy to which the enactment is directed.?

35. This Court is of the considered opinion that Sub Section (14) of Section 11 and the Fourth Schedule relatable to it, are applicable to even Arbitral Tribunal appointed by the parties themselves in terms of their contract/agreement.

36. This Court is also in agreement with the observations made by the various High Courts quoted hereinabove, regarding the question of "Sum in Dispute" which has to be taken cumulatively as the claim and counter claim and not calculated separately as eventually only one of the parties to the arbitration proceedings would most likely succeed. If the claimant succeeds it would be getting around 198 crores whereas if the respondents succeed they would be getting an amount of Rs.230 crores. As each of the parties would be getting only the amount claimed by them at the termination of the arbitration proceedings.

37. This Court is also of the considered opinion that the Fourth Schedule is applicable to even Arbitral Tribunals appointed under Section 11 (2) and the ceiling limit of Rs.30 lacs as Model Fee for all claims above Rs.20 crores would be applicable in the case of determination of Fee of Arbitral Tribunal and the orders impugned have erroneously ignored the Fourth Schedule saying that it would only be applicable to cases where the High Court has framed Rules or appointed Arbitrators.

38. With regard to the question whether Fee should be taken as a composite amount or is to be paid separately and individually to each Arbitrator, this Court is of the considered opinion that the arguments raised by Shri Sudeep Seth, learned Senior Counsel appeal more to reason, because under Section 2 (d) of the Act the Arbitral Tribunal is defined either as a sole arbitrator or a Panel of arbitrators and the language used in Sub Section (14) of Section 11 is for *"determination of Fees of the Arbitral Tribunal"*. Had the Legislature intended that the Fee as mentioned in the Fourth Schedule was to be given to each of the members of the Arbitral Tribunal individually, in case it was a multi member body, then it would have clarified the same by appending another note to the Fourth Schedule by saying that in the event the Tribunal is a multi member body each of its its members would be getting the Fee as mentioned in the Schedule.

39. For the reasons as mentioned hereinabove, this Court the orders impugned deserve to be set aside. The **orders impugned are set aside**.

40. The Arbitral Tribunal shall be free to determine its Fees and administrative expenses taking into consideration the observations made in this judgment and pass a fresh orders.

41. The Writ petition stands **allowed.**

(2021)08ILR A394
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 Cr.P.C. No. 47061 of 2019

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

Counsel for the Applicants:
Sri Nuruddin Khan

Counsel for the Opposite Parties:
A.G.A., Sri Syed Shahnawaz Shah

Criminal Law - Code of Criminal Procedure, 1973- Section 482- Quashing of proceedings-On basis of Compromise-Non-Compoundable offences- Sections 147, 323, 504 IPC- Keeping in view the nature and gravity and the severity of the offence which are more particularly in private dispute and differences it is deem proper and meet to the ends of justice. The proceeding of the aforementioned case be quashed.

It is settled law that where the parties to a dispute decide to end the criminal proceedings, which are non-compoundable but not a heinous offence and are private in nature, then the inherent jurisdiction u/s 482 Cr.Pc can be exercised to quash the criminal proceedings on the basis of compromise arrived at between the parties.

Criminal application allowed. (E-2)

Judgements/ Case law cited:-

1. B.S. Joshi Vs St. of Har. & ors. 2003 (4) ACC 675.

2. Gian Singh Vs St. of Punj. 2012 (10) SCC 303

3. Dimpy Gujral & ors. Vs U.T Through Admin. 2013 (11) SCC 697

4. Narendra Singh & ors. Vs St. of Punj. & ors. 2014 (6) SCC 466

5. Yogendra Yadav & ors. Vs St. of Jhar. 2014 (9) SCC 653

Judgements/ Case law relied upon:-

1. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & ors. Vs St. of Guj. & anr. (2017) 9 SCC 641

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

1. Heard Shri Nuruddin Khan learned counsel for the applicants as well as Syed Shahnawaz Shah learned counsel for the opposite party no.2 and the learned A.G.A. and perused the record.

2. This application u/s 482 Cr.P.C. has been preferred seeking the quashing the entire proceedings including summoning order dated 7.5.2011 of Complaint Case No.1047 of 2010 (Imamuddin Vs. Fakeera) under Sections 147, 323, 504 IPC, Police Station Chandpur, District Bijnor pending in the Court of Civil Judge (J.D.)/ Judicial Magistrate, Chandrpu District Bijnor.

3. Learned counsel for the applicants has argued that the compromise between the parties has already been filed as Annexure-6 to the present petition and as the matter has been compromised on 31.8.2019 , therefore, the present case be finally decided.

4. Learned counsel for the applicants submitted that both the parties have come to terms and have buried their differences and disputes. Therefore, no useful purpose would be served to keep the matter alive and pending. Learned counsel for opposite party no.2 has filed an affidavit stating therein in paragraph nos. 7 & 8 that opposite party no.2 is no more interested to pursue the case any more against the applicant. This fact of compromise has confirmed and nodded in affirmative by the counsel for the parties and has jointly submitted that there would be no harm and error and would be in the interest of justice that the proceedings may be quashed in the light of the compromise.

5. It was further submitted by both the counsel that the parties appeared before the

Court below and Court below verified the signatures of both the parties and the Judicial Magistrate Chandpur, Bijnor duly verified the veracity of the compromise deed vide order dated 6.02.2020. Copy of the same is filed as Annexure No.SA1 to the Supplementary Affidavit.

6. Learned counsel for the applicants has drawn the attention of the Court and placed reliance of the judgment of the Hon'ble Apex Court in support of his case.

(i) **B.S. JOSHI VS. STATE OF HARYANA AND OTHERS 2003 (4) ACC 675.**

(ii) **GIAN SINGH VS. STATE OF PUNJAB 2012 (10) SCC 303.**

(iii) **DIMPEY GUJRAL AND OTHERS VS. UNION TERRITORY THROUGH ADMINISTRATOR 2013 (11) SCC 697.**

(iv) **NARENDRA SINGH AND OTHERS VS. STATE OF PUNJAB AND OTHERS 2014 (6) SCC 466.**

(v) **YOGENDRA YADAV AND OTHERS VS. STATE OF JHARKHAND 2014 (9) SCC 653.**

7. Summarizing the ratio of all the above cases the latest judgment pronounced by Hon'ble Apex Court in the case of **"DPARBATBHAI AAHIR @ PARBATBHAI BHIMSINHBHAI KARMUR AND OTHERS. VS. STATE OF GUJARAT AND ANOTHER reported in (2017) 9 SCC 641** and in paragraph no.16, the Hon'ble Apex Court has summarized the broad principles with regard to exercise of powers under Section 482 Cr.P.C. in the case of compromise/settlement between the parties. Which emerges from precedent of the subjects as follows:-

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

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

iii. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

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

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

vi. In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous

and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are truly speaking not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

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

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

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

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

8. With the assistance of the aforesaid guidelines, keeping in view the nature and gravity and the severity of the offence which are more particularly in private dispute and differences it is deem proper and meet to the ends of justice. The proceeding of the aforementioned case be quashed.

9. This order is being passed by this Court after hearing the contesting parties and perusing the affidavit filed by learned counsel for the opposite party no.2. This Court has not verified their credentials. If at all, opposite party no.2 feels that he has been duped or betrayed, then in that event, he may file recall application explaining the reasons for filing the said application.

10. The present 482 Cr.P.C. application stands **allowed**. Keeping in view the compromise arrived at between the parties, entire proceeding of Complaint Case No.1047 of 2010 (Imamuddin Vs. Fakeera) under Sections 147, 323, 504 IPC, Police Station Chandpur, District Bijnor pending in the Court of Civil Judge (J.D.)/ Judicial Magistrate, Chandrpu District Bijnor is hereby quashed.

11. The parties may file the copy of this order before the Court below within three weeks from today.

12. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

13. The concerned Court/ Authority/ Official shall verify the authenticity of such

computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)08ILR A398
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2021

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ B No. 525 of 2021

Ambika Prasad & Ors. ...Petitioners
Versus
A.D.M. Basti & Ors. ...Respondents

Counsel for the Petitioners:
Sri Mazhar Abbas Zaidi, Sri Sunil Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri Shiv Dayal Tiwari, Sri Sabhapati Tiwari

A. UP Consolidation of Holdings Act, 1953 – Sections 12 & 48, Explanation (2) to Section 48 – Consolidation proceeding – Belated appeal before SOC – Delay Condonation rejected – Revision before DDC – Scope and maintainability – Though in operative portion D.D.C. has made an observation to dismiss the revision on the ground of maintainability, in the body of the judgment it has discussed the merits of the delay condonation in detailed and affirmed the finding of SOC – Held, S. 48 vested vast power in DDC having supervisory jurisdiction over all the subordinate authorities, as such he may call for and examine the record of any case decided or proceeding taking by any subordinate court – Decision on the condonation of delay cannot be said to be an interlocutory order as defined in the Explanation - 2 to Section 48 of the Act. (Para 11 and 13)

Writ petition dismissed. (E-1)

Cases relied on :-

1. Parash Nath Vs DDC & ors., 2008 (104) RD 516

2. Smt. Urmila Vs Amit Kumar Agrawal & ors., 2013 (118) RD 180

3. Jeet Narain & anr. Vs Govind Prasad & ors., 2010 (3) ADJ 470 (SC)

4. Mukesh & anr. Vs Additional District Magistrate (Finance and

Revenue), Mathura & ors., 2015 (8) ADJ 73

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

1. Heard Sri Mazhar Abbas Zaidi, learned counsel for the petitioner, who has appeared through video conferencing. Learned Standing Counsel for the respondent nos.1 to 3 and Sri Shiv Dayal Tiwari, learned counsel for the respondent nos.4 to 7, at admission stage.

2. Petitioners have filed the present writ petition challenging the impugned order dated 07.01.2021 passed by the Additional District Magistrate, Basti (respondent no.1) exercising his power under Section 48 of the U.P. Consolidation of Holdings Act, 1953 (in brevity "U.P.C.H. Act") in Revision No.459 of 2020 (Computerized No.D-202017140001798) (Suit No.01798 of 2020) (Ambika Prasad and Others vs. Smt. Savitri Devi and Others) and order dated 09.01.20215 passed by the Settlement Officer of Consolidation, Basti (in brevity "S.O.C.")(respondent no.3) in Appeal No.120 under Section 11 (1) of the U.P.C.H. Act.

3. Present writ petition is arising out of proceeding under section 12 of UPCH Act. Dispute relates to property belongs to one Hari Prasad. Plot in question i.e. Khata

No.407 situated in village Shankarpur was recorded in the name of Hari Prasad. After his death name of Ramsuresh @ Ramduresh (predecessor in interest of the petitioners) was ordered to be recorded in the revenue record vide order dated 30.01.1982 passed by the Assistant Consolidation Officer (in brevity "A.C.O."). After lapse of 29 years, Smt. Savitri Devi (predecessor in interest of respondent nos.4 to 7) had filed an appeal dated 16.07.20210 (annexure no.2) under Section 11 (1) of the U.P.C.H. Act, challenging the order dated 30.01.1982 on the ground that it was ex-parte order passed behind her back without giving her any opportunity of hearing. In appeal she had prayed condonation of delay in filing the appeal. Vide order dated 09.01.2015(annexure no.5), the S.O.C. has allowed the prayer for condonation of delay and fixed date for hearing on the merits of the appeal. Feeling aggrieved, present petitioners have preferred a revision before the Deputy Director of Consolidation (in brevity "D.D.C.") (respondent no.2), which has been dismissed vide order dated 07.01.2021 (Annexure-8), with an observation that there is no force in the revision, which is in fact not maintainable against an interlocutory order.

4. Learned counsel for the petitioners submits that the D.D.C. has illegally dismissed the revision on the ground of maintainability, whereas the order passed, allowing the prayer for condonation of delay, is revisable and same should be examined by the D.D.C. in exercise of revisional jurisdiction under Section 48 of the U.P.C.H. Act. He has also assailed the order of the S.O.C. on the ground that delay has illegally been allowed only on the basis of litigation which is going on between the parties with respect to the property of Hari Prasad situated in other villages namely Sarbhanaga and Majhauwa. In support of his submissions learned counsel for the petitioners has cited the case of **Parash Nath Vs. DDC and others, reported in 2008 (104) RD 516** and the case of **Smt. Urmila Vs. Amit Kumar Agrawal & Others, reported in 2013 (118) RD 180.**

5. Per contra, learned counsel for the respondent nos.4 to 7 contended that the S.O.C. has rightly allowed the prayer for condonation of delay in positive exercise of jurisdiction and the same is not amenable to the higher court. He has further contended that the revision filed by the present petitioners has rightly been rejected by the D.D.C. with an observation that there is no force in the revision filed by the revisionists as well as on the ground of maintainability. He submits that the D.D.C. has discussed the merits, for condonation of delay, at length and dismissed the revision. Mere making an observation with respect to the maintainability of revision, would not effect the judgment passed by the D.D.C. In support of his case, learned counsel for the respondents has cited **Jeet Narain and Another vs. Govind Prasad and Others, 2010 (3) ADJ 470 (SC)** and **Mukesh and another vs. Additional District Magistrate (Finance and Revenue), Mathura and others, 2015 (8) ADJ 73.** Learned counsel for the respondents has also submitted that with respect to the property of deceased Hari Prasad situated in another village, lis is pending before this High Court bearing Writ B No.11154 of 1982. In the aforesaid matter, restoration application is still pending.

6. Perused the record on board and considered the submissions of learned counsels for the parties.

7. Dispute relates to the property belongs to Hari Prasad. Genealogical tree as shown in the memo of appeal filed by Smt. Savitri Devi(predecessor in the interest of respondent nos.4 to 7) reveals that Hari Prasad and Hardeo were collateral descendants from common ancestral Vinda. Smt Savitri Devi is claiming her right and title over the property in question on the basis of registered will deed dated 24.12.1983 executed by Hari Prasad. She is grand daughter of Hari Prasad. She came with the case that Hanshraji(mother of Smt. Savitri), daughter of Hari Prasad, was blind lady, therefore, Hari Prasad had executed a registered will deed in her(Smt. Savitri Devi) favour, being pleased with her services. Second set of person namely Ramsuresh @ Ramduresh (predecessor in the interest of petitioners) was claiming his right and title over the property of Hari Prasad being a survivor. It appears that property of Hari Prasad is situated in three villages namely Shankarpur, Sarbhanga and Majhauwa. With respect to the property of Sarbhanga and Majhauwa it is averred that she has got her name mutated vide order dated 15.02.1988. So far as the property situated in village Shankarpur is concerned, Ramsuresh @ Ramduresh has got his name mutated vide order dated 30.09.1982.

8. For the condonation of delay in filing the appeal dated 16.07.2010 against the order of C.O. Dated 30.09.1982, Smt. Savatri Devi (appellant before SOC) came with the plea that on the basis of registered will deed she has got her name mutated, vide order dated 15.02.1988, over the property situated in village Sarbhanga and Majhauwa, but she could not get her name mutated over the property situated in village Shankarpur, inasmuch as she did not come to know about consolidation proceedings went on in village. When the respondent (in appeal before SOC) threatened to her for taking the possession, she obtained extract of khatauni on 24.06.2010 and came to know about the endorsement of order dated 30.09.1982 passed by ACO. On inquiry, no such record was found relating to the order dated 30.09.1982.

9. Settlement Officer of Consolidation has discussed the matter in detail in deciding the condonation of delay in filing the appeal and, came to the conclusion that in the property in question i.e. khata no.407 situated in village Shankarpur interest of the appellant is also involved, therefore, gave finding that it would not be appropriate to dismissed the appeal on the ground of maintainability and the laches.

10. In support of his finding SOC has discussed the pendency of lis between the parties with respect to property situated in village Sarbhanga and Majhauwa, where initially name of the Smt. Savitri was recorded, but subsequently, vide order dated 13.03.2001, name of the present petitioners were mutated. Against order dated 13.01.2001 passed by C.O. restoration application is still pending before the court concerned.

11. I am not satisfied with the arguments advanced by counsel for the petitioners that revision was dismissed only on the ground of maintainability. Order dated 07.01.2021 passed by DDC reveals that it has discussed the merits of the condonation of delay and affirmed the finding recorded by S.O.C. Though in operative portion D.D.C. has made an observation to dismiss the revision on the ground of maintainability, in the body of the judgement it has discussed the merits of the delay condonation in detailed and affirmed the finding of SOC.

12. Case cited by the petitioners reported in 2013 (118) RD 180 is not

applicable in the present matter, inasmuch as it relates to the temporary injunction which was modified to some extent in appeal. Another cited case reported in 2008 (104) RD 516, is applicable to some extent in the present matter, wherein revision was held maintainable against allowing or rejecting the condonation of delay passed by C.O. Preposition laid down by Co-ordinate Bench of this Court in the aforesaid case is also applicable in this matter, but unfortunately same would not come to the rescue of the petitioners. In the aforesaid matter this Court has relied upon the Supreme Court decision reported in 1984 RD 382, Sashi Prasad Gupta Vs. DDC wherein Hon'ble Supreme Court has expounded that higher court cannot lightly interfere with the direction of the C.O. unless the order sought to be revised is clearly erroneous and likely to cause gross miscarriage of justice. It is further observed in the aforesaid judgment that when order has been made under section 5 of Limitation Act by the lower court in exercise of its discretion allowing or refusing an application to the extent time, it cannot be interfered within revision, unless lower court has acted with material irregularity or contrary to law or has come to that conclusion on no evidence. Paragraph 12 of the case of Paras Nath (Supra) is quoted below:-

"The Supreme court in Shanti Prasad Gupta v. Deputy Director of Consolidation, camp at Meerut and other, considered the scope and power of Deputy Director of Consolidation under section 48 of U.P Consolidation of Holding Act, 1953. in the case before the supreme court objection under sector 9-A was filed with delay. The consolidation officer vide order dated 22ndjuly, 1975 condond the delay in filling the objection. A revision was filed before the Deputy Director of Consolidation challenging the order of Consolidation officer. The Deputy Director of Consolidation interfered with the order of Consolidation officer. The writ petition was filed in the High Court and thereafter matter was taken to the Apex Court, The Apex Court laid down that Deputy Director of Consolidation cannot lightly interfere with the discretion of the Consolidation Officer unless the order sought to be revised is clearly erroneous or is likely to cause gross miscarriage of justice . Following was laid down in paragraph 3 of the said judgment -

"3?.Whether or not there is sufficient cause for condonation of delay is a question of fact dependent upon the fact and circumstances of a particular case, and the proposition is well settled that when order has been made under section 5, Limitation Act by the lower Court in the exercise of its discretion allowing or refusing an application to extend time, it cannot be interfered with in revision, unless the lower Court has acted with material irregularity or contrary to law or has come to that conclusion on no evidence. We are aware that the power of the Director under sector 48 of the Act are wider than those mentioned in section 115 of the Code of Civil Procedure. Even so, the Director cannot lightly interfere with the discretion of Consolidation Officer, unless the order sought to be revised is clearly erroneous or is likely to cause gross miscarriage of justice. Such was not the case here. The Consolidation Officer had in condoning the delay exercised his discretion judicially on the basic of evidence produced before him by the parties. The Deputy Director of Consolidation (exercising the powers of Director)had without assigning any reason allowed the revision-petitioner to produce additional evidence (letter) before him,

which the revision-petitioner could with due diligence, produce before the Consolidation Officer, but failed to do so. Then it is not apparent from the impugned order whether the appellant before us, was also given by the Deputy Director an opportunity to produce evidence in rebuttal of the additional evidence, although a bold mention is there that "the opposite party has not any documentary evidence in rebuttal of this."

13. Section 48 of UPCH Act vested vast power in DDC having supervisory jurisdiction over all the subordinate authorities, as such he may call for and examine the record of any case decided or proceeding taking by any subordinate court. In this conspectus, it cannot be said that DDC has got no jurisdiction to entertain any application under section 48 of UPCH Act against any order or proceeding which comes from the subordinate authority. So far as the decision on the condonation of delay is concerned, it cannot be said to be an interlocutory order as defined in the explanation-2 to section 48 of UPCH Act. Any decision on the delay condonation amounts termination of proceeding for condonation of delay. Therefore, order passed on the delay condonation application can be assailed before the higher court.

14. Division Bench of this Court in the matter of Mst. Kailashi Vs. DDC and others, reported in 1972 RD 80 has held that the revisional powers under section 48 of UPCH Act are very wide and can reach every order passed by sub-ordinate consolidation courts, even orders passed on delay condonation.

15. In the matter in hand, petitioners have failed to make out a case as to what prejudice will caused to them due to remand of matter before S.O.C. for considering the right and title of the parties. No material irregularity or the error have been pointed out by the counsel for the petitioners in the orders passed by SOC and DDC.

16. On the contrary learned counsel for the respondents has cited paragraph nos.7, 8 and 9 of the case of Mukesh (Supra) to substantiate his submissions that ordinary higher court should not interfere in positive exercise of the decision made by the subordinate court. Relevant paragraph nos.7 and 8 of the aforesaid judgment is quoted below:-

"7. It is settled that once the delay has been condoned meaning thereby the Court has exercised its discretion in a positive manner and unless there is no explanation or the explanation furnished is malafide, the higher Court should not interfere with such orders.

8. The Apex Court in State of Bihar and others v. Kameshwar Prasad Singh and another, JT 2000 (5) SC 389, has held that "once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior Court should be free to consider the cause shown for the delay afresh and it is open to such superior Court to come to its own finding even untrammelled by the conclusion of the lower Court.

9. This view has constantly been followed by the Apex Court in numerous cases thereafter. Reference may be given in Apanshu Mohan Lodh v. Stae of Tripura,

2004 1 SCC 119, State (NCT of Delhi) vs. Ahmed Jaan, 2008 (10) JT 179, Indian Oil Corporation Ltd. v. Subrata Borah Chowlek, (2010) 262 ELT 3. In Jeet Narain and another v. Govind Prasad and others, 2010(3) adj 470 SC, the Apex Court has condoned the delay of 26 years considering the merit of the case in which the order was obtained by playing fraud."

17. Both the consolidation courts, SOC and DDC, in positive exercise of jurisdiction, have given opportunity of hearing to the contesting respondents after considering the bonafides of Smt. Savitri Devi, who is claiming her right and title over the property in question on the basis of registered will deed executed by her maternal grand father. Mere an endorsement relating to some case over the khatauni cannot confer any right and title in favour of the recorded person and said entry is always subject to scrutiny by the competent court. Therefore, on the ground of laches valuable right of any person, who is vitally interested in the property in question, cannot be negated.

18. In light of the discussion as made above, I do not find any justification in interfering the orders passed by SOC and DDC. Counsel for the petitioners fails to substantiate his submissions in assailing the orders passed by SOC and DDC. Opportunity of Smt. Savatri Devi, to be heard, cannot be denied on the pretext of technicalities, who has vested interest in the property in question being a legatee as well as grand daughter of recorded tenure holder. I do not find any illegally, perversity or error in the impugned orders passed by SOC and DDC to warrant the indulgence of this Court in exercising extraordinary jurisdiction under Article 226 of the Constitution of India.

19. Present writ petition is devoid on merits and is, accordingly, dismissed.

(2021)08ILR A403
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2021

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ B No. 695 of 2021

Shankarlal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Dwivedi

Counsel for the Respondents:
C.S.C., Sri Ashish Kumar Mishra, Sri Shri Krishna Mishra, Sri Ajay Mishra

A. UP Consolidation of Holdings Act, 1953 – Sections 4, 6 & 12 – Consolidation operation in pursuance of notification u/s 4 initiated – Subsequently notification u/s 6 issued to cancel the notification u/s 4 – Effect – Relevancy of the final order passed during consolidation proceeding – Held, the provisions u/s 6(2) of the Act left no room for doubt that final orders, if any, passed during the consolidation proceeding, on or before the cancellation of notification as provided u/s 6(1), shall be given effect to the revenue records and accordingly, final revenue records shall be maintained after cessation of the area to be under consolidation operations – Consolidation authorities are under legal obligation to correct the revenue record in pursuance of the final order passed by the Assistant Consolidation Officer. (Para 8, 14 and 16)

Writ petition disposed of. (E-1)

Cases relied on :-

1. Madan Shah & ors. Vs Deputy Director of Consolildation, Aligarh, Camp Mathura & ors., 2007 (102) RD 809

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

1. Heard Shri Pramod Kumar Dwivedi, learned counsel for the petitioner, Shri Ashish Kumar Mishra, learned Advocate, holding brief of Shri Krishna Mishra, learned counsel for the impleadment applicants, learned Standing Counsel representing the respondent nos. 1 to 3 and perused the record.

2. In view of the peculiar facts and circumstances of the present case and the order proposed to be pased hereunder, this Court proceeded to finally decide this matter at the admission stage with the consent of the learned counsels for the parties, without calling for their respective affidavits, with liberty to the respondents to move recall application, in case, the details of the facts as given in the present writ petiton are found incorrect.

Order on Civil Misc. Impleadment Application No.3 of 2021

1. The instant impleadment application has been moved by three applicants namely Rajendra Prasad, Ram Raja & Rajesh sons of Jawahar Lal, claiming their right and title over the property in question i.e. Plot No. 4875/1 area 0.69 hectare on the basis of succession that originally plot No. 4875 area 4-5-0 was recorded in the name of Gaya Prasad, who was grand-father of the present applicants. During Consolidation proceeding, by manipulation, some portion of original plot has incorrectly been recorded as Plot No. 4875/1 area 0.69 hectare. Applicants are in the possession over the entire area i.e. 4-5-0 of Plot No. 4875 and they are paying revenue rent. Accordingly, they wants to be impleaded in the array of the parties in the present writ petition and desired to be heard in opposition and claims that their presence before this Court is necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the present matter.

2. Per contra, learned counsel for the petitioner submits that the name of Gaya Prasad (predecessor in the interest of the applicants) was already ordered to be deleted from the revenue record vide order dated 14.11.1977 passed by Consolidation Officer and in his place names of Dwarika Prasad and three others were ordered to be recorded over Plot No. 4875/1 area 0.69 hectare. At subsequent stage, Dwarika Prasad and his brothers had executed a registered sale deed dated 22.08.1983 in favour of Smt. Battu Devi, who had also got her name mutated in the revenue record and, being recorded as tenure holder, she had executed a registered sale deed dated 22.02.2005 in favour of Shankarlal (petitioner herein) who has also got the mutation order dated 07.04.2005 passed by Assistant Consolidation Officer in a proceeding under Section 12 of U.P. Consolidation of Holdings Act, 1953(in brevity "U.P.C.H. Act").

3. In this view of the matter, since 14.11.1977, name of the predecessor in the interest of the present applicants was deleted by the judicial order. At this juncture, right and title of the present applicants cannot be recognized by this Hon'ble Court, directly, without it's adjudication by the competent Courts. Present applicants, in case, have any grievance with respect to the entries and judicial orders passed in favour of the

petitioner and predecessors in his interest, they can file an appropriate application/suit before the competent Courts to get their right and title declared by way of taking suitable steps under the law as advised.

4. In this conspectus as above, I do not find any force in the impleadment application moved by the applicants. Their presence before this Court cannot be said to be necessary in order to enable the Court effectively and completely to adjudicate upon and settle the question involved in present writ petition. As such, they cannot be said to be vitally interested person in the present matter, and have got no right to be heard in opposition. Accordingly, instant impleadment application is **rejected** *in limine.*

Order on Writ Petition

1. By means of this writ petition, petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India beseeching the mandamus commanding District Magistrate/ District Consolidation Officer, Banda, (respondent No.3) to record his name in the revenue record over the Plot No. 4875/01 in pursuance of the order dated 07.04.2005 passed by Consolidation Officer, Banda, in case No. 347 & 359 under Section 12 of U.P.C.H., Act.

2. Grievance of the petitioner is that Revenue Authorities are illegally averting their official duty to implement the order dated 07.04.2005 passed by Assistant Consolidation Officer, Banda, in proceeding under Section 12 of U.P.C.H. Act.

3. Factual matrix, as shown in writ petition, is that property in question i.e. Plot No. 4875/01 situated in village Oran, Tehsil-Atarra, District-Banda, was recorded in the name of Gaya Prasad. In the year 1972 village was notified under Section 4 of U.P.C.H. Act. During the consolidation proceeding name of Gaya Prasad was ordered to be deleted, vide order dated 14.11.1979 passed by the Consolidation Officer in Case No.10683, and in his place names of Dwarika Prasad, Chhotelal, Baldeo Prasad & Awadhesh sons of Bhagwat Prasad were ordered to be recorded. In compliance of the aforesaid order, names of Dwarika Prasad and others were mutated in the consolidation record. At subsequent stage, aforesaid recorded persons namely Dwarika Prasad and others had executed a registered sale deed dated 22.08.1983 in favour of Smt. Battu Devi w/o Mahaveer qua property in question who had also got her name recorded in the consolidation record, in proceeding under Section 12 of U.P.C.H. Act, vide order dated 06.12.1983 passed by Consolidation Officer in Case No. 441. Smt. Battu Devi had also executed a registered sale deed dated 22.02.2005 in favour of present petitioner namely Shanker lal with respect to the 1/10rd of her share of Plot No. 4875/01 measuring area 0.069 Hectare. On the basis of the aforesaid sale deed dated 22.02.2005, Assistant Consolidation Officer has passed an order dated 07.04.2005 under Section 12 of U.P.C.H. Act in case No. 346 & 359 for recording the name of the present petitioner in place of Smt. Battu Devi.

4. Submission made by learned counsel for the petitioner is that order dated 07.04.2005 passed under Section 12 of U.P.C.H. Act has attained finality between the parties, inasmuch as same has never been challenged before any competent Court by any aggrieved person, therefore, revenue

records should be corrected in implementation of order dated 07.04.2005 passed by Assistant Consolidation Officer in favour of present petitioner. It is further submitted that earlier notification under Section 4 of U.P.C.H. Act was cancelled by the subsequent notification dated 07.06.2016 u/s 6(1) of U.P.C.H. Act with respect to the village-Oran, where property in question situates. He has emphasised the consequential effect of cancellation of notificiation as enshrined u/s 6(2) of U.P.C.H. Act and submits that after cancellation of notification with respect to any area/unit, such area shall, subject to final orders relating to the correction of land records, if any, passed on or before the date of such cancellation, cease to be under consolidation operations, with effect from the date of such cancellation.

5. In the light of the submission made by learned counsel for the petitioner, it would be appropriate to discuss the scope of Section 6 to expore the possiblity of the implementation of order passed by the Consolidation Officer.

Provisions of Section 6 of U.P.C.H. Act is reproduced as under:-

"(1) It shall be lawful for the State Government at any time to cancel the [notification] made under Section 4 in respect of the whole or any part of the area specified therein.

"(2) Where a [notification] has been cancelled in respect of any unit under sub-section (1), such area shall, subject to the final orders relating to the correction of land records, if any, passed on or before the date of such cancellation, cease to be under consolidation operations with effect from the date of the cancellation."

6. Section 6(1) of U.P.C.H. Act empowers the State Government to cancel the notification issued under Section 4 of U.P.C.H. Act by which particular area or unit brought under the consolidation operation. The consequential effect of the cancellation of notification is enunciated under sub-Section 2 of Section 6 of U.P.C.H. Act which denots that, from the date of cancellation of the notification area/unit shall ceased to be under consolidation operation subject to final orders passed with regard to correction of records.

7. To avert any complications due to the cancellation of the notification promulgated under Section 4 of U.P.C.H. Act, Legislation has made the provisio under Section 6(2) of U.P.C.H. Act. Phrase "subject to the final orders relating to the correction of land records" as used u/s 6(2) of U.P.C.H. Act explicity connotes wider effect of notification u/s 6(1) of U.P.C.H. Act. After cancellation of notification, land records, inluding basic year entries should be corrected in accordance with the orders, passed during the consolidation proceedings, which have attained the finality.

8. Provisions u/s 6(2) of U.P.C.H. Act, left no room for doubt that final orders, if any, passed during the consolidation proceeding, on or before the cancellation of notification as provided u/s 6(1) of U.P.C.H. Act, shall be given effect to the revenue records and, accordingly, final revenue records shall be maintained after cessation of the area to be under consolidation operations.

9. Dealing with the effect of cancellation of notification, the provisions as embodied under proviso 2 of Section 5 of U.P.C.H. Act is also required to be considered, which run as below:-

"Provided further that on the issue of a notification under sub-section (1) of Section 6 in respect of the said area or part thereof, every such order in relation to the land lying in such area or part as the case may be, shall stand vacated;

10. Bare reading of the second provisio to Section 5(2) of U.P.C.H. Act denots the consequential effect in those matters where final orders have not been passed on or before the cancellation of the notification. It provides that where the lis is pending and final order could not be passed relating to the correction of land record before cessation of unit to be under consolidation operation due to notification u/s 6(1) of U.P.C.H. Act, in that condition, proceeding of pending suits/cases, in which the order of abatment had been passed due to enforcement of notification under Section 4 of U.P.C.H. Act, shall stands revived. Therefore, all the pending proceedings which are abated under Section 5(2)(a) of U.P.C.H. Act shall be revived and abatement order shall be vacated after notification under Section 6(1) of U.P.C.H. Act, in case, no final order could be passed for the correction of land record during the consolidation proceedings. Legislation is never intended to prolong the litigation or to promote the multipicity of the proceeding. It has also never intended to leave the right and title of the parties undecided.

11. Learned counsel for the petitioner, in support of his case, has placed reliance on order passed by coordinate Bench of this Court in Civil Misc. Writ Petition No. 2980 of 1994 (Madan Shah and others Vs. Deputy Director of Consolildation, Aligarh, Camp Mathura and others), 2007 (102) RD 809. Relevant portion of the aforesaid order is quoted below:-

"4.While sub-section (1) of Section 6 deals with the power of the State Government to cancel the notification under Section 4 at any time sub section (2) to section 6 deals with the effect a notification under Section 6(1) would have upon the consolidation proceedings. It provides that the area shall cease to be under consolidation operations with effect from the date of the cancellation but this is subject to any final orders relating to correction of land records. The question which arises is whether the order passed by the Dy. Director of Consolidation in a revision arising out of an objection under Section 9 is a final order relating to correction of land records. The words " orders relating to correction of land records " as used in Section 6(2) are wide and would also cover orders passed in title disputes under Section 9A because these orders can direct change of basic year entries. It is therefore necessary to examine the relevant provisions of the Consolidation of Holdings Act which confer finality upon orders passed in the consolidations proceedings. An order passed under Section 9A deciding objection relating to title is appelable under Section 11. Sub-section (1) of Section 11 provides that the order of the Settlement Officer Consolidation except as otherwise provided shall be final A revision lies against the order of the Settlement Officer Consolidation to the Dy. Director of Consolidation under Section 48 of the Act. It is thus clear that unless a revision is filed the order of the Settlement Officer Consolidation passed under sub-section (1) of Section 11 shall be final. If a revision is filed the order of the Dy. Director of Consolidation shall be final. The effect of the notification under sub-section (1) of Section 6 envisaged in sub-section (2) is that the consolidation operations shall

cease in the village subject to the decision of the appeal or where a revision has been preferred to the order in the revision. If the legislature intended that all orders passed before issuance of the notification under Section 6 be set at naught it would not have specified in sub-section (2) that the consolidation operations shall cease in the area from the date of cancellation nor made the ceasure subject to final orders relating to correction of records passed before the date of the notification. When a notification under Section 4(2) is published proceedings for correction of records and a suit or proceeding in respect of declaration of rights or interest in any land shall on an order being passed by the court where it is pending stand abated. The effect of the 2nd proviso of sub-section 2 of Section 5 is that on the issuance of notification under sub-section (1) of Section 6 an order of abatement shall stand vacated and the proceedings will revive. Reading this proviso with Section 6 (2) it appears that the revival of the proceedings contemplated is in cases where final orders have not been passed. In cases where final orders have been passed sub-section (2) of Section 6 itself provides that the ceasure of the consolidation operations will be subject to such final orders. Sub-sections (1) and (2) of Section 6 and the Second proviso of sub-section (2) of Section 5 have to be read together to determine this effect. Thus read it is clear that it is only where final orders relating to correction of land records have not been passed that the proceedings of pending suit in which the order of abatement had been passed shall stand revived. In cases where a final order relating to correction of land records has been passed the final order would be affected by notification under Section 6(1) and provisions of Section 49 of the Consolidation of Holdings Act would become applicable."

12. Learned counsel for the petitioner has drawn the attention of this Court towards the order dated 13.07.2016 passed by another co-ordinate Bench of this Court in Writ B 3121/2016(Annexure No.6) wherein identical matter has been considered by the Court and issued a direction to the Revenue Court/Tehsildar to give effect to the orders passed by consolidation authority. Relevant portion of order dated 13.07.2016 is quoted below:-

"Before this court, the petitioner has pressed relief no.2. Section 6(2) of U.P. Consolidation of Holdings act, 1953 (hereinafter referred to as the 'Act') provides that where a notification has been cancelled in respect of any unit under Sub Section 1, such area shall, subject to final orders relating to correction of land records, if any, passed on or before the date of such cancellation, cease to be under consolidation operation, w.e.f. the date of cancellation. Thus, under Section 6(2), final orders relating to corrections of land records, if any, passed on or before the date of such cancellation, cease to be under consolidation operation, w.e.f. the date of cancellation. Thus, under Section 6(2), final orders relating to correction of land records were saved, even after cancellation of the consolidation proceeding.

In such circumstances, the revenue authorities may give effect to the orders relating to correction of land records, which have become final before the consolidation authorities.

The petitioner is disposed of directing the Revenue Court/Tahsildar to give effect to the orders of consolidation authorities, which have become final in respect of correction of land records, according to the provisions of Section 6(2) of the Act."

13. Learned counsel for the petitioner has also drawn attention of this Court towards Government Order dated 12.12.2014 with respect to implementation of judicial orders passed during consolidation proceeding, before notification under Section 6(1) of the U.P.C.H. Act, which is quoted as under:-

प्रेषक,
चकबन्दी आयुक्त
उत्तर प्रदेश,
लखनऊ।
सेवा में,
समस्त जिलाधिकारी/जिला उप संचालक चकबन्दी
उत्तर प्रदेश।
पत्रांक– 5049/जी–419/2013–13 दिनांक 12 दिसम्बर 2014

विषय– उत्तर प्रदेश जोत चकबन्दी अधिनियम की धारा 6(1) के अतंर्गत प्रख्यापन के पश्चात चकबन्दी प्रकिया के अतंर्गत पारित न्यायिक आदेशों के प्रभाव के सम्बन्ध में।

महोदय,

प्रायः देखने में आता है कि उत्तर प्रदेश जोत चकबन्दी अधिनियम 1953 की धारा 6(1) के अतंर्गत प्रख्यापन के पश्चात चकबन्दी प्रकिया के अन्तर्गत पारित आदेशों के प्रभाव के सम्बन्ध में भ्रम की स्थिति रहती है। जबकि इस सम्बन्ध में निदेशालय स्तर से पूर्व में परिपत्र संख्या 2101/जी–415/2012–13 दिनांक 09.04.2013 जारी कर आवश्यक निर्देश जारी किये जा चुके है। मा0 राजस्व परिषद के पत्र संख्या ई–2633/4–विविध/2011 दिनांक 01.11.2012 के माध्यम से उक्त के सम्बन्ध में यह दिशा निर्देश दिये गये है कि किसी ग्राम में उत्तर प्रदेश जोत चकबन्दी अधिनियम की धारा 6(1) के प्रख्यापन की स्थिति में जब उक्त ग्राम में चकबन्दी प्रकिया प्रारम्भ हुई व जिस तिथि को धारा 6(1) लागू हुई, उस बीच की अवधि में पारित 6(1) लागू हुई, उस बीच की अवधि में पारित न्यायिक आदेशों के अनुपालन हेतु तहसील कर्मियों को अधिनियम की धारा 6(2) में विद्यमान विधि के अन्तर्गत निर्देशित किया जाना चाहिए।

उत्तर प्रदेश जोत चकबन्दी अधिनियम की धारा 6(2) में व्यवस्था है कि जब उपधारा (1) के अधीन किसी कटक के सम्बन्ध में विज्ञप्ति रद्द कर दी जाये तो वह क्षेत्र उक्त रद्द करने के दिनांक पर या उससे पहले भूमि अभिलेखों में संशोधन से सम्बन्ध यदि कोई अन्तिम आज्ञा हो तो उसके अधीन रखते हुए रद्द के दिनांक से चकबन्दी क्रियाओं के अधीन न रह जायेगा अर्थात धारा 6(1) के प्रख्यापन के दिनांक को चकबन्दी प्रक्रिया के अन्तर्गत भूमि अभिलेखों से सम्बन्ध प्राधिकारियों द्वारा पारित वे सभी आदेश जिनके विरुद्ध कोई अपील/निगरानी सक्षम न्यायालय में विचाराधीन न हो तथा वे आदेश अन्तिम हो गये, प्रभावी रहेंगे।

अतः उपरोक्त परिप्रेक्ष्य में अनुरोध है कि उत्तर प्रदेश चकबन्दी अधिनियम 1953 की धारा 6(2) में दी गई, व्यवस्था एवं इस सम्बन्ध में भा0 राजस्व परिषद के पत्र दिनांक 01.11.2012 में दिये गये निर्देश के अनुसार आवश्यक कार्यवाही कराने का कष्ट करें।

भवदीय
ह0 अ0
चकबन्दी आयुक्त
उत्तर प्रदेश

14. In this view of matter, Consolidation authorities are under legal obligation to correct the revenue record after the cancellation of the notification under Section 4 of U.P.C.H. Act in accordance with the final orders which were passed and attained finality on or before the cancellation of notification as mentioned under Section 6(1) of U.P.C.H. Act. Present matter relates to the consequential effect of the cancellation of the notification wherein final order had already been passed to correct the revenue record. Therefore, petitioner has legal right to get his name recorded under the provisions of Section 6(2) of U.P.C.H. Act.

15. In the present matter, petitioner has given succinct description of facts that

vide order dated 14.11.1977, name of the recorded tenure holder was deleted and in his place names of Dwarika Prasad and three others were recorded over the plot in question. Subsequently, Dwarika Prasad and others have executed a registered sale deed in favour of Smt. Battu Devi, vendor of the present petitioner, who had also got her name mutated in record, in a proceeding under Section 12 of U.P.C.H. Act and at later stage, she had executed a registered sale deed dated 22.02.2005 to the extent of 9/10rd of her share in the property in question i.e. Gata No. 4871/01 area 0.069 Hectare in favour of present petitioner. On the basis of the aforesaid sale deed dated 22.02.2005, Assistant Consolidation Officer has passed an order dated 07.04.2005 under Section 12 of U.P.C.H. Act for recording the name of the present petitioner in place of his vendor. All the three orders passed by the consolidation Courts since 14.11.1977 have attained finality inasmuch as no one has challenged the aforesaid orders before the competent Court.

16. In this conspectus as above, claim of the petitioner to get his name recorded in the revenue record, in persuance of final order dated 07.04.2005 passed by Assitant Consolidation Officer, after notification under Section 6(1) of the U.P.C.H. Act, is justified in the eyes of the law and authorities concerned, are under legal obligation to implement said order passed by the competent Court, which became final between the parties.

17. As such, the instant writ petition is allowed with a direction to District Magistrate(respondent No.3) to ensure the implementation of order dated 07.04.2005, in the revenue record, passed by Assistant Consolidation Officer, Banda, in Case No. 347 & 359 under Section 12 of U.P.C.H. Act, in the light of the provisions as contained under Section 6(2) of U.P.C.H. Act and direction issued under the Government order dated 12.12.2014 expeditiously, preferably within a period of two months from the day of production of computerized copy of this order along with a fresh representation which shall be moved by the petitioner within a period of three weeks' from today and, accordingly, issue extract of fresh khatauni qua Gata No. 4875/1 situated in Village Oran, Tehsil-Atarra, Distrcit-Banda.

18. The petitioner shall file computer generated copy of this order downloaded from the official website of High Court Allahabad supported by an affidavit, which shall be verified by the concerned authority from the website of the High Court.

19. With the aforesaid observations, the instant writ petition is **disposed of.**

(2021)08ILR A410
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2021

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ B No. 936 of 2021

Rajaram ...Petitioner
Versus
D.D.C./A.D.M. (E/R), Mahoba & Ors. ...Respondents

Counsel for the Petitioner:
Smt. Gaytri Rajput, Sri Dinesh Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Achal Singh, Sri Mannu Choudhary

A. UP Consolidation of Holdings Act, 1953 – Sections 19 & 20(1) – Provisional Consolidation Scheme – Allotment of three Chak – Validity – Held, Consolidation Courts are empowered u/s 19 (1)(e) of the Act for carving out third chak to the tenure holder and in case it is more than that, approval in writing of Deputy Directory of Consolidation is required – There is no impediment in allotting the third chak to any tenure holder – High Court found no illegality in allotment of third chak in favour of the petitioner, which is duly permissible under the law. (Para 12 and 13)

B. UP Consolidation of Holdings Act, 1953 – Section 48 – Power of revision – Scope – Held, power u/s 48 of the Act not only authorizes the revisional court to examine any finding recorded by any subordinate court with respect to the fact or law but also empowered it to re-appreciate any oral or documentary evidence. (Para 16)

Writ petition dismissed. (E-1)

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

1. Heard learned counsel for the petitioner, learned Standing Counsel for respondent no.1, 2 and Sri Mannu Chowdhary learned counsel for the respondent no.5 i.e. Gaon Sabha.

2. In view of the peculiar facts and circumstances of the case and the order proposed to be passed hereunder, this Court is proceeding to finally decide this matter at the admission stage, without putting notice to respondents.

3. Instant petition has been preferred challenging the impugned order dated 18.12.2020(Annexure-5) passed by the Deputy Director of Consolidation (respondent no.1) in Revision No.33 preferred by petitioner and also order dated 15.05.2019 (Annexuure No.3) passed by the Settlement Officer of Consolidation (respondent no.2) in Appeal No.26 preferred by Moti Lal (respondent no.3).

4. Facts give rise to this petition is that in provisional consolidation scheme petitioner has been preferred chak no.149 at two places. First chak was proposed on two plots i.e. plot no.253/2 min area 0.497 hectare and plot no.258/2 min area 0.332 hectare. Second chak was proposed over plot no.345 etc., total seven plots. As per case of the petitioner he was fully satisfied with the proposed chak and was consented having the same without any objection.

5. On the other had contesting respondent no.3, Moti Lal has been proposed chak no.114 at two places. His first chak was proposed over plot no.380/59 etc. and second chak was proposed over plot nos.342 and 380/40 min.

6. Feeling aggrieved respondent no.3 has filed objection under Section 20(1) of U.P. Consolidation of Holdings Act, 1953(in brevity UPCH Act), qua placement of second chak and made prayer for shifting it over plot no.404 and 406, which are his original holdings. Objection as mentioned above filed by respondent no.3 was allowed by Consolidation Officer vide its order dated 12.03.2019 (A-2), proposing him chak over plot no.404 min and 406 min in place of plot nos.380/62 and 380/59 from the first chak.

7. Being not satisfy, respondent no.3 has preferred appeal beseeching allotment of chak over plot nos.246/1 area 0.055 hectare and 246/2 area 0.684 hectare, including the area of embankment (Bandhi), which are his original holding, in place of his second chak which has been

carved out over plot no.342/0.381 min and 380/40 min.

8. Settlement Officer of Consolidation has allowed the appeal filed by respondent no.3, vide order dated 15.05.2019 (Annexure no.3), shifting his second chak over plot no.346 etc, including the area of embankment which belongs to him. In this view of the matter plot no.342 area 0.381 hectare and plot no.380/4 area 0.152 hectare has been taken out from the chak of the respondent no.3 and in its place, he has been proposed chak over plot no.346/1 area 0.045 hectare, plot no.346/2 area 0.163 hect. and plot no.347 area 0.410 hectare.

9. It appears that due to the aforesaid adjustment made by the Settlement Officer of Consolidation in the chak of respondent no.3, some prejudice caused to the petitioner who has, being aggrieved, filed revision before Deputy Director of Consolidation, registered as revision no.33(Raja Ram Vs. Moti Lal) (Annexure no.4.). Revision filed by the petitioner was clubbed alongwith the other revisions filed on behalf of the co-villagers which have been decided vide common judgement and order dated 18.12.2020 (Annexure no.5) passed by the Deputy Directory of Consolidation, which is under challenged before this Hon'ble Court.

10. It is submitted by learned counsel for the petitioner that Settlement officer of Consolidation has illegally interfered in the second chak of the petitioner, which consists of his original holdings i.e. plot no.346/1m 346/2 and 347 and has illegally carved out third chak over plot nos.377 and 378. Deputy Director of Consolidation has illegally affirmed the order passed by the Settlement Officer of Consolidation. It is further submitted that while dismissing the revision Deputy Directory of Consolidation has illegally made some minor alteration in the chak of petitioner with respect to plot no.346/2, 380/26, 377 and 378.

11. I do not find any substance in the submission made by the learned counsel for the petitioner challenging the creation of third chek and supervisory power of Deputy Directory of Consolidation making minor alteration in the chak of the chak holders. Learned counsel for the petitioner has failed to point out any irregularity or perversity in the order passed by the consolidation court or in proceedings and has failed to point out any violation of the provisions as enunciated under Section 19 of UPCH Act, as well.

12. Consolidation Courts are empowered under section 19 (1)(e) of UPCH Act for carving out third chak to the tenure holder and in case it is more than that approval in writing of Deputy Directory of Consolidation is required. The relevant provision of Section 19(1)(e) of UPCH Act is reproduced below:-

"[19. Conditions to be fulfilled by a Consolidation Scheme. - (1) A Consolidation Scheme shall fulfill the following conditions, namely, -

"(e) every tenure-holder is, as far as possible, allotted a compact area at the place where he holds the largest part of his holding:

provided that no tenure-holder may be allotted more chaks, than three except with the approval in writing of the Deputy Director of Consolidation:

Provided further that no consolidation made shall be invalid for the reason merely that the number of chaks allotted to a tenure-holder exceeds three;"

13. Proviso 1 and 2 to Section 19(1)(e) of UPCH Act. explicitly denotes that there is no impediment in allotting the third chak to any tenure holder; Even more than three chaks can also be permitted that too with the prior approval in writing of Deputy Directory of Consolidation. Meaning thereby no interference is warranted merely the reason that three or more than three chaks have been allotted to tenure holder, unless it is substantiated by the aggrieved tenure holder that due to allotment of the said chak, serious injury will caused to him, applying the provision, as discussed above.

14. This Court finds no illegality in allotment of third chak in favour of the petitioner, which is duly permissible under the law. Even otherwise, nothing has been demonstrated by the counsel for the petitioner as to what prejudice will cause to him due to carvation of third chak by the Settlement Officer of Consolidation. In dismissing the revision filed by petitioner Deputy Director of Consolidation has given a categorical finding that first chak allotted to the petitioner was carved out in his original holding i.e. plot no.253 min etc. which consists of measuring area 0.829 hectare and the second chak was also carved out in original holding of the petitioner i.e. plot nos.345 and 380/27min etc. measuring area 2.235 hectare, which includes original measuring area 1.016 hectare. So far his third chak is concerned it has been carved out over plot no.378 etc. measuring area 0.726 hectare, which includes original holding of the petitioner measuring area 0.378 hectare. In this view of the matter all the three chaks of the petitioner are consists of maximum area of the original holding belongs to him.

15. Demand of the petitioner qua shifting of chak from plot no.378 etc to plot no.346/1 and 346/2 etc has rightly been negatived by the D.D.C. with an observation that petitioner has allotted maximum area of his original holding in his chak. A very minor alteration has been made by D.D.C. in the third chak of petitioner over plot no.378 proposing change over plot no.346/2, 380/27 etc. It is observed by learned D.D.C. that due to aforesaid alteration the chak proposed over plot no.346/2 etc became measuring area 1.690 hectare which includes original holding of the petitioner measuring area 1.045 hectare. It is observed that said proposed area in his chak is more accommodating the area from his original holding i.e. more than the measuring area 1.016 hectare which has earlier been allotted to him from his original holding. Order passed by the D.D.C explicitly assigned the reasons in dismissing the revision filed by the petitioner who has been found, prima-facie, no grievance due to allotment of 3rd chak made by S.O.C. or the minor alteration in his chak made by the D.D.C.

16. In his supervisory jurisdiction under Section 48 of the UPCH Act, revisional court is empowered to satisfy himself as to the regularity of proceeding, or as to the correctness, legality or propriety of any order passed by any subordinate authority. Explanation 3 appended to Section 48 of the Act, which was introduced by U.P. Act no.3 of 2002(w.e.f. 10.11.1980), enunciate the vast power of revisional court to examine the correctness, illegality or propriety of any order. Power of the revisional court under section 48 of the UPCH Act not only authorizes him to examine any finding recorded by any subordinate court with respect to the fact or law but also empowered him to reappreciate any oral or

documentary evidence. Examining the finding given by D.D.C. in the light of the jurisdiction as enunciated u/s 48 of the Act, this Court do not find any illegality or perversity in the order passed by respondent no.1, who has made minor alteration in the chak carved out over plot no.380/27, 378 etc by providing larger area of original holding of the petitioner.

17. In this conspectus as discussed above, I do not find any merit in the present writ petition warranting indulgence of this Hon'ble Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India. Petition is totally devoid on merits, therefore, is accordingly dismissed. There is no order for cost.

(2021)08ILR A414
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD. 30.07.2021

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Criminal Misc. Bail Application No. 7399 of 2019

Trishul Chandra Jaiswal
...Applicant (In Jail)
Versus
Union of India ...Opposite Parties

Counsel for the Applicant:
Sri Vikrant Neeraj, Sri Ashok Kumar Pandey, Sri Chandra Kesh Mishra, Sri Krishna Nand Singh, Sri Satish Sharma

Counsel for the Opposite Parties:
Sri Ashish Pandey

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 439 -Narcotics Drugs and Psychotropic Substances Act, 1985-Sections8/20/27A/29/60 - application-rejection-applicants claims parity-mandatory provision u/s 37 of the Act is attracted-in the present case the recovered and seized contraband was 354.205 kgs. of ganja from two vehicles, which is much more than the commercial quantity- for the offences u/s 27A and 29 recovery from physical possession is not required-more so, applicant had been involved in four cases of same nature-on all occasions he obtained bail orders and misused the same repeatedly- merely long detention in jail does not entitle an accused to be enlarged on bail.(Para 1 to 14).

B. The scheme of the section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained u/s 439 of the Cr.P.C., but is also subject to the limitation placed by section 37 which commences with non-obstante clause. the operative portion of the said section is in negative form prescribing the enlargement of bail to any person accused of commission of an offence under the act, unless twin conditions are satisfied. the first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. if either of these two conditions is not satisfied, the ban for granting bail operates.(Para 8,9)

C. When a stand was taken that the accused was a history sheeter, it is imperative for the Court to scruitinize every aspect and not capriciously record that the accused is entitled to be released on bail on the ground of parity.(Para 13)

The application is rejected. (E-5)

List of Cases cited:

1. Chandigarh Administration Vs Jagjit Singh (1995) AIR SC 705

2. Satyedra Singh Vs St. of U.P. (1996) A. Cr. R. 867

3. U.O.I .Vs Rattan Mallik @ Habul, (2009) 1 SCC (Cri) 831

4. U.O.I. Vs Shiv Shankar Kesari, (2007) 7 SCC 798

5. U.O.I .Vs Ram Samujh (1999) 9 SCC 429

6. St. of Ker.Etc. Vs Rajesh Etc. (2020) AIR SC 721

7. Vijay Kumar Vs Narendra & ors. (2002) 9 SCC 364

8. Ramesh Kumar Singh Vs Jhabbar Singh & ors. (2004) SCC (Cri) 1067

9. Girand Singh Vs St. of U.P. (2010) 69 ACC 39

10. Rajesh Ranjan Yadav Vs CBI thru its Director (2007) 1 SCC 70

11. Sudha Singh Vs St. of U.P. & anr. (2021) 4 SCC 781

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. Satish Sharma, learned counsel for the applicant, Mr. Ashish Pandey, learned Special Counsel for the Union of India/Narcotics Bureau of Investigation (for short "NCB"), as well as perused the entire material available on record.

2. This is the second bail application filed by the applicant. The first bail application filed by the present applicant has been rejected as withdrawn by this Bench vide order dated 24th October, 2019 passed in Criminal Misc. Bail Application No. 38334 of 2019.

3. The applicant-Trishool Chandra Jaiswal, has filed this second bail application with a prayer to enlarge him on bail in Case Crime No. 04 of 2016, under Sections 8/20/27A/29/60 of Narcotics Drugs and Psychotropic Substances Act, 1985 (for shot NDPS Act"), Police Station-Industrial Area, District-Allahabad/Prayagraj, during the pendency of the trial.

4. In nutshell, prosecution case is that the complainant is an Intelligence Officer of NCB, Zonal Office Lucknow. On 9th February, 2016 at 1000 hrs. Superintendent of NCB, Zonal Unit at Lucknow received a specific information through Zonal Director, NCB, Lucknow from STF, Allahabad telephonically that two persons resident of Manda, Allahabad are suspected to carry huge quantity of Ganja concealed in Mahindra pickup vehicles bearing Registrar Nos. U.P. 64 H 8131 and U.P. 66 K 6415. The said persons with the above said vehicles were to pass from Mawaiya ADA crossing between 1500-1700 hrs. The information was recorded in writing and passed to the higher authorities. As per the telephonic direction of Zonal Director, a team was constituted. The said team left Lucknow and reached Mawaiya ADA crossing at 1730 hrs. on the same day, where the said team met with the team of STF, Allahabad and Station House Officer, Police Station-Industrial Area, Allahabad along with Sub-Inspector. The Sub-Inspector, STF, Allahabad apprised the team of NCB that on 9th February, 2016 at 1645 hrs, they intercepted two pick up vehicles bearing registration nos. U.P. 64 H 8131 and U.P. 66 K 6415, wherein Ganja has been concealed. Two persons were also found in the vehicles. The team of NCB reached near the vehicles and on asking of the team of NCB, the person who was driving the vehicle no. U.P. 64 H 8131 disclosed his name as Narendra Kumar and the person who was driving the vehicle no. U.P. 66 K 6415 disclosed his identity as

Bhai Lal. The team of NCB requested the local person to witness the procedure of search and seizure under Section 50 of NDPS Act but no one agreed. Thereafter, notices under Section 50 of the NDPS Act were served upon Narendra Kumar and Bhai Lal to the said notice, both persons responded in writing that they do not want ot be searched before any Magistrate or Gazetted Officer and NCB team itself may carry out their personal search. Thereafter personal search of above persons were carried out. During search, two mobile phones, Rs. 1200/- and Rs. 1800/- were found from the personal possession of Narendra Kumar and Bhai Lal respectively. On the indication of Narendra Kumar and Bhai Lal, total 354.205 kgs. Ganja was recovered from both the vehicles. After recovery the statements of both the persons were recorded under Section 67 NDPS Act. In the said statements both the accused persons have admitted their involvement in illicit trafficking of above seized 354.205 kgs. Ganja, which they received from the Jungle area, 150 km. away from Sambalpur, Orissa by Trishul Chand Jaiswal (applicant herein), son of Vijay Lal Jaiswal and were to deliver the same to Trishul Chand Jaiswal (applicant herein) at Village-Tikari, Post-Babhani Hethar, Police Station_manda, District-Allahabad (U.P.). After recording of the confessional statements of both the persons under Section 67 of NDPS Act, the team of NCB arrested them. The name of Kapoor Chand Jaiswal, who happens to be brother of Trishul Chand Jaiswal, also surfaced during the course of investigation,. Some seized material has been sent for chemical examination of which the report of the Joint Director, Government Opium & Alkaloid Works, Ghazipur (UP) dated 26th February, 2016 was received in the Zonal Office, NCB at Lucknow on 29th February, 2016. The report shows that on the basis of chemical and cinematographic examination of the samples, it is concluded that each of the two sample under reference is Ganja (Cannabis) within the meaning of NDPS Act, 1985. The complaint case being Case Crime No. 04 of 2016, under Sections 8/20/27A/29/60 of Narcotics Drugs and Psychotropic Substances Act, 1985 (for shot NDPS Act"), Police Station-Industrial Area, District-Allahabad/Prayagraj has been filed before the District Judge by NCB against four persons, namely, Narendra Kumar, Bhai Lal, Trishul Chand Jaiswal and Kapoor Chand Jaiswal.

5. In support of the present bail application, learned counsel for the applicant submits that neither the applicant has been arrested from the spot nor any intoxicating material has been recovered from his possession. The applicant has been falsely implicated and story has been built up by the officers and official of NCB, STF Allahabad and the Police Station-Manda, Prayagraj in order to only obtain appreciation from their superior authorities. The mandatory provisions of NDPS act has not been complied with in the present case. Apart from the above, learned counsel for the applicant submits that the co-accused, Kapoor Chand Jaiswal has already been enlarged on bail by a Coordinate Bench of this Court vide order dated 13th December, 2018 passed in Criminal Misc. 18546 of 2018. The case of the present applicant is more or less identical to that of the aforesaid co-accused. As such, the present applicant may also be enlarged on bail. The learned counsel for the applicant has further argued that since the applicant is in jail since 3rd November, 2018, therefore, considering the long period of detention as well as the status of the trial which is not likely to be concluded in near future, the

applicant be enlarged on bail. The applicant has criminal antecedents of 13 cases but the same have satisfactorily been explained in paragraph-22 of the affidavit accompanying the present bail application. It is next contended that there is no possibility of the applicant of fleeing away from the judicial process or tampering with the witnesses and in case, the applicant is enlarged on bail, the applicant shall not misuse the liberty of bail.

6. Per contra, Mr. Ashish Pandey, learned counsel for the NCB has opposed the bail prayer of the applicant. He submits that the parity claimed by the learned counsel for the applicant is liable to be rejected on the ground that the grant of bail is not a mechanical act and principle of consistency cannot be extended to repeating a wrong order. If the order granting bail to an identically placed co-accused has been passed in flagrant violation of well settled principle, it will be open to the Judge to reject the bail application of the applicant before him as no Judge is obliged to pass orders against his conscience merely to maintain consistency. Mr. Pandey has also placed reliance upon following judgments of the Apex Court as well as of this Court:

a) In Chandigarh Administration Vs. Jagjit Singh; AIR 1995 SC 705, the Apex Court in paragraph-8 has held as follows:

"..... if the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal and unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order."

"..... The illegal/unwarranted action must be corrected, if it can be done according to law-indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law-but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition.

"..... Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law."

b**) In Special Leave Petition No. 4059 of 2000**: Rakesh Kumar Pandey Vs. Munni Singh @ Mata Bux Singh and another, decided on 12.3.2001, the Hon'ble Apex Court strongly denounced the order of the High Court granting bail to the co-accused on the ground of parity in a heinous offence and while cancelling the bail granted by the High Court it observed that:-

"The High Court on being moved, has considered the application for bail and without bearing in mind the relevant materials on record as well as the gravity of offence released the accused-respondents on bail, since the co-accused, who had been ascribed similar role, had been granted bail earlier."

c) In **Satyendra Singh Vs. State of U.P.**; 1996 A. Cr. R.867 also, the following observations have been made by this Court in para 16:-

"The orders granting, refusing or cancelling bail are orders of interlocutory nature. It is true that discretion in passing interim orders should be exercised judicially but rule of parity is not applicable in all the cases, where one or more accused have been granted bail or similar role has been assigned inasmuch as bail is granted on the totality of facts and circumstances of a case. Parity can not be a sole ground and is one of the grounds for consideration of the question of bail."

7. Even otherwise, Mr. Pandey, learned counsel for the NCB has pointed out that the Coordinate Bench while granting bail to the co-accused, Kapoor Chand Jaiswal of which, applicant claims parity, has not considered the mandatory provisions of Section 37 of NDPS Act. There is no dispute that commercial quantity of Ganja is 20 Kgs, but in the present case the recovered and seized contraband is 354.205 kgs. of Ganja from two Tata pickup vehicles, which is much more than the commercial quantity, therefore, provisions of section 37 of Narcotics Drugs & Psychotropic Substances Act are attracted in this case, which is in addition to section 439 of Cr.P.C. and mandatory in nature. He, therefore, submits that before granting bail for the offence under N.D.P.S. Act twin conditions as provided under Section 37(1)(b) (i) and (ii) have to be satisfied.

8. Mr. Pandey has referred to Section 37 of the N.D.P.S. Act, which is quoted herein below:

"37. Offences to be cognizable and non-bailable. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

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

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

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

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

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

9. Mr. Pandey submits that on several occasions, the Apex Court has considered the issue relating to provisions of Section 37 of the N.D.P.S. Act and after wholesome treatment laid down guidelines in this regards, which would be useful to quote herein-below:

i. The expression 'reasonable grounds' has not been defined in the N.D.P.S. Act, but the Apex Court in the case of **Union of India Vs. Rattan Mallik @ Habul,** reported in 2009 (1) SCC (Crl) 831, has settled the expression "reasonable grounds". Relevant paragraphs no. 12, 13 and 14 are quoted herein below:

"12.It is plain from a bare reading of the non-obstante clause in the Section and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by sub-clause (b) of sub- section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds".

13.The expression `reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide Union of India Vs. Shiv Shanker Kesari, 2007(7) SCC 798] Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

ii. In case of **Union of India Vs. Ram Samujh** reported in 1999 (9) SCC 429, the Apex Court has made following observations in paragraph 7 of the said judgment, which are reproduced herein below:-

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered and followed. It should be borne in mind that in murder case, accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or in inflicting death blow to number of innocent young victims, who are vulnerable: it causes deleterious effects and deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didien v.

Chief Secretary. Union Territory of Goa. [1990] 1 SCC 95 as under:

"24.With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportion in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in the wisdom has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine."

iii. In **Union of India Vs. Shiv Shankar Kesari**, reported in (2007) 7 SCC 798, the Apex Court elaborated and explained the conditions for granting of bail as provided under Section 37 of the Act. Relevant paragraph Nos. 6 and 7 are extracted here in below :

"6. As the provision itself provides no person shall be granted bail unless the two conditions are satisfied. They are; the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail. Both the conditions have to be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail.

7. The expression used in Section 37 (1)(b) (ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged."

iv. In recent decision of Apex Court in **State of Kerala Etc. Vs. Rajesh Etc. reported in AIR 2020 Supreme Court 721,** the Apex Court again considered the scope of Section 37 of N.D.P.S. Act and relying upon earlier decision in Ram Samujh (Supra) held as under:

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing

that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

10. So far as the next submission of the learned counsel for the applicant that since the applicant is in incarceration for a long time, he is liable to be released on bail is concerned, Mr. Pandey, the learned counsel for the NCB submits that the same also has no leg to stand on the ground that there is good authority to hold that mere long detention in jail does not entitle an accused to be enlarged on bail pending trial. It has been held to this effect in **Vijay Kumar vs. Narendra and others**, reported in **2002 (9) SCC 364, Ramesh Kumar Singh vs. Jhabbar Singh and others**, reported in 2004 SCC (Cri) 1067 and **Girand Singh vs. State of U.P.**, reported in 2010 (69) ACC 39.

11. Mr. Pandey, has also referred to the judgment of the Apex Court rendered in the case of **Rajesh Ranjan Yadav vs. CBI through its Director** reported in 2007 (1) SCC 70 wherein the Apex Court has held as under:

".....None of the decisions cited can be said to have laid down any absolute and unconditional rule about when bail should be granted by the Court and when it should not. It all depends on the facts and circumstances of each case and it cannot be said there is any absolute rule that the mere fact that the accused has undergone a long period of incarceration by itself would entitle him to be enlarged on bail".

In view of the aforesaid authority of law, learned A.G.A. states that mere long incarceration of the applicant cannot be a ground to enlarge him on bail in such a heinous offence like Section 304-B I.P.C. He, therefore, submits that the present second bail application is liable to be rejected.

12. Mr. Pandey, learned counsel for the NCB next submits that although the applicant has explained his criminal history in paragraph-22 of the affidavit accompanying the bail application and copies of which have been brought on record by means of the supplementary affidavit, he is a habitual offender. He has also been involved in four cases of same nature like NDPS Act. On all occasions, he has obtained bail orders and misused the same repeatedly. If this Court releases him on bail, he will misuse the same again by indulging in another case. Learned counsel for the NCB also submits that after registration of the present complaint case, the NCB has summoned the applicant repeatedly, but he has not responded to the same.

13. To the submission made by the learned counsel for the applicant that no intoxicating material has been recovered from the possession of the applicant, Mr. Pandey submits that the applicant is being prosecuted for the offences under Sections 27A and 29 of NDPS Act. For the offences under Section 27A and 29 of the NDPS

Act, recovery from the physical possession is not required. Thus, learned counsel for the NCB submits that on this ground alone, the applicant is not entitled for bail. In support of this ground, learned counsel for the NCB has placed reliance upon the latest judgment of the Apex Court in the case of **Sudha Singh Vs. State of Uttar Pradesh & Another** reported in (2021) 4 SCC 781. He has also referred paragraph nos. 8 to 11, which read as follows:

"8. This Court in Neeru Yadav vs. State of U.P. held that when a stand was taken ***that the accused was a history sheeter, it was imperative for the High Courts to scrutinise every aspect and not capriciously record that the accused was entitled to be released*** *on bail on the ground of parity.*

9. In Ash Mohammad vs. Shiv Raj Singh, this Court observed that when citizens were scared to lead a peaceful life and heinous offences were obstructions in the establishment of a well-ordered society, the courts play an even more important role, and the burden is heavy. ***It emphasized on the need to have a proper analysis of the criminal antecedents of the accused.***

10. In Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another, it was held that this Court ordinarily would not interfere with ***a High Court's order granting or rejecting bail to an accused. Nonetheless, it was equally imperative for the High Court to exercise its discretion judiciously, cautiously and strictly*** *in compliance with the ratio set by a catena of decisions of this Court. The factors laid down in the judgment were:*

(i) Whether there was a prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of accusations;

(iii) severity of the punishment in the event of a conviction;

(iv) danger of the accused absconding or fleeing, if granted bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of repetition of the offence;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger of justice being thwarted by grant of bail."

14. On the cumulative strength of the aforesaid, learned counsel for the NCB submits that this application of the applicant for grant of bail is liable to be rejected.

15. Having considered the submissions made by the learned counsel for the applicant, the learned counsel for the NCB, upon perusal of the evidence brought on record, authority of law mentioned herein above, the nature of the offence levelled against the applicant, the provisions of NDPS Act and criminal history of the applicant basically of the same nature, I do not find any good reason to exercise my discretion in favour of the accused-applicant. Thus, this second bail application stands rejected.

(2021)08ILR A423
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.08.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Criminal Misc. Anticipatory Bail Application U/S 438 No. 7661 of 2021

Pankaj Grover ...Applicant(In Jail)
Versus
Directorate of Enforcement, Govt. Of India, Lucknow ...Opposite Party

Counsel for the Applicant:
Priyam Kumar Singh, Amit Shukla, Dhruv Rajpurohit, Kshitij Agnihotri, Neha Shukla

Counsel for the Opposite Party :
A.G.S., Shiv P. Shukla

A. Criminal Law - Code of Criminal Procedure, 1973-Section 438 - Prevention of Money Laundering Act, 2002 - Section 3/4-grant of anticipatory bail-application-rejection-evidence collected revealed that the applicant in connivance with his father constantly manipulate the records to conceal the "Proceeds of Crime" and sold off half of the factory property after knowledge of initiation of present proceedings under PMLA-the written directions given by father to his son which were recovered during the search clearly establish that the said person in possession or use of the property acquired out of /in lieu of "Proceeds of Crime" in the instant case were prone to encash the same at the earliest opportunity to frustrate the proceedings under PMLA.(Para 1 to 37)

B. Usually socio-economic offenders abscond to some other country and after that it becomes difficult to bring them back and complete the criminal proceeding against them. their monetary sound condition particularly proceed of crime obtained not by honest working but by deceiving others causes more prone situation for influencing witnesses and other evidences. Furthermore, status, position of offender provides opportunity to influence investigation and prosecution. (Para 38)

The application is rejected. (E-5)

List of Cases cited:

1. Gurbaksh Singh Sibbia Vs St. of Punj. (1980) AIR SC 1632

2. Siddharam Satlingappa Mhetre Vs St. of Mah.(2011) 1 SCC 694

3. Jai Prakash Singh Vs St. of Bih. & Anr.(2012) 4 SCC 379

4. Nikesh Tarachand Shah Vs U.O.I .& anr.(2018) 11 SCC 1

5. Nagaland Senior Govt. Employees Welfare Assn. & ors. Vs St. of Nagaland & ors. (2010) 7 SCC 643

6. Molar Mal (dead) thru L.Rs. Vs M/s Kay Iron Works (Pvt) Ltd.(2000) 4 SCC 285

7. Dr. Shah Faesal & ors. Vs U.O.I. & anr.(2020) 4 SCC 1

8. Sh. Balchand Jain Vs St of M.P.(1976) 4 SCC 572

9. Satpal Singh Vs St. of Punj.(2018) 13 SCC 813

10. Sushila Aggarwal & ors . Vs St.(NCT of Delhi) & anr. (2020) 5 SCC 1

11. P. Chidambaram Vs ED (2019) 9 SCC 24

12. Okram Ibobi Singh Vs ED (2020) SCC OnLine Mani 365

13. Vinod Bhandari Vs Assistant Divector (2018) SCC OnLine MP 1559

14. St. of Guj. Vs Mohanlal Jitamalji Porwal (1987) 2 SCC 364

15. Himanshu Chandravadan Desai Vs St. of Guj. (2006) AIR SC 170

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. The present application under Section 438 Cr.P.C. has been filed seeking anticipatory bail apprehending arrest in ECIR No.01/PMLA/LZO/2012 dated 14.04.2012 (Complaint No.115 of 2018), under Section 3/4 of Prevention of Money Laundring Act, 2002, Enforcement Agency E.D., District Lucknow.

2. Shri I. B. Singh, learned Senior Counsel assisted by Shri Amit Shukla, learned counsel appearing for the applicant has submitted that the applicant is the erstwhile sleeping Director of M/s Surgicoin Medequip Pvt. Ltd. (for short 'company'). The respondent lodged the instant Enforcement Case Information Report (for short 'ECIR') against all the persons named in F.I.R. No. RC-1(A)/2012-CBI/SC.II/New Delhi Dated 02.01.2012. The applicant was never named in the predicate offence and no first information report was lodged against him. He has also submitted that the applicant was also not named in the ECIR and no role whatsoever has been assigned in the ECIR.

3. Shri Singh has submitted that the Hon'ble High Court vide order dated 15.11.2011 passed in W.P. No.3611/2011 (PIL), W.P. No.3301/2011 (PIL) and W.P. No.2647/2011 (PIL) directed the Central Bureau of Investigation (for short 'CBI') to conduct a Preliminary Enquiry in the matter of execution and implementation of National Rural Health Mission (for short 'NRHM') and utilization of funds at various levels during such implementation in the entire State of Uttar Pradesh and also directed to register regular cases in respect of the persons against whom prima facie cognizable offence is made out in accordance with law.

4. It is submitted that in pursuance to the aforementioned orders of the Court, five separate preliminary enquiries were registered in different branches of CBI. Preliminary Enquiry No.5(A)/2011/SC.II/CBI/New Delhi was registered on 19.11.2011 in respect of alleged irregularities in the utilization of funds of Government of India. On 02.01.2012, a first information report being R.C. No.1(A)/2012-C.B.I./SC II/New Delhi was registered by CBI under Sections 120-B r/w Sections 420, 409 of IPC and Section 13(2) r/w Section 13(1)(d) of the Prevention of Corruption Act against several persons. Further, Directorate of Enforcement lodged Enforcement Case Information Report No.ECIR/01/PMLA/LZO/2012 dated 14.04.2012 against all the persons named in FIR No.RC-1(A)/2012-CBI/SC.II/New Delhi. Thereafter, Directorate of Enforcement passed order of Provisional Attachment dated 05.04.2017 and provisionally attached two of the properties.

5. It is further submitted that Directorate of Enforcement preferred Original Complaint on 11.05.2017 under Section 5(5) of the Prevention of Money Laundering Act, 2002 (for short "PMLA") being OC No. 773 of 2017 before learned Adjudicating Authority, PMLA, New Delhi seeking confirmation of the Provisional Attachment Order No. 03 of 2017 dated 05.04.2017 which vide judgment and order dated 13.09.2017 confirmed the order of Provisional Attachment. Thereafter,

Directorate of Enforcement filed Complaint under Section 45 of PMLA against M/S Surgicoin Mediquip Pvt. Ltd., Naresh Grover, Pankaj Grover, Abhay Kumar Bajpai.

6. Shri Singh has submitted that Directorate of Enforcement misled the learned Special Judge, PMLA, Lucknow and only disclosed the confirmation of Attachment order by the Adjudicating Authority dated 13.09.2017. The complainant has chosen not to disclose before the Court the part setting aside of order dated 13.09.2017 passed by learned Appellate Authority, PMLA, New Delhi in Appeal No.FPA-PMLA-2058/LKW/2017 being preferred by Bajaj Finance Ltd. vide its judgment and order dated 28.06.2018.

7. It is submitted that learned Special Judge, PMLA, Lucknow vide its order dated 23.10.2018 on the basis of misrepresentation being made by the complainant took cognizance of Complaint No.115 of 2018 and passed summoning order against the applicant alongwith others. It is further submitted that learned Special Judge, PMLA issued bailable warrant which was served on the applicant and bonds were furnished by him. Thereafter, the applicant preferred an anticipatory bail application before the learned Special Judge, PMLA, Lucknow being Bail No.3812 of 2021, which was rejected/dismissed vide order dated 12.07.2021.

8. Shri Singh has submitted that accusations have been made only with ulterior motive and offence under Section 3 of PMLA cannot be made out against the applicant as none of the essentials of Section 3 has been met in the present case in respect of the applicant. It is submitted that Section 3 of PMLA mandates the existence of 'Proceeds of Crime', however, in the present case, there are no 'Proceeds of Crime'. Section 3 of PMLA is reproduced hereinbelow:

"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 [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering."

9. It is submitted that in the present case, the properties in question were acquired by the applicant in the year 2002 and 2001 and the alleged year of commission of crime is 2010-11. The properties in question were never owned by the applicant nor the sale consideration of the properties was paid by the applicant. Hence, no question of proceeds of crime arises.

10. Shri Singh has submitted that custodial interrogation is not required in the present case as the investigation has already been completed and complaint has been filed.

11. It is further submitted that the present complaint has been filed by the respondent after the lapse of eight years since lodging of ECIR and upon conclusion of enquiry, which was duly supported by the applicant as and when directed, hence, the custody of the applicant in any event is not required. It is also submitted that the maximum punishment provided for alleged commission of offence under Section 3 of PMLA is from 3 to 7 years in terms of

Section 4 of PMLA and the Hon'ble Supreme Court in a catena of judgments while citing Section 41 and 41A of Cr.P.C. has held that where the arrest is not required for the offences punishable upto 7 years, the arrest shall not be made.

12. It is submitted that pre-trial detention of the accused - applicant would serve no useful purpose since the accused - applicant has deep root in the society and there can be no apprehension of him absconding from justice or otherwise harassing or intimidating witnesses or hampering the trial.

13. In support of his argument, learned Senior Counsel has relied upon judgments of the Hon'ble Supreme Court in the case of ***Gurbaksh Singh Sibbia vv. State of Punjab - AIR 1980 SC 1632 & Siddharam Satlingappa Mhetre v. State of Maharashtra - (2011) 1 SCC 694,*** wherein it has been held that the Court dealing with a bail application should be satisfied that it is necessary to keep an accused behind bars for ensuring the presence during trial before refusing him bail and when this condition is absent, the right of the accused to liberty shall not be put on peril.

14. He has also relied upon another judgment of Hon'ble Supreme Court in the case of Jai Prakash Singh v. State of Bihar & Anr. - (2012) 4 SCC 379, wherein it is held that "parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the Court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the Court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty."

15 . Shri Singh has submitted that in view of the aforesaid ratio of the judgments, since the applicant does not have any previous criminal history and he is a respectable citizen, and there is no chance of his fleeing away from the justice, anticipatory bail may be granted to him.

16. Per Contra, Shri S.B. Pandey, learned Senior Advocate/Assistant Solicitor General of India assisted by Shri Shiv P. Shukla, Advocate appearing for respondent/Directorate of Enforcement has sought dismissal of the present anticipatory bail application and submitted that in terms of the twin conditions prescribed in Section 45 of PMLA, this Court could grant anticipatory bail to the applicant only after recording a satisfaction that there were reasonable grounds for believing that the applicant was not guilty of the alleged offence and that while on bail he was not likely to commit any offence. It is further submitted that though in ***Nikesh Tarachand Shah v. Union of India and Anr. - (2018) 11 SCC 1,*** Section 45(1) of PMLA, as it then stood, had been declared unconstitutional by the Hon'ble Supreme Court but the defect pointed out by the Hon'ble Supreme Court, which formed the basis to declare Section 45(1) as unconstitutional, had been cured by the Legislature through its Act No.13 of 2018. As per Act No.13 of 2018 the offending expression "punishable for a term of an imprisonment of more than three years under Part A of the Schedule" has been substituted with "under this Act". In view of the aforesaid amendment the twin conditions prescribed under Section 45(1) of the PMLA stood revived. The amended Section 45(1) of the PMLA has not been challenged by the applicant and therefore, the applicant as also this Court is bound by the aforesaid twin conditions.

17. It is further submitted that in terms of the law laid down by the Hon'ble Supreme Court in the case of ***Nagaland Senior Government Employees Welfare Association and others vs. State of Nagaland and others - (2010) 7 SCC 643***, a statute is deemed to be constitutionally valid till struck down by a competent Court. In the case of ***Molar Mal (dead) through L.Rs. v. M/s. Kay Iron Works (Pvt.) Ltd., - (2000) 4 SCC 285,*** the Hon'ble Supreme Court had held that where the constitutional validity of a provision was not under challenge such provision would bind the Court.

18. It is submitted that the observations of the Hon'ble Supreme Court in Nikesh Tarachand Shah's case (supra) that Section 45(1) of the PMLA would not apply to the grant of anticipatory bail were obiter as this was not the issue which the Hon'ble Supreme Court had been called upon to consider and decide. In any case the findings returned by the Hon'ble Supreme Court that Section 45(1) would not apply to anticipatory bails were per incuriam since Section 45(1) applied to bails which would also include anticipatory bails. In this regard he has placed reliance on the law laid down by the Hon'ble Supreme Court in ***Dr. Shah Faesal and Ors. vs. Union of India and Anr. - (2020) 4 SCC 1, Sh. Balchand Jain vs. State of Madhya Pradesh - (1976) 4 SCC 572, Satpal Singh vs. State of Punjab - (2018) 13 SCC 813 and Sushila Aggarwal and Ors. vs. State (NCT of Delhi) and Anr. - (2020) 5 SCC 1.***

19. Shri Pandey has submitted that a perusal of the voluminous oral and documentary evidence collected during the course of investigation has revealed that Naresh Grover, Director of M/s Surgicoin Medequip Pvt. Ltd. in connivance with his son Pankaj Grover (present applicant) has been constantly trying to manipulate the records to conceal the "Proceeds of Crime" and has also clandestinely sold off half of the factory property after knowledge of initiation of present proceedings under the PMLA. The written directions given by Naresh Grover to his son Pankaj Grover, which were recovered during the search clearly establish that the said persons in possession or use of the property acquired out of/in lieu of "Proceeds of Crime" in the instant case were prone to encash/sell the same at the earliest opportunity to frustrate the proceedings under this Act and thus, the properties identified in their hands in lieu of "Proceeds of Crime" were attached by PAO No.3/2017 dated 05.04.2017. It is vehemently submitted that in the instant case, the investigation has established that Proceeds of Crime to the tune of Rs.21,20,87,617/- has been generated.

20. It is submitted that the investigation has further revealed that out of the said "Proceeds of Crime" a sum of nearly Rs.10 Crore has been paid by way of bribe/commission to various officials and ministers and their associates leaving the balance "Proceeds of Crime" of about Rs.11 Crore in the hands of M/s Surgicoin Medequip Pvt. Ltd. However, the said sum has been siphoned off by manipulating records and showing fictitious transactions to frustrate the proceedings under PMLA. Moreover, the allegation in respect of the balance remaining out of the "Proceeds of Crime" in the hand of M/s Surgicoin Medequip Pvt. Ltd. is also contained in two other ECIRs registered by the Department bearing ECIR No.06-07/PMLA/LKZO/2012 both dated 14.04.2012 is nearly Rs.8.65 Crore. Thus, the cumulative balance of the "Proceeds of

Crime" in the hands of M/s Surgicoin Mediquip Pvt. Ltd. is over Rs.19 Crore

21. It is submitted that in the case of ***P. Chidambaram v. Directorate of Enforcement - (2019) 9 SCC 24,*** the Hon'ble Supreme Court has held that the power under Section 438 Cr.P.C. was an extraordinary power and the same was to be exercised sparingly. It is also held that privilege of the pre-arrest bail should be granted only in exceptional cases.

22. It is submitted that the present applicant is involved in a serious offence and his custodial interrogation is essential to know as to whether other benefits have been received by him from NRHM scheme scandal or from any other influential person directly or indirectly, whether the applicant has diverted his ill-gotten money to anybody else. It is further submitted that economic offence constitute a class apart having serious social ramifications and there being prima-facie materials to show the applicant involvement in the economic offence with larger scale conspiracy, his application for anticipatory bail deserves to be rejected.

23. I have heard learned counsel for the parties and perused the records.

24. Learned Assistant Solicitor General for the respondent (Directorate of Enforcement) opposes the prayer for grant of anticipatory bail on the ground that the offence is grave in nature. He has also drawn my attention to the amended provisions of PMLA and submitted that the Hon'ble Supreme Court in the case of Nikesh Tarachand Shah (supra) struck down Section 45 of the PMLA, 2002, so far as it imposes further two conditions for release on bail, to be unconstitutional is concerned, he has submitted that now the Government has brought an amendment in the Finance Act, 2018, which has come into effect from 19.4.2018 to Section 45(1) of the PMLA, thereby inserting words "under this Act' in Section 45(1) of PMLA. He has submitted that in view of the said amendment, the original Sub-section (ii) of Section 45(1) which imposes the said twin conditions automatically stands revived and the said condition therefore, remained in the statute book and hold the field even as of today for deciding the application for bail/anticipatory bail by an accused under PMLA and the judgment delivered by the Hon'ble Supreme Court in the case of Nikesh Tarachand Shah (supra) has become ineffective and, therefore, the prayer for anticipatory bail of the applicant has to be considered in view of the amended provision of Section 45(1) of the PMLA.

25. The Hon'ble Supreme Court in the case of Nikesh Tarachand Shah (supra) has in unequivocal terms held in para 44 that "we have struck down Section 45 of the Act as a whole'. It is further held by the Hon'ble Supreme Court in para 45 that, "we declare Section 45(1) of the PMLA in so far as it imposes two further conditions for release on bail to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India."

26. In the case of ***Okram Ibobi Singh Vs. The Directorate Enforcement - 2020 SCC OnLine Mani 365***, the High Court of Manipur at Imphal has held that it can be easily deciphered, on comparative reading of Section 45 (1) of the PMLA, pre-amendment and post amendment, that Clause (ii) of sub- Section (1) remained as it stood before amendment. The issue which arises for consideration is as to

whether the Hon'ble Supreme Court's decision in case of Nikesh Tarachand Shah (supra) can be said to have lost its significance because of the aforesaid amendment in Section 45(1) of the PMLA. The Court after considering submission of both sides and the law laid down in case of Nikesh Tarachand Shah (supra), and also referring to several decisions has held that the Hon'ble Supreme Court has taken into consideration the illustrations while arriving at a conclusion that the twin conditions is unconstitutional. It was observed that the Hon'ble Supreme Court has clearly held that indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution of India. In the background, it is to be seen as to whether the amendment introduced in Section 45 of the PMLA shall amount to reframing the entire Section 45 and thereby reviving and resurrecting the requirement of twin-conditions under sub-Section (1) of Section 45 of the PMLA for grant of bail. In view of clear language used in paragraph 46 of the Hon'ble Supreme Court's decision in case of Nikesh Tarachand Shah (supra), the Court has no hesitation in reaching a definite conclusion that the amendment in sub-Section (1) of Section 45 of the PMLA introduced after the Hon'ble Supreme Court's decision in the case of Nikesh Tarachand Shah (supra) does not have the effect of reviving the twin-conditions for grant of bail, which have been declared ultra vires Articles 14 and 21 of the Constitution of India.

27. In the case of ***Vinod Bhandari v. Assistant Director - 2018 SCC OnLine MP 1559***, the High Court of Madhya Pradesh has held that the original Section 45 has neither revived nor resurrected by the Amending Act and, therefore, as of today there is no rigor of said two further conditions under original Section 45(1)(ii) of PMLA for releasing the accused on bail under the said Act.

28. In view of the above, it can safely be concluded that the twin conditions as imposed by Section 45 of PMLA cannot be looked into while deciding the bail/anticipatory bail application as the same are violative of Articles 14 and 21 of Constitution of India. Thus, the contention advanced by Shri Pandey in respect of applicability of Section 45 cannot be accepted.

29. Learned Assistant Solicitor General for respondent to oppose the prayer of pre-arrest bail has laid much emphasis on the fact that since the applicant has been indicted in an economic offence and sufficient materials are there showing his indictment in the aforesaid serious offence, his custodial interrogation is needed to unearth the involvement of any other persons or the larger angle of conspiracy in commission of the offence alleged to have been committed by the applicant. In support of his contention he has placed reliance on a decision of the Hon'ble Supreme Court in the case of P. Chidambaram (supra).

30. The importance and relevance of custodial interrogation of the accused in a case of the present nature and also that the Court should be loathed in grant of bail/pre-arrest bail in respect of persons indicted in economic offences has been elaborated by the Hon'ble Supreme Court in P. Chidambaram's case (supra) as follows:

"76. In Siddharam Satlingappa Mhetre v. State of Maharashtra (supra), the Supreme Court laid down the factors and parameters to be considered while dealing

with anticipatory bail. It was held that the nature and the gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused very carefully. It was also held that the court should also consider whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

77. After referring to Siddharam Satlingappa Mhetre judgment and observing that anticipatory bail can be granted only in exceptional circumstances, in Jai Prakash Singh v. State of Bihar, the Supreme Court held as under : (SCC p.386, para 19)

"19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See D.K. Ganesh Babu v. P.T. Manokaran, State of Maharashtra v. Modh. Sajid Husain Mohd. S. Husain and Union of India v. Padam Narain Aggarwal.)

Economic Offences:

78. Power under Section 438 Code of Criminal Procedure being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In Directorate of Enforcement v. Ashok Kumar Jain, (1998) 2 SCC 105, it was held that in economic offences, the Accused is not entitled to anticipatory bail.

79. The learned Solicitor General submitted that the "Scheduled offence" and "offence of money laundering" are independent of each other and PMLA being a special enactment applicable to the offence of money laundering is not a fit case for grant of anticipatory bail. The learned Solicitor General submitted that money laundering being an economic offence committed with much planning and deliberate design poses a serious threat to the nation's economy and financial integrity and in order to unearth the laundering and trail of money, custodial interrogation of the Appellate is necessary.

80. Observing that economic offence is committed with deliberate design with an eye on personal profit regardless to the consequence to the community, in State of Gujarat v. Mohanlal Jitamalji Porwal, (1987) 2 SCC 364, it was held as under:

5. ..... The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of

the damage done to the national economy and national interest.....

81. Observing that economic offences constitute a class apart and need to be visited with different approach in the matter of bail, in Y.S. Jagan Mohan Reddy v. CBI, (2013) 7 SCC 439, the Supreme Court held as under:

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

35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the Accused, circumstances which are peculiar to the Accused, reasonable possibility of securing the presence of the Accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations.

82. Referring to Dukhishyam Benupani, Assistant Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria, (1998) 1 SCC 52, in Enforcement Officer, Ted, Bombay v. Bher Chand Tikaji Boara, (1999) 5 SCC 720, while hearing an appeal by the Enforcement Directorate against the order of the Single Judge of the Bombay High Court granting anticipatory bail to the Respondent thereon, the Supreme Court set aside the order of the Single Judge granting anticipatory bail."

31. Responding to the aforesaid contention of Shri Pandey, learned Senior Counsel appearing for the applicant by placing reliance on several judgments of the Hon'ble Supreme Court has submitted that there is no restriction in Section 438 Cr.P.C. to entertain a prayer for anticipatory bail in respect of a person accused in economic offence. There is no such prohibition to entertain such prayer in respect of accused person indicted in economic offences in Section 438 of Cr.P.C., provided the offence committed is non-bailable one. It is only in respect of offences as enumerated under Section 438(4) of Cr.P.C. and also in respect of offence under special statute wherein jurisdiction under Section 438 of Cr.P.C. has been specifically ousted, even if the offences are non-bailable, a person cannot invoke the jurisdiction under Section 438 of Cr.P.C. seeking pre-arrest bail. In the case of Sushila Aggarwal (supra) the Hon'ble Supreme Court in paragraphs-69, 70 and 71 have held as follows:--

"69. It is important to notice, here that there is nothing in the provisions of Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time period, or in terms of the nature of the offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref Chandra Mohan v. State of Uttar Pradesh). In Reserve Bank of India v. Peerless

General Finance and (1967) 1 SCR 77 Investment Co. Ltd., the relevance of text and context was emphasized in the following terms:

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then Section by section, Clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

70. Likewise, in Directorate of Enforcement v. Deepak Mahajan 40 this court referred to Maxwell on Interpretation of Statutes, Tenth Edn., to the effect that if the ordinary meaning and grammatical construction : (scc PP.453-54, PARA 25)

"25.....leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words..."

71. This court, long back, in State of Haryana v. Sampuran Singh. observed that by no stretch of imagination a Judge is entitled to add something more than what is there in the statute by way of a supposed intention of the legislature. The cardinal principle of construction of statute is that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. It is sufficient, therefore to notice that when Section 438 - in the form that exists today, (which is not substantially different from the text of what was introduced when Sibbia was decided, except the insertion of sub-section (4)) was enacted, Parliament was aware of the objective circumstances and prevailing facts, which impelled it to introduce that provision, without the kind of conditions that the state advocates to be intrinsically imposed in every order under it."

32. So also, in the case of Gurbaksh Singh Sibbia (supra), the Hon'ble Supreme Court has negatived the proposition that the larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised, so also did not endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is

imprisonment for life as circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal. The Hon'ble Supreme Court has also not held that in case of a person accused of economic offence though non-bailable in nature, cannot invoke the jurisdiction of Section 438 of Cr.P.C. for his release on pre-arrest bail nor the aforesaid is the contention of the learned counsel for the applicant. The Hon'ble Supreme Court in different decisions, however, held that economic offences constitute a class apart, the Court need to visit the same with a different approach in the matter of bail/anticipatory bail and should be loathed while extending the benefit of bail/pre-arrest bail to a person accused of such offences. The aforesaid is also the view of the Hon'ble Supreme Court in the case of P. Chidambaram (supra).

33. Now, coming to the other contention of learned counsel for the respondent that since custodial interrogation is much more fruitful for collection of further evidence, and the interrogation of the applicant is required to unveil the larger conspiracy in the aforesaid heinous and serious offence in which crores of rupee has been collected by the company, of which money trail was found with the applicant, pre-arrest bail should not be granted to him.

34. In the case of ***Gurbaksh Singh Sibbia (supra***), the Hon'ble Supreme Court in paragraph-19 has held as under:--

"19. A great deal has been said by the High Court on the fifth proposition framed by it, according to which, inter alia, the power under Section 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith....."

35. In the case of *Gurbaksh Singh Sibbia (supra),* in Paragraph - 15, it is held that:--

"15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a "Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guide-lines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature

has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the Courts by law."

36. In the instant case, during the course of investigation under the PMLA, 2002, searches were conducted under Section 17 of PMLA, 2002 at the office, factory and residential premises of Naresh Grover, Director of M/s Surgicoin Medequip Pvt. Ltd. During these searches several incriminating documents were seized. These documents included letters written by Naresh Grover, who was in judicial custody at that time, to his son Pankaj Grover directing him to manipulate the accounts and records to defeat the allegation of supply of material under NRHM Scheme at astronomical rates of profit as well as of short supply of the said material. In the statements recorded under Section 50 of PMLA, 2002 both Pankaj Grover as well as Mr. Rajendra Kaul have admitted that the profit margin on procurement/manufacture of certain items ranged up to 200%. Moreover, the fact that Naresh Grover had directed Pankaj Grover in writing not to submit the original invoices and the ledgers of the sundry creditors and debtors to the ED as well as to manipulate the records of the genuine creditors with other fictitious entries establishes that he was wilfully and knowingly trying to frustrate the proceedings under the Act and was also attempting to deflect the process of investigation

37. A perusal of the voluminous oral and documentary evidence collected during the course of investigation has revealed that Naresh Grover, Director of M/s Surgicoin Medequip Pvt. Ltd. in connivance with his son Pankaj Grover (present applicant) has been constantly trying to manipulate the records to conceal the "Proceeds of Crime" and has also clandestinely sold off half of the factory property after knowledge of initiation of present proceedings under the PMLA. The written directions given by Naresh Grover to his son Pankaj Grover, which were recovered during the search clearly establish that the said persons in possession or use of the property acquired out of/in lieu of "Proceeds of Crime" in the instant case were prone to encash/sell the same at the earliest opportunity to frsutrate the proceedings under PMLA. It is vehemently submitted that in the instant case, the investigation has established that Proceeds of Crime to the tune of Rs.21,20,87,617/- has been generated.

38. Change in society has caused complete change in nature, cause, mode, rate and impact of crime on individual member of the society and society at large. Further, all and every stereotype of crime and criminals have completely changed and it is causing greater problem to criminal justice. Previously crimes were committed by un-socialised or mal-socialised or improperly socialised persons for whom all traditional criminologists have been of opinion that they belong to lower class, such criminals were committing crime in unorganised manner without proper planning or completely in un-planned manner by using crude modus operandi leaving clues on crime scene, traditional evidences were available particularly eye witnesses, crimes were committed to satisfy need and necessity or enmity or jealousy or lust. To deal such crimes simple and general measures of criminal justice was efficient. Simple investigating agency

and its investigation procedure; traditional prosecution and prosecution measures were effective, traditional sentencing and its infliction was sufficient to tackle problem of traditional criminality. Crimes are now committed by influential persons belonging to upper class in organised manner after well planning by use of modern gadgets in course of performance of their official, professional, business activities in which they have expertise. Criminal acts committed by professionals, businessmen and public servants, it is very difficult to identify whether sober and civilised activity was committed or criminal act was committed. Such criminals have no criminal self image, further by societal members there is no labelling which affect seriously pursuits to cope with crime and criminality. Economic offenders are only concerned with their personal gain even at the cost of irreparable and serious loss to society which provided socialization and made him a human being, provided status and position, provided respect and reputation, provided stature and means.

39. In ***State of Gujarat v. Mohanlal Jitamalji Porwal - (1987) 2 SCC 364***, the Hon'ble Supreme Court observed:

"[...] the entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national; interest [...]"

40. To gain more and more profit, to become rich quick such criminal even has no problem to cause problem for the whole society, affect safety and security of life of societal members, misappropriation of public exchequer and ultimately affect completely wellbeing of society at large. In the way to accumulate money and to get physical commodities, life, property and well-being of common persons have no value. Criminal acts committed by such persons are creating a serious challenge before criminal justice system; It is difficult to identify whether crime was committed, when it is identified that crime was committed, it is difficult to find out clues and thereby evidences; when evidences are available, nature of evidences is completely different as not possible to be collected by simple investigating, presented by prosecution agency and ultimately to convict and sentence; when sentenced, simple sentence is not effective to deal with such modern criminals and their criminality. A criminal of such modern criminality are respected and influential persons with position, status, standing and means thereby they are always in situation to influence proceeding in investigation and prosecution, tamper with the evidences and pressurise witnesses.

41. Socio-economic criminals are economically sound and belong to elite class. Furthermore, they commit crime to get more and more money. They are in possession of large amount of proceed of crime. When a person has money earned by honesty and labour, they think again in

spending the money but when money is obtained by corrupt means, such person may not have any problem spending. A criminal of economic offences has larger amount of proceed of crime, he may use it and affect the investigation and win over witnesses. In ***Himanshu Chandravadan Desai v. State of Gujrat - AIR 2006 SC 170*** the appellant - accused was one of Directors of a Bank and together with other Directors and Managing Director of Bank siphoned off crores and crores rupees fund of the Bank by bogus loans and fictitious letters of credit in the name of their friends, relatives, associates and name-lender companies either without any securities or with wholly inadequate security. The Court of Session and the High Court rejected bail and then the appellant-accused moved the Hon'ble Supreme Court. The accused was remaining in custody for longer period since his surrender on 24.10.2002. The Hon'ble Supreme Court decided that having regard to huge amounts involved in the systematic fraud, there is danger of the appellants absconding, if released on bail, or attempting to tamper with the evidences by pressurizing witnesses. The Hon'ble Supreme Court refused to grant bail. In socioeconomic offences always the court considers monetary position of the accused and amount involved in criminal case. More the accused is economically sound and more the amount involved in criminal case; it cause more the chance of affecting the requirements of criminal justice, more the accused is unfit for bail, thereby, more the chance of refusal to grant bail.

42. In socio-economic offences proceed of crimes are larger and further, offenders are economically sound, therefore, in releasing them on bail/anticipatory bail probability of abscondance not within country but beyond country is more probable. Usually socio-economic offenders abscond to some other country and after that it becomes difficult to bring them back and complete the criminal proceeding against them. Further, their monetary sound condition particularly proceed of crime obtained not by honest working but by deceiving others causes more prone situation for influencing witnesses and other evidences. Furthermore, status and position of offender provides opportunity to influence investigation and prosecution.

43. For the discussions made hereinabove and keeping in view the principles settled by the Hon'ble Supreme Court, this Court finds no merit in the application under Section 438 Cr.P.C. filed by the applicant. Consequently, the instant anticipatory bail application is rejected.

44. It is made clear that observations made hereinabove are exclusively for deciding the instant anticipatory bail application and shall not affect the trial in any manner.

45. I may put on record an appreciation for my law clerk Mr. Keshav Dwivedi, who has assisted me in my research to enable me to decide the matter with promptness.

(2021)08ILR A436
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.08.2021

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Bail No. 8227 of 2021

Rohit ...Applicant
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Applicant:

Sri Piyush Kumar Singh

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Bail - Indian Penal Code, 1860 - Sections 363, 366 & 376 - The Code of criminal procedure, 1973 - Section 439(1-A) - Protection of Children from Sexual Offences Act, 2012 - Section 2(1)(d) , 3 /4 , 33(7) , 40 - Right of child to take assistance of experts, etc.- The Protection of Children from Sexual Offences Rules, 2020 - Rules 4(13) & 4(15) - Procedure regarding care and protection of child - A proper and effective legal assistance can be given to a person only when such a person is made aware of the pending proceedings - If the person is not made aware of the proceedings, no legal assistance can be given to him - it is the duty of the SJPU or local police to keep the child and his/her parent/guardian or other person in whom the child has trust and confidence, informed about the developments including the arrest of the accused, applications filed and other Court proceedings. (Para - 10,12)

(B) Protection of Children from Sexual Offences Act, 2012 - Section 40 - family or guardian of the child is entitled to assistance of a legal counsel of their choice - if they are unable to afford a legal counsel, the Legal Services Authority is duty bound to provide a legal counsel.(Para - 20)

Applicant impleaded complainant as opposite party no.2 - Registry while reporting raised an objection - applicant deleted the name of the complainant as opposite party no.2 - questions before Court - (i) whether the complainant or any person on behalf the child victim is to be made a party to the proceedings (ii) what should be the mode of service upon such a person, as the Court is required to ensure that the identity of the child victim is not disclosed at any time during the course of investigation or trial. (Para -3)

HELD:- The applicant is permitted to implead the complainant as opposite party no.2. (Para - 24)

Issue notice to opposite party no.2 . (E-6)

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

1. Heard learned counsel for the applicant Sri Piyush Kumar Singh, Sri Anurag Verma, Sri Jayant Singh Tomar and Sri Shaunak Singh learned AGA for the State and Sri Rahul Kumar Singh as amicus curiae, who has also assisted the Court by placing relevant laws before the Court.

2. The present bail application is filed by the accused-applicant-Rohit, who is involved in F.I.R./Case Crime No.0091 of 2021, under Sections 363, 366 and 376 I.P.C. and Sections 3 /4 of Protection of Children from Sexual Offences Act, 2012 (POCSO Act), Police Station-Achalganj, District-Unnao.

3. In this bail application, the applicant had initially impleaded the complainant by name as opposite party no.2. The Registry while reporting raised an objection that the complainant is made a party and, thus, learned counsel for the applicant deleted the name of the complainant as opposite party no.2. Therefore, two questions arose before the Court for consideration; (i) whether the complainant or any person on behalf the child victim is to be made a party to the proceedings; and (ii) if any such person is to be made opposite party in the bail application, what should be the mode of service upon such a person, as the Court is required to ensure that the identity of the child victim is not disclosed at any time during the course of investigation or trial.

4. With regard to the first question, whether the complainant or any other person on behalf of the child victim is required to be heard in the bail application is concerned, so far as a child up to the age of 16 years is concerned, suffice would be to refer to Section 439(1-A) of the Criminal Procedure Code, 1973 (Cr.P.C.). The aforesaid Section 439(1-A) of Cr.P.C. is incorporated by amendment made by Act No.22 of 2018 w.e.f. 21.4.2018. It reads:

"439. Special powers of High Court or Court of Session regarding bail-.....

(1-A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860)."

5. Sections 376(3), 376-AB, 376-DA and 376-DB of I.P.C. refer to sexual offences against a child below the age of 16 years and 12 years. Thus, as per sub-section (1-A) of Section 439 of Cr.P.C., the presence of the informant or any person authorized by him is mandatory at the time of hearing of the bail application with regard to sexual offences. Thus, in all such cases, it is incumbent upon the Court to ensure service of notice of bail application upon the informant.

6. A question still arises, that, as to whether under the POCSO Act, with regard to sexual offences against the child up to the age of 18 years, any person on behalf of the child victim is required to be given an opportunity to oppose the bail application. Section 2(1)(d) of the POCSO Act defines a child as "a person below the age of 18 years'.

7. Section 40 of the POCSO Act reads:

***"40. Right of child to take assistance of experts, etc**.- Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973 (2 of 1974), the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:*

Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them."

8. Learned counsel for the applicant submits that under Section 40 of the POCSO Act, only assistance of a legal counsel is provided to the child. It does not give any power of hearing to them for opposing the bail application. The said Section does not give any special right to the guardian or family of the child or puts any obligation upon the Court as Section 439(1-A) of Cr.P.C. does.

9. Opposing the contention of learned counsel for the applicant, learned AGA and Sri Rahul Kumar Singh advocate submit that Section 40 of the POCSO Act read with the Rules of 2020 makes it incumbent upon the Court to give an opportunity of hearing to the family/guardian of the child victim at the time of hearing of the bail application.

10. A perusal of Section 40 of the POCSO Act, if made cursorily, would only indicate that it provides entitlement of legal assistance through a counsel of their choice or through Legal Services Authority, to the family or guardian of the child. However, such legal assistance would be meaningless if the family or guardian of the child is not

aware of the said legal proceedings. A proper and effective legal assistance can be given to a person only when such a person is made aware of the pending proceedings. If the person is not made aware of the proceedings, no legal assistance can be given to him.

11. The Protection of Children from Sexual Offences Rules, 2020 (for short "the Rules of 2020') are framed to give effect to the purpose of the POCSO Act. Rules 4(13) and 4(15) relevant for the purpose of this case, which read:

"4. Procedure regarding care and protection of child-

(13) It shall be the responsibility of the SIPU, or the local police to keep the child and child's parent or guardian or other person in whom the child has trust and confidence, and where a support person has been assigned, such person, informed about the developments, including the arrest of the accused, applications filed and Court proceedings.

(14) .....

(15) The information to be provided by the SJPU, local police, or support person, to the child and child's parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following: -

(i) the availability of public and private emergency and crisis services; (ii) the procedural steps involved in a criminal prosecution;

(iii) the availability of victim's compensation benefits;

(iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;

(v) the arrest of a suspected offender;

(vi) the filing of charges against a suspected offender;

(vii) the schedule of Court proceedings that the child is either required to attend or is entitled to attend;

(viii) the bail, release or detention status of an offender or suspected offender;

(ix) the rendering of a verdict after trial; and

(x) the sentence imposed on an offender."

12. A perusal of Rule 4(13) itself shows that it is the duty of the SJPU or local police to keep the child and his/her parent/guardian or other person in whom the child has trust and confidence, informed about the developments including the arrest of the accused, applications filed and other Court proceedings. The "applications filed and the other Court proceedings" is a wide worded phrase which also includes within its ambit bail applications filed before any Court whatsoever. Therefore, the bail applications filed, either before the Special Court or before the High Court, are also included in the same and, thus, it is the duty of the SJPU or the local police to inform the parent/guardian of the child victim with regard to the same. Similarly, Rule 15 sub-rules (vii) and (viii) also makes it incumbent upon the SJPU and local police

to inform the child and parent or guardian with regard to the schedule of the Court proceedings that the child is either required to attend or is entitled to attend and bail, release and detention status of the offender or suspected offender.

13. Therefore, from the reading of Section 40 of POCSO Act as well as Rule 4(13) and 4(15) of the Rules of 2020, it is clear that this Court is required to ensure that the SJUP or the local police informs the family or guardian of the child and also provide them legal assistance as required with regard to all proceedings, including the bail applications filed by the accused. Thus, it is necessary to implead the complainant, and in case the complainant is not a family member or guardian of the child, then the family member or guardian of the child as opposite party along with the complainant in the bail applications filed before this Court.

14. There is yet another reason to serve notice of the bail application in every POCSO offence case upon the parent/guardian of the child. A perusal of provisions of POCSO Act and Rules of 2020 casts a duty upon every person involved with the matter including the courts to provide circumstance and atmosphere wherein the victim child and his family feels safe and secure. Providing complete knowledge of judicial proceeding and opportunity to participate in the same would be a step in right direction in making the victim child and his family to maintain its faith in the justice delivery system of the society and thus feel safe and secure.

15. So far the second question, with regard to the manner in which notices is to be served, ensuring that identity of the child is not disclosed is concerned, such a duty is cast upon the Special Court under Section 33(7) of the POCSO Act. Section 33(7) reads as under:

"33. Procedure and powers of Special Court-

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial."

16. This Court as well as the Supreme Court repeatedly, in number of judgments, have emphasized to protect the identity of the child in every possible manner by every person concerned. Therefore, in case the guardian or family member or any other person of the child is made opposite party by name and notices are served upon them in normal course, there is every possibility that the identity of the child may get revealed to the public at large.

17. In view thereof, it would be appropriate that the complainant, and where complainant is not a family member, along with him, parent/guardian is made opposite party in the following format:

"Complainant in Case Crime No. ....., Police Station-....., District-....., service of notice through Investigating Officer/S.H.O. of the Police Station"

or as per the requirement in a case along with complainant, "Parent/Guardian of the victim in Case Crime No. ....., Police Station-....., District-....., service of notice through Investigating Officer/S.H.O. of the Police Station."

18. Notice in every case shall be served through Investigating

Officer/S.H.O. of the Police Station concerned upon such complainant and/or parent/guardian of the child. The Investigating Officer/S.H.O. of the Police Station concerned shall ensure that identity of the child does not get disclosed in any manner whatsoever during investigation, trial or during service of notice.

19. It has also come in the knowledge of this Court that in large number of cases, due to poverty or other similar circumstances, the parents of the victim-child are unable to engage a counsel and make a proper representation before the Court.

20. Under Section 40 of the POCSO Act, the family or guardian of the child is entitled to assistance of a legal counsel of their choice or if they are unable to afford a legal counsel, the Legal Services Authority is duty bound to provide a legal counsel.

21. In the given circumstances, since in large number of cases, family members are unable to engage a counsel and represent in the bail applications, the notice shall also include in hindi language, that, in case the person so desires, he will get free assistance including a lawyer to represent him from the Legal Services Authority at High Court, Lucknow Bench, Lucknow and for the same he can contact:

"Dr. Satyabhan Singh, H.J.S.,
Registrar(J)(Listing)/Secretary,
High Court Legal Services Sub-Committee,
Chamber No.9, High Court, Lucknow Bench, Lucknow.
Mobile No.9935299286,
Email:-
"hclssclko@allahabadhighcourt.in'"

22. Every notice issued to the complainant or to the family/guardian of the child shall also include the aforesaid details in Hindi language to enable him, in case he so desires, to take assistance from the Legal Services Authority.

23. The Senior Registrar of this Court shall ensure compliance forthwith.

24. In view of the aforesaid, in the present case, learned counsel for the applicant is permitted to implead the complainant as opposite party no.2 during the course of the day, in the manner provided in this order.

25. Issue notice to opposite party no.2 returnable in week commencing 31.8.2021.

26. List in week commencing 31.8.2021.

27. Meanwhile, learned A.G.A. may file counter affidavit.

(2021)08ILR A441
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.08.2021

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. Bail Application No. 12172 of 2021

Munna Ram ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Manvi Duxit Sharma, Sri Vinayak Nath Singh, Sri Irshad Husain, Sri Manu Srivastava, Sri Anil Babu, Sri Ashwini Kumar Awasthi, Sri Manish Tiwari

Counsel for the Opposite Party:
A.G.A., Sri Pradeep Kumar Rai, Sri Mahesh Kumar

(अ) फौजदारी कानून - जमानत - भारतीय दंड संहिता - धारा 420, 467, 468, 471, 406, 34

प्रश्न गत भूमि का विक्रय लेख का संपादन करके उक्त का हस्तांतरण वादी को कर दिया - वादी उक्त कृषि भूमि पर रिहायशी निर्माण करना चाहता है - सफलता नही मिलने पर आवेदक को परेशान करने के लिए झूठी प्रथम सूचना रिपोर्ट लिखादी - वर्तमान मुकदमा दीवानी प्रकृति का - अपराधिक रंग दिया गया - वादी मुकदमा के पास सिविल न्यायालय में जाकर दीवानी वाद दायर करने का विधिक विकल्प । (पैरा - 4,5)

निर्णय:- समस्त तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए तथा प्रस्तुत मामले के गुण दोष पर बिना कोई टिप्पणी किए आवेदक को जमानत पर छोड़ना उचित प्रतीत होता है। (पैरा - 10)

जमानत प्रार्थना पत्र स्वीकार। (E-6)

<u>उद्धृत मामलों की सूची :-</u>

1. शरद कुमार संधी प्रति संगीता राने (2015) 12 एस० सी० सी० 781
2. जीएचसीएल ईम्पलाइज स्टाक आपशन ट्रस्ट प्रति इंडिया इन्फोलाइन लि० (2013) 4 एस० एस० सी० 505
3. कमिश्नर आफ पुलिस एवं अन्य प्रति देवन्द्र आनन्द एवं अन्य 2019 एस० सी o सी० आन लाइन एस० सी० 996
4. गोविंद प्रसाद केजरीवाल प्रति राज्य बिहार एवं अन्य ए० आई० आर० 2020 एस० सी० 10 79

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1ण यह दाण्डिक प्रकीर्ण जमानत प्रार्थना पत्र, आवेदक की ओर से मुकदमा अपराध संख्या 395 वर्ष 2020 अन्तर्गत धारा 420, 467, 468, 471, 406, 34 भा0 दं0 सं0, थाना एक्सप्रेसवे, जिला गौतमबुद्ध नगर में जमानत पर मुक्त करने हेतु प्रस्तुत किया गया है।

2ण आवेदक की ओर से विद्वान वरिष्ठ अधिवक्ता श्री मनीष तिवारी, वादी की ओर से विद्वान अधिवक्ता श्री प्रदीप कुमार राय एवं राज्य की ओर से विद्वान अपर शासकीय अधिवक्ता को सुना एवं पत्रावली का सम्यक परिशीलन किया।

3ण संक्षेप में अभियोजन तथ्य इस प्रकार है कि ग्राम किडावली परगना दादरी गौतमबुद्ध नगर में स्थित खाता नं0 29 खसरा नं0 1/7 मिनजुमला का 2520 वर्गगज कृषि भूमि जिसके बारे में उसे बताया गया कि उक्त भूमि हर प्रकार से पाकसाफ है और उसे किसी भी जाति का व्यक्ति क्रय कर सकता है। कुल रूपये 57 लाख पर तय हुआ। पांच लाख रूपये एडंवास दिए और दिनांक 10–8–2018 को विक्रय करार निष्पादित हुआ जिस पर वादी और मुन्नाराम ने अपना अपना हस्ताक्षर बनाया और गवाह के रूप में वादी के पुत्र वैभव आनन्द व सुनील कुमार सिंह ने हस्ताक्षर किये। उसके पश्चात विभिन्न तिथियों को कुल 29 लाख रूपये मुन्नाराम को भुगतान किया। करार में तय हुआ कि 57 लाख रूपये में ही मुन्नाराम उक्त प्रतिफल मूल्य का आधा पेमेन्ट ले लिए जाने पर उक्त पचीस सौ बीस वर्गगज भूमि का बाउन्ड्री गार्ड रूम एवं गेट बनवायेगा। एडवांस 5 लाख व उसके बाद 29 लाख वादी के पुत्र वैभव आनन्द के आईडीएफसी बैंक से मुन्नाराम के डे ड्रीम के खाता एक्सिस बैक में आईएमपीएस के माध्यम से ट्रान्सफर हुए। उक्त भुगतान के बाद भी बाउन्ड्री गार्ड रूप गेट का निर्माण नहीं कराया गया और कहा कि विक्रय विलेख के बाद उक्त निर्माण करा देगें। दिनांक 26–112018 को व्रिकय विलेख के निष्पादन के समय वादी मुन्ना राम को अपने स्टेट बैंक इंडिया जेसी रोड पटना के खाता संख्या 10954310286 के कुल तीन चेक दिए जिसमें से पहला चेक दस लाख रूपये का नकदीकरन कराने के बाद भी मुन्नाराम ने बाउंड्री गार्ड रूम गेट का निर्माण नहीं कराया। उक्त निर्माण कराने के लिए मुन्नाराम ने उक्त एजेन्ट सुशांत सिंह उर्फ सुशांत जालीदार के एक्सिस बैंक के खाते में वादी के पुत्र ने 8 लाख रूपये ट्रांसफर किये। उसें बाद पता चला कि मुन्नाराम अनुसूचित जनजाति के हैं और उन्होंने उक्त भूमि अनुसूचित जाति के लोगों से क्रय की है

और उक्त भूमि सामान्य वर्ग के लोगों को नहीं बेची जा सकती है। उक्त भूमि को मुन्नाराम ने 2017 में इन्दू पत्नी हृदय नारायण सिंह जो संभवक एनटीपीसी में कार्यरत है को बेच दी थी। इस प्रकार मुन्नाराम, सुनील कुमार सिंह, सुशांत सिंह जालादर के सहयोग से कुल 52 लाख रूपये छल करके ले लिए हैं।

4ण आवेदक के विद्वान वरिष्ठ अधिवक्ता श्री मनीष तिवारी द्वारा यह तर्क प्रस्तुत किया गया कि आवेदक ग्रेट मगध इन्फ्राटेक प्रा0 लि0 का मालिक है और उसकी कम्पनी जमीनों का क्रय–विक्रय का काम करती है। इसी क्रम में उसकी कम्पनी ने दिनांक 18–10–2016 को एक जमीन का क्रय किया जिसका क्षेत्रफल 1.6860 हे0 था। उक्त भूमि का विक्रय लेख शपथपत्र के अनुसंलग्नक –3 के रूप में संलग्न है और उसमें से .1689 हे0 जमीन का विक्रय श्रीमती इन्दू पत्नी हृदय नारायण सिंह को दिनांक 20–6–2017 को विक्रय लेख लिखकर सम्पादित कर दिया जो शपथपत्र के अनुसंलग्नक–4 के रूप में संलग्न है। इस प्रकार कुल भूमि 1.6860 हे0 मे से .1689 हे0 भूमि श्रीमती इन्दू को विक्रय करने के पश्चात आवेदक के पास 1.5 हे0 जमीन शेष बची और उसमें से .2106 हे0 भूमि वादी मुकदमा श्री राघवेन्द्र कुमार सिंह को दिनांक 28–11–2018 को निष्पादित कर दी है इसलिए वादी का यह कहना कि प्रश्नगत भूमि पूर्व में श्रीमती इन्दू को कर दी थी गलत है और अस्वीकार है।

5ण जहाँ तक वादी के विद्वान अधिवक्ता का यह तर्क है कि आवेदक अनुसूचित जनजाति का है और उसे भूमि सामान्य वर्ग को बेचने का अधिकार नहीं है के उत्तर में अभियुक्त/आवेदक के अधिवक्ता का यह कथन है कि प्रश्नगत भूमि का स्वामित्व ग्रेट मगध इन्फ्राटेक प्रा0 लि0 के पास है और कोई भी कम्पनी की जाति नहीं होती और किसी को भी जमीन बेच सकता है। कम्पनी को लेकर कोई विवाद नहीं है। आवेदक के विद्वान अधिवक्ता का यह भी तर्क है कि प्रश्नगत भूमि कृषि भूमि है और उस पर कृषि कार्य के अतिरिक्त अन्य किसी भी प्रकार का रिहायसी निर्माण वर्जित है जैसा कि विक्रय लेख जो वादी मुकदमा को किया गया है में स्पष्ट लिखा है। बावजूद इसके वादी मुकदमा उक्त प्रश्नगत कृषि भूमि पर रिहायसी निर्माण करा रहें है जिसे सक्षम अधिकारी द्वारा मना किया गया तो वादी ने झूंठा मुकदमा आवेदक के विरूद्व संस्थित किया है। आवेदक के विद्वान अधिवक्ता का यह भी तर्क है कि वर्तमान मुकदमा दीवानी प्रकृति का है जिसे जानबूझकर आवेदक को परेशान करने की नियत से अपराधिक रंग दिया गया है। वादी मुकदमा के पास सिविल न्यायालय में जाकर दीवानी वाद दायर करने का विधिक विकल्प खुला है।

6ण आवेदक के विद्वान अधिवक्ता का यह भी तर्क है कि वाद कारण के लगभग दो वर्षो के बाद प्रथम सूचना रिपोर्ट दर्ज करायी गयी है जिसका कोई समुचित विलम्ब का कारण नहीं दर्शाया गया है। आवेदक का कोई अपराधिक इतिहास नहीं है तथा उसने स्वेच्छा से प्रश्नगत भमि का विक्रय लेख का सम्पादन करके उक्त का हस्तांतरण वादी को कर दिया है तथा उक्त कृषि जमीन पूर्ण रूप से पाक और साफ है। वादी उक्त कृषि भूमि पर रिहायसी निर्माण चाहता है और जब उसे उसमें सफलता नहीं मिली तो उसने झूंठी प्रथम सूचना रिपोर्ट लिखाकर आवेदक को परेशान करने लगा।

7ण आवेदक के विद्वान वरिष्ठ अधिवक्ता श्री मनीष तिवारी ने विधिक तर्क भी रखा कि प्रश्नगत भूमि का विक्रय अभियुक्त/आवेदक की कम्पनी ग्रेट मगध इन्फ्राटेक प्रा0 लि0 ने वादी के पक्ष में निष्पादित किया है किन्तु उक्त कम्पनी को अभियोजन वाद में पक्ष नहीं बनाया गया है। ऐसी दशा में वास्ताविक विक्रेता को पक्ष न बनाये जाने पर अभियोजन को नहीं चलाया जा सकता है और प्रतिवाद अपने आप समाप्त समझा जायेगा। अपने तर्क को बल देते हुए आवेदक के विद्वान अधिवक्ता ने निम्न कानूनी विधियों को उद्वरित किया है:–

1– शरद कुमार संघी प्रति संगीता राने (2015) 12 एस0 सी0 सी0 781

2– जीएचसीएल ईम्पलाइज स्टाक आपशन ट्रस्ट प्रति इंडिया इनफोलाइन लि0 (2013) 4 एस0 सी0 सी0 505

3– कमिश्नर आफ पुलिस एवं अन्य प्रति देवन्द्र आनन्द एवं अन्य 2019 एस0 सी0 सी0 आन लाइन एस0 सी0 996

4– गोविन्द प्रसाद केजरीवाल प्रति राज्य बिहार एवं अन्य
ए0 आई0 आर0 2020 एस0 सी0 1079

8ण वादी मुकदमा श्री प्रदीप कुमार राय द्वारा प्रतिशपथ पत्र दाखिल किया गया और तर्क दिया गया कि प्रश्नगत विक्रय लेख सम्पादित होने के पश्चात वादी मुकदमा को पता चला कि अभियुक्त मुन्नाराम जो ग्रेट मगध इन्फ्राटेक प्रा0 लि0 का निदेशक है वह अनुसूचित जनजाति का है तो ऐसी दशा में विक्रय लेख शून्य है और उसे बेचा नहीं जा सकता है। श्री प्रदाप कुमार राय द्वारा यह भी तर्क अपने प्रतिशपथ पत्र के प्रस्तर 7 एवं 8 में रखा गया कि वादी ने 8 लाख रूपये सह–अभियुक्त सुशात सिंह को दिए थे जिसकी जमानत इस न्यायालय द्वारा सशर्त स्वीकार की गयी है क्योंकि वह विक्रय लेख का गवाह था। वर्तमान वाद में आरोप पत्र दाखिल हो चुका है। आगे प्रतिशपथपत्र के प्रस्तर 14 में पैसे के बारे में किसी भी प्रकार का विवाद नहीं है, स्वीकार किया गया है। प्रतिशपथपत्र के उत्तर में आवेदक/अभियुक्त के विद्वान अधिवक्ता का तर्क है कि वादी मुकदमा द्वारा केवल दो तर्क उठाये गये है प्रथम– विक्रेता अनुसचित जनजाति का है और बिना अनुमति के विक्रय करने का अधिकार नहीं है और दूसरा प्रश्नगत भूमि का विक्रय पूर्व में श्रीमती इन्दू को किया गया है के बारे में श्री तिवारी ने तर्क रखा कि पूर्व में भी उसने इसका समुचित उत्तर दे दिया है कि प्रश्नगत भूमि कम्पनी की है और अभियुक्त ने कम्पनी की हैसियत से जमीन लिखी है और कम्पनी को अधिकार है कि वह किसी को भी जमीन बेचकर हस्तानान्तरण कर सकता है, जाति उसमें बाधक नहीं है। साथ ही श्रीमती इन्दू को जिस जमीन को बेचना कहा जाता है वह वादी की जमीन से अलग है उसका प्रश्नगत जमीन से कोई लेना देना नहीं है। आगे यह भी कहा गया कि मामला सिविल प्रकृति का है इसे अपराधिक मामले की तरह नहीं देखा जा सकता है और प्रश्नगत मामले में विधिक व्यवस्था के अनुसार कम्पनी को पक्ष बनाना चाहिए जो नहीं बनाया गया। इस कारण अपराधिक मामला नहीं चल सकता है।

9ण इसके विपरीत विद्वान अपर शासकीय अधिवक्ता द्वारा जमानत का विरोध किया गया।

10ण समस्त तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए तथा प्रस्तुत मामले के गुण–दोष पर बिना कोई टिप्पणी किये मेरे विचार से आवेदक को जमानत पर छोडना उचित प्रतीत होता है।

11ण तदनुसार आवेदक **मुन्ना राम** का जमानत प्रार्थना पत्र स्वीकार किया जाता है। उसे उपरोक्त अपराध में निम्न शर्तो के साथ सम्बन्धित न्यायालय की सन्तुष्टि पर व्यक्तिगत बंध पत्र एवं उसी धनराशि के दो प्रतिभू प्रस्तुत करने पर जमानत पर छोड दिया जाए।

(1) आवेदक विचारण के दौरान सम्बन्धित न्यायालय के समक्ष उपस्थित होगा।

(2) आवेदक गवाहान को किसी भी प्रकार से प्रभावित नही करेगा।

(3) आवेदक विचारण के दौरान साक्ष्य से कोई छेड छाड नहीं करेगा।

12ण यदि आवेदक द्वारा उपरोक्त शर्तो का उल्लंघन किया जाता है तो विचारण न्यायालय को यह छूट रहेगी कि वह आवेदक की जमानत निरस्त कर सकेगा।

(2021)08ILR A444
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Ist Bail Application No. 14096 of 2021

Sayara Uruz @ Afsana ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Rajiv Kumar Mishra, Sri Anand Kumar Mishra

Counsel for the Opposite Party:

A.G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Section 306 - Abetment of Suicide - every case turns on its own facts - Even one additional or different fact may make a big difference between the conclusion in two cases, because even a single significant detail may alter the entire aspect - basic principle of criminal jurisprudence - a man may tell a lie , but circumstances do not. (Para - 8,9)

Son of deceased moved a written application to the Station House Officer, police station - mentioning therein that her mother has telephonically informed him that on 23.12.2020 at 6.30 a.m. his father had committed suicide by hanging in the flat.

HELD:- For abetment of suicide, there must be a reasonable certainty to incite the consequence.There is a proximate link between the unfortunate incident in question and act of the accused applicant. Allegations and materials against the applicant are of definite nature (not imaginary or inferential one), hence as on date, from the materials available in case diary of this case and as mentioned in preceding paragraph no.6, prima-facie case for abetment and instigation is made out against the applicant - No good ground to grant bail to the applicant at this stage.(Para - 7,9,10)

Bail application rejected. (E-6)

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

1 -By means of this application, applicant Sayara Uruuz alias Afsana, who is involved in Case Crime No. 385 of 2020, under section 306 IPC, police station Chamanganj, district Kanpur Nagar, seeks enlargement on bail during the pendency of trial.

2- Heard Mr. Rajeev Kumar Mishra, learned counsel for the applicant, Mr. Rabindra Kumar Singh, learned Additional Government Advocate assisted by Mr. Rajmani Yadav and Mr. Prashant Kumar Singh, learned brief holders, representing the State of U.P. and perused the record as well as case diary of the case, produced by the learned A.G.A.

Brief facts:

3- In short compass the facts of the case as unfolded by the prosecution are that Sameer Ahmad, who is the son of deceased Shakeel Ahmad moved a written application to the Station House Officer, police station Chamanganj, Kanpur Nagar mentioning therein that her mother has telephonically informed him that on 23.12.2020 at 6.30 a.m. his father Shakeel Ahmad had committed suicide by hanging in the flat, which was entered in G.D. No.22 dated 23.12.2020 at 8:21 O'clock in the police station. On receiving the aforesaid information, Sub-Inspector-Tanveer Ahmad along with other police personnel reached at the spot, and after preparing inquest report at the spot and taking the opinion of witnesses of inquest, the body of the deceased was sent for post-mortem examination. Thereafter, on the basis of contents of suicide note, which was recovered from the possession of the deceased at the time of conducting inquest proceeding, first information report dated 24.12.2020 has been lodged at 20:52 O'clock by the informant-Tanveer Ahmad, S.I., against the wife of the deceased, namely, Sayara Uruuz alias Afsana (applicant) and one Rajnish Sethi for the alleged commission of abetment of suicide.

Submissions on behalf of accused/applicant:

4- It is submitted by learned counsel for the applicant that the applicant is

absolutely innocent and has falsely been implicated in the present case with some ulterior motive. It is further submitted by learned counsel for the applicant that the alleged suicide note is a fabricated document and the same has not been sent for forensic test, hence the same is irrelevant material and cannot be treated as evidence against the applicant. It is also submitted that there is no corroborative evidence to support the contents of alleged suicide note. The alleged act of the applicant cannot be said to be of such nature, which led the deceased to commit suicide seeing no option left. Much emphasis has been given by contending that the deceased instead of committing suicide had an option to give "talaq" to his wife (applicant). No case for abetment or instigation of suicide is made out against the applicant. The applicant has no criminal antecedent to her credit and is facing detention since 05.02.2021. It is next contended that there is no chance of the applicant of fleeing away from the judicial process or tampering with the prosecution evidence.

Submissions on behalf of State/opposite party:

5- Per contra, learned Additional Government Advocate has opposed the bail prayer of the applicant by contending that deceased was the second husband of the applicant. One Israr Beg, was the first husband of the applicant. Applicant had two children, namely, Ashi and Danish from the wedlock of her first husband (Israr Beg), but on account of her bad habits and illicit relation with other persons, her first husband had given divorce (talaq) to her. Thereafter, she performed her second marriage with the deceased on 19.01.1989, which was their love marriage and from the wedlock of the deceased, she has one son, namely, Samir Ahmad. It is next submitted that at the time of conducting inquest proceeding, a mobile phone and suicide note of seven pages, which was kept in sealed envelop were recovered from the possession of the applicant, which was opened in the presence of higher officers, in which deceased alleged inter-alia that four times, he had caught his wife (applicant) red-handed with other persons. It also stated that she has illicit relation with several persons and she does not want to give-up her relation with them. Much emphasis has been given that bare perusal of the suicide note, it is apparently clear that on account of bad conduct and illicit relation of the applicant with co-accused Rajnish Sethi and other persons mentioned in the suicide note as well as abetment and instigation made by the applicant and co-accused Rajnish Sethi, deceased committed suicide. It is also submitted that the suicide note in question along with samples of hand writing and specimens of signature of the deceased were sent for forensic test to the Vidhi Vigyan Prayogshala, U.P. Rajgarh, Jhansi, which was received in the laboratory on 16.02.2021 and as per report dated 01.03.2021 of the aforesaid laboratory, it has confirmed that said suicide note has been written by the deceased. It is also pointed out that Guddu alias Riyaz (brother of the deceased) in his statement dated 28.12.2020, apart from making serious allegations against the applicant, as mentioned in the suicide note, also alleged inter-alia that deceased before his death had sent his audio and WhatsApp massage from his mobile No. 6392666621 to his mobile No. 8433866110 about his grievances, as mentioned in the suicide note. The said audio/voice recording has been mentioned word by word, by the investigating officer in the case diary No.16

dated 17.03.2021 and C.D. (compact disc) of the same has also made part of the case diary. Smt. Zeba (sister), Haji Sohail Ahmad (brother-in-law), Rajeev Malhotra (friend) of the deceased in their statements recorded on 28.12.2020, 17.02.2020 and 17.02.2021 respectively, have also supported the contents of the suicide note. The applicant, who was absconding after the death of the deceased, was arrested on 05.02.2021. The statements of Samir Ahmad (son of the deceased) and other persons, who were the witnesses of the inquest proceeding, were also recorded. It is also pointed out that as per entry made in C.D. No.19 dated 11.03.2021, on analysis of CDR of mobile number 955988261 of the applicant and mobile number 9839940652 of co-accused Rajnish Sethi, it was found that there were lot of conversations between them. On 22.03.2021, Danish (son of the applicant) gave a mobile phone to the investigating officer and told that the same belongs to her mother (applicant) and through which she used to talk to her friends. There were two sim-cards bearing nos. 8303336146 and 9559882618 in the said mobile, in which applicant had saved the mobile number 9839940662 of co-accused Rajnish Sethi in the name of "JK". The applicant after committing suicide by her husband (deceased) sent WhatsApp message to co-accused on 23.12.2020 at 09:45 pm and expressed her happiness by writing 'Aameen'. The said mobile phone has been deposited by the investigating officer in malkhana. Referring the contents of suicide note, statements of Guddu alias Riyaz, Smt. Zeba, Haji Sohail Ahmad, Rajeev Malhotra, Samir Ahmad and Danish and other corroborative evidences submits, that it is a clear case of abetment and instigation by the applicant and co-accused Rajnish Sethi, due to which deceased was compelled to commit suicide. Charge-sheet dated 27.03.2021 has been submitted in this case. No case for bail is made out. Lastly it is submitted that as per the allegation against the applicant, she appears to be a shrewd lady and in case of granting bail, there is every possibility of tampering the prosecution evidences /witnesses.

Materials on record:

6- Before delving into the matter, it would be useful to quote the suicide note, statements of Guddu alias Riyaz, Smt. Zeba, Haji Sohail Ahmad and Rajeev Malhotra, which are as under:-

6.1-श्री शकील अहमद पुत्र स्वर्गीय मुमताज अहमद निवासी मकान नंबर 105/38 नियर गुरूद्वारा चमनगंज कानपुर नगर (असर भाई का किराए का मकान)

मेरा निकाह 19 जनवरी 1989 मे लखनऊ मे हुआ था । मेरा कोर्ट मैरिज एक साल के बाद कानपुर नगर मे हुआ था शायरा उरूज उर्फ अफसाना बेगम पुत्री गुलाम मुर्तजा निवासी-कमाल खां का हाता नई सड़क के निवासी थे। सायरा उरूज अफसाना बेगम की पहली शादी इसरार बेग निवासी चमनगंज से हुई थी, जिससे दो बच्चे थे, एक बेटी आशी, एक बेटा दानिश, सायरा उरूज उर्फ अफसाना बेगम के गलत कामो की वजह से और दूसरे व्यक्तियों से नाजायज संबंध होने की वजह से उसके पहले पति इसरार बेग ने उसे तलाक दे दिया था उसको मोतीझील मे मैं किसी व्यक्ति के साथ गाड़ी मे देखा था व पकङा था।

शायरा उरूज उर्फ अफसाना बेगम मुझे एक काम के अड्डे पर मिली थी मुझे उससे प्यार हो गया सायरा उरूज उर्फ अफसाना बेगम से मैने शादी कर लिया। और बुरे काम

नही करने को कहा, और मैने पटकापुर मे मकान किराए पर लेकर दिया, सलीम भाई का मकान पार्क के पास नियर जामा मस्जिद मे लेकर दिया, यह नही मानी और फिर वही यह गलत काम करती थी मैने इसे 4 बार रंगे हाथो पकड़ा, पहली बार रामनगिना सिंह के साथ, दूसरी बार बीना तिवारी के अड्डे पर एक कस्टमर के साथ, तीसरी बार-रजिया मौसी के घर में गुड्डू मखनिया बाजार का निवासी के साथ पकड़ा, चौथी बार आफताब अहमद निवासी नई सड़क के साथ नबाबगंज मे पकड़ा। इसने चारो बार माफी मांगी और कसम खाया की माफ कर दीजिए,सायरा उरूज उर्फ अफसाना बेगम से मेरा एक बेटा सन् 1992 में हुआ,1993 में बेटे का नाम समीर अहमद उर्फ बादशाह रखा, 1993 मे मैने उसका वर्थडे लैंड मार्क मे किया। इसकी वजह से मेरी मां और मेरा पूरा खानदान मेरे खिलाफ हो गया। इसकी वजह से मेरी मां ने मेरा हिस्सा नही दिया, जो कि मेरा कमाया हुआ था, मेरी मां ने कहा कि इस गलत औरत का सात छोड़ दो और अपना हिस्सा ले लो, मेरा एक भाई गुड्डू व दो बहने निखत व जेबा है जो कि तलाक महल रेहमानी मार्केट निवासी है। मेरी शादी से रेहमानी मार्केट के सभी लोग वह पुरा खानदान वह समाज खिलाफ हो गया क्योंकि सायरा उरूज उर्फ अफसाना बेगम एक बाजारू औरत थी फिर भी मैने सायरा उरूज उर्फ अफसाना बेगम का साथ दिया और मैने पकटापुर का मकान छोड़ दिया। और पूनम कपूर के मकान पाण्डू नगर में मकान किराए पर लिया और अपने पैतृक बिजनेस रबड़ केमिकल का काम चालू किया और बहुत पैसे कमाए मैने अपने पहले दोनो बच्चो व पत्नी को बहुत प्यार करता था, और बहुत प्यार से फैमिली को पाला, मैं न कुवारा था मैने कोई शादी नही कि यह मेरी पहली और आखिरी शादी है। सायरा उरूज उर्फ अफसाना बेगम ने हमेशा धोखा दिया मेरी मां इस दुनिया मे नहीं है। मेरी मां इस दुनिया में नही है मां ने कहा कि एक दिन यह ऐसा धोखा देगी की तुम्हें आत्महत्या करनी पड़ जायेगी इस औरत ने तेरी जिन्दगी बर्बाद कर दी। मेरा कहना है कि ऐसी औरत से न तो कोई प्यार करें और न तो कोई भरोसा करें या सिर्फ रूपया और अय्याशी के लिए होती हैं। यह दुनिया के लिए एक सबक है। दुनिया के सामने यह एक शरीफ औरत बनी रहती है शक्ल से यह मासूम और भोली है। मेरा बिजनेस खराब होने की वजह से मैं दिल्ली चला गया और एक साल दिल्ली रहने के बाद फिर वापस आ गया। फिर पुराना बिजनेस स्टार्ट किया और पूनम कपूर का मकान किराए पर लिया। इसकी अय्यासी की वजह से मैंने पूनम कपूर के ही मकान में खुदकुशी करने की कोशिश भी की थी। इस औरत ने मुझे बर्बाद कर दिया हर वक्त रूपये की डिमांड करती रहती है। मेरे पहले दोनो बच्चो की शादी हो गई बेटी आशी की शादी हल्द्वानी और बेटे की शादी जूही से हुई सबने मिलकर किया अब बादशाह की शादी बाकी है। और मैं जाब के लिए 2014 मे दिल्ली चला गया। मैंने इनको बेकनगंज मे मकान किराए पर लेकर दिया, बाद में यह मकान छोड़कर चमनगंज असर भाई के मकान में किराए पर चले गए मैंने महीने में 20-25 हजार रुपये जो मिलता था वह मैं घर भेज दिया करता था। ईद व बकरीद मे 50-50 हजार रूपये भेजता था। मैं साल में सिर्फ 3 दिन के लिए ईद व 3 दिन के लिए बकरीद में आता था। दिसबंर 2019 तक 10000/-रू० घर भेजा था। यहां पर मेरा जाब चला गया और मैं बहुत बीमार हो गया मुझे टीबी हो गई, जनवरी में मैं कानपुर वापस आ गया उर्सला अस्पताल में इलाज कराया और मेरी मां जिंदा थी वह मुझे डक्टर पंथ से इंगलिस दवायें भेजती थी किसी ने मेरे ऊपर एक नही लगाया चार महीने मैं बिस्तर पर रहा, मेरी दोनो आंखो में मोतियाबिन्द हो गया जो मैं दिल्ली से रूपया लाया था और जो कुछ भी मेरे पास था मैं सब अपनी पत्नी को दिया करता था इस वजह से मैं अपना आपरेशन भी नही करा पाया। मेरे एक दोस्त ने 25000/- रू० की मदद की जिससे मैंने

15 अगस्त 2020 में सारिम आई केयर सेंटर चमनगंज में कराया 20 अगस्त 2020 में मेरी मां का देहान्त हो गया, मां के देहान्त के बाद मेरी भाई ने बताया कि मां ने तुम्हारे लिए 15000/- रूपये रखे हैं तुम अपनी दूसरी आंख का आपरेशन करा लो। 26 सितम्बर 2020 को भाई ने सारिम आई केयर सेंटर चमनगंज में मेरी दूसरी आँख का आपरेशन ले जाकर कराया। अगस्त में पत्नी को दस हजार रूपये दिए और सितम्बर में हमारे एक दोस्त ने 20 हजार दिये वह भी पत्नी को दे दिया। इस औरत ने मुझे बर्बाद कर दिया है, मैं साल में 5-6 दिन के लिए ईद व बकरीद में आता था मेरे पीछे क्या हो रहा है मालूम नही। मेरी पत्नी के पास दो मोबाइल हैं मो0 नं०-8303336146, 9559882618 है जब मेरी तबीयत कुछ सही हुई तब मैंने महसूस किया कि मो ० नं०- 9559882618 हर रोज रात्रि में 9-10 बजे काल आती थी और दिन भर मैसेज आते थे, एस० एम० एम० व काफी लम्बी बात होती थी जिस नंबर से काल व मैसेज आते थे वह नंबर रजनीश सेठी मो०-9839940652 का था। दूसरे कमरे में जाकर मेरी पत्नी बात करती थी और मेरे पूछने पर कहती कि सहेली का काल व मैसेज है, मैंने बहुत दिन इस पर भरोसा किया, फिर बाद में पता किया मैंने कहा कि पति पत्नी मे कुछ छिपा नही होता। तुम पूरे खानदान फैमिली से मेरे सामने बात करती हो, और जब इस सहेली का काल और मैसेज आता है तो दूसरे कमरे में क्यों चली जाती हो यह नंबर जो बताया वह रजनीश सेठी का है मो०9839940652 और सायरा उरूज उर्फ अफसाना बेगम का मो०नं०- 9559882618 पर मैसेज व काली आती है रात में 4-5 बजे मैसेज आता था और किया भी जाता था। जब मैंने नोट किया और मुझे शक किया। एक दिन जब यह नहाने चली गई तो मैंने नंबर चेक करने के लिए फोन उठाया नंबर खुलने के वजाय मैसेज वक्स खुल गया 9559882618 जो मेरी पत्नी का है हमारी पत्नी की ओर से मैसेज किया गया था की बहुत प्यार करते है। डार्लिंग, जो कि रजनी सेठी के मो०नं०-9839940652 पर मैसेज किया गया था। उधर से आया लव यू डार्लिंग, पत्नी की तरफ से कहां-कहां जा रहे हो, रजनीश सेठी की ओर से शायरी आयी, रजनीश सेठी की ओर से फिर आया होटल पहुंचने वाला हूँ। पत्नी ने लिखा कितने बजे, यह बात 03 अगस्त 2020 सुबह 6 बजे की है रजनीश सेठी होटल स्टेशन व्यू का मालिक है जो सूतर खाने में है। आज से 5 वर्ष पहले जब मैं वेकनगंज मे रहता था तो उस वक्त मेरा पत्नी के पास एक मोबाइल था जिसका नं०-8303336146, उस मो० नं०- 9839940652 जो कि रजनीश सेठी का था, हर रोज लगभग आधा पौन घन्टा बात होती थी मेरे पूछने पर यही बात कहती थी कि मेरी सहेली का फोन है मैने भरोसा किया, 2014 में दिल्ली व्यापार के सिलसिले मे चला गया मैं साल में 2-3 दिनों के लिए आता था मुझे मालूम नही मेरे पीछे क्या हो रहा है। 03 अगस्त 2020 की सुबह जब मैसेज पढ़ा तो मो०नं०-9839940652 जो कि रजनीश सेठी का है तब मुझे मालूम हुआ कि यह नंबर तो मैने 5 वर्ष पूर्व भी हमने देखा था। इतने दिनो में मैने घर पर बहुत कम रोटी खायी सिर्फ दवा खाकर अपना काम चलाया। मेरे पास जो भी थोड़े बहुत रूपए आते थे वह पत्नी को दे देता था। इस मैसेज को लेकर पत्नी से बहुत लड़ाई हुई। मेरी पत्नी कहने लगी कि तुम झांटू आदमी हो झांटे उखाड़ लोगे, मैं अपनी पत्नी से बहुत प्रेम करता था मैने उसे फिर समझाया, कि चला छोड़ा पिछली बाते अब फिर नए सिरे से जीवन शुरू करते हैं और मैं बहुत पैसे कमा कर लाऊगां। मैंने फैमिल का वास्ता दिया और कहा कि पूरी फैमिली बर्बाद हो जायेगी। उसने दानियाल व कुरान की कसम खायी न मैसेज करती हूँ और न ही मेरी बात होती है। और जो पिछली बाते थी वह सब खत्म हो गई। मैने एक बार फिर भरोसा किया और मैं दिल्ली जाने की तैयारी करने लगा। मेरी पत्नी के व्हाट्सअप वाले नंबर पर मो०नं० 8303336146 पर 28 सितम्बर 2020 से फिर से

व्हाट्सएप मैसेज फिर आने लगी मुझे शक हुआ, मो० नं०- 9335181345 जो आशीष शुक्ला का है और उसकी पत्नी नूपुर शुक्ला मो० नं०- 9415154954 से दिन भर हर दस मिनट में व्हाट्सअप और मैसेज आने लगे और जबाव भी व्हाट्सअप और मैसेज से ही दिये जाने लगा। इस तरह की अश्लील मैसेज दिन भर आते थे गुड मार्निंग से लेकर गुड नाइट तक। यह आशीष शुक्ला या तो पत्नी का कोई क्लांइट है या फिर मेरे पकड़े जाने के डर से रजनीश सेठी ने अपने किसी आदमी का फोन इस्तेमाल कर रहा है। कुछ मैसेज मैने चोरी से पढ़े यह लिखा था कि रायपुर पहुंच गए है क्या कर रहे हो एक दिन लिखा था कि आज टाइम नही है क्या घूमने के लिए, और काम के लिए। मैसेज भेजा पत्नी ने आज नही कल शाम को तो दोनो तरफ से ओके हुआ। एक दिन दिन भर मैसेज नहीं आया तो दूसरे दिन पत्नी बहुत परेशान हो गई उसने मैसेज किया कि सब ठीक है कोई बात तो नही, वह मैसेज देखती और उसी टाइम डिलीट कर देते है। बरहाल यह जो भी हो आशीष शुक्ला है, इस पर सख्त से सख्त कार्रवाही हो जो मुझे ज्ञात था मैने बता दिया। 3 अक्टूबर 2020 का मैंने रजनीश सेठी मोबाइल नंबर 9839940652 से शाम 6 बजे पत्नी को मैसेज आया नाटी गर्ल इस तरह की सारी अश्लील बाते रजनीश सेठी और आशीष शुक्ला के मोबाइल से होती थी। पत्नी के दोनो मोबाइल नं - 8303336146, 9559882618 है हमें लगता है कि रजनीश सेठी जो कि होटल स्टेशन व्यू का मालिक है रुपये का लालच देकर पत्नी का शोषण कर रहा है। मुझे लगता है कि इसने पत्नी का नाम सायरा उरूज उर्फ अफसाना बेगम का नाम बदलकर साईना सेठी के नाम से विवाह कर लिया है। क्योंकि पत्नी के मो० नं०- 9559882618 के टू कालर पर साईना सेठी का नाम आ रहा है। रजनीश सेठी ने रूपये का लालच देकर और भी बहुत सारी औरतो का शोषण किया है, मेरी पत्नी के रजनीश सेठी और आशीष शुक्ला से अबैध संबंध है। यह दुनिया के लिए एक सबक है, गलत औरतो से शादी करना और प्यार करना और अपने मां बाप की बात न मानकर गलत करना उसी की सजा भुगत रहा हूँ। मैं अपनी पत्नी से बहुत प्रेम करता हूँ। इस उम्र मे 50 वर्ष मे गैर मर्दो के साथ घूमना व उसके साथ गायब रहना और गलत संबंधो को रखना इस वजह से परेशान होकर मैं आत्महत्या कर रहा हूँ इसमे मेरे बच्चो का कोई कसूर नही है, उनको तो यही लगता है कि मम्मी पापा मे बहुत लड़ाईच हुई है। 6 अक्टूबर 2020 को झगड़ा करके उसने मुझे घर से निकाल दिया और कहा मेरा क्या उखाड़ लोगे, मुझे तुम्हारे साथ नहीं रहना है मुझे उन्ही आदमियों के साथ रहना है। यह सारी बाते मेरी पत्नी के दोनो मोबाइल रजनी सेठी और आशीष शुक्ला के मोबाइल पर काल डिटेल, व्हाट्सएप डिटेल और एस० एम० एस० डिटेल से सब मालूम हो जाएगा। यह रजनीश सेठी औरतो को अपने जाल में फंसा कर वह पैसे का लालच देकर शोषण करता है, इसने मेरा पूरा परिवार खत्म कर दिया है। मेरी एस०एस०पी०,डी०एम० कानुपर और तमाम मीडिया से यह अपील है कि ऐसे लोगो को ना छोड़ा जाए, मेरी पत्नी की किए की सजा अल्लाह ताला इसी दुनिया में उसे देगा मैं बहुत दुखी मन से आत्महत्या कर रहा हूँ मेरी मौत की वजह मेरी पत्नी व रजनीश सेठी है। इन पर सख्त से सख्त कार्रवाही की जाये।

प्रार्थी
ह०-अपठनीय
सकील अहमद
पुत्र स्वर्गीय मुमताज अहमद

"Shakeel Ahmad S/o Late Mumtaz Ahmed

मेरे मरने के बाद मेरा शव के हवाले कर दिया जाए (1) My Friend owner-GCM Rubber

Dado Nagar (Kanpur)

Raju-Malhotra-9336100014 (MOBiel)

(2) My Sado Haji Shuhail Ahmed Beconganj-Corporater(Kanpur) (9539127915) Mobiel No-(9839127915)

(3) My Brother-Guddo-Rehmani Market

Talk Mahal (Kanpur)

Mobiel (8433866410) (8433866410)

(4) My Sister-Zeba-Mumtaz Rehmani Market (Kanpur) Mobile No 9621977605 9621977605"

6.2- गुड्डू उर्फ रियाज पुत्र स्वर्गीय मुमताज अहमद निवासी 101/110 फ्लैट 9 रहमानी मार्केट तलाक महल थाना कर्नलगंज कानपुर पूछताछ मे बताया कि मेरी उम्र 54 साल कि शकील मेरा छोटा भाई था उसकी शादी 1989मे अपनी मर्जी से सायरा उरूज उर्फ अफसाना बेगम पुत्री गुलाम मुर्तजा निवासी कमाल खान का हाता नई सड़क थाना बेगमगंज के साथ अपनी मर्जी से प्रेम विवाह किया था शादी से पूर्व सायरा उरूज उर्फ अफसाना की एक शादी पहले भी इसरार बेग निवासी चमनगंज के साथ हुआ था। इसरार बेग से पुत्र दानिश व पुत्री आशी हुई थी इसरार बेग ने सायरा उरूज उर्फ अफसाना गलत चाल चलन के कारण सायरा उरूज उर्फ अफसाना को तलाक दे दिया था। तलाक के बाद शकील ने सायरा उरूज प्रेम विवाह किया था सायरा उरूज की गलत हरकते हमारे परिवार वालो को मालूम थी इस कारण हमारी माता जी हम लोग परिवार के सभी लोग शकील की शादी मे शिरकत नही किए थे शायरा उरूज उर्फ अफसाना पत्नी शकील अहमद नि० 105/37 सी प्रेम नगर गुरूद्वारा के पास चमनगंज कानपुर एक स्वच्छंद विचारो की महिला थी और वह हमारे भाई के साथ अक्सर मारपीट करती थी और पैसे के लिए हमेशा उसको हमेशा प्रताड़ित करती रहती थी। उसके संबंध कई गैर मर्दों से थे इसलिए सायरा का हमारे घर मे आना जाना बन्द था इसी का फायदा उठाकर उसने मेरे भाई को बहुत परेशान किया और कई गैर मर्दों के साथ उसने अपने संबंध बढ़ाई मेरे भाई ने कई बार कहा था कि अब हम अपने पैतृक मकान में रहेगें, लेकिन सायरा ने हमेशा मना किया कभी किराए पर पूनम कपूर के मकान पाड़ नगर में कभी पटकापुर मे रही और नसर भाई के मकान चमनगंज मे रहने लगी थी मेरे भाई ने अपने पत्नी को खुश करने के लिए सारे जतन किए लेकिन उसके गलत चाल चलन की वजह से गैर मर्दो के साथ उसका सम्पर्क होने के कारण समझाने पर मारपीट पर आमादा हो जाती थी। जिस कारण मेरा भाई परेशान रहता था। अपनी परेशानी की सारी बाते मुझसे बताई थी मैने अपनी भाभी को समझाया भी था। इस कारण मेरी भाभी मुझसे नराज रहती थी। मेरी भाभी रजनीश सेठी पुत्र स्वर्गीय ओम प्रकाश सेठी निवासी 70/87 सूतर खाना थाना हरवंस मोहाल कानपुर नगर होटल ब्यू का मालिक जो अय्यास किस्म का आदमी था मेरी भाभी घंटो घंटो उस आदमी से बात किया करती थी। जिस कारण मेरा भाई काफी तनाव मे रहता था। जिस कारण घर मे कई बार मार पीट की नौबत तक आ गई सायरा उरूज और रजनीश शेट्टी आदि लोगो ने भाई को इतना ज्यादा अपमानित किया कि आत्महत्या के लिए मेरे भाई को मजबूर कर दिया मेरे भाई को सायरा उरूज और रजनीश शेट्टी आदि आत्महत्या के लिए काफी उकसाया कहती थी ये मर जाये तो मेरा रास्ता साफ हो जाये मेरी भाभी फोन से गन्दी गन्दी बाते रजनीश से भाई को सुना सुना कर करती थी। जिससे मेरे भाई ने भाभी से कहा था कि अगर तुम अपनी आदत से बाज नही आओगी तो हम आत्महत्या कर लेगे तो भाभी ने कहा था कर लो तो रास्ता साफ हो जाये ये यही बात रजनीश को समझाया तुम अपनी आदत से बाज नही आओगे तो हम

आत्महत्या कर लेगें तो रजनीश ने कहा था कर लो तो रास्ता साफ हो जाये ये बात भाई ने मुझसे बतायी थी। जो मेरे भाई ने अपने सुसाइड नोट में लिखा है मेरे भाई ने मरने से पहले अपने मोबाइल नंबर 6392666621 मे व्हाट्सएप मेरे मो० नं० 8433866110 पर अपनी आवाज में अपनी आडियो व सुसाइड नोट भेजा था जिसमे उसने अपनी पीड़ा को बयान किया और अपने आत्महत्या करने के कारणों को बताया था मेरे भाई के आत्महत्या करने दोनो दोषी है जो मैने अपने बयान में कहा है श्रीमान जी मेरा बयान है

6.3- जेबा पत्नी अनवर हसीव अहमद निवासी 1/110 फ्लैट 9 रहमानी मार्केट तलाक महल थाना कर्नलगंज कानपुर पूछताछ से बताया की मेरी उम्र 42 साल कि शकील मेरा बड़ा भाई था उसकी शादी 1989 मे अपनी मर्जी से सायरा उरूज उर्फ अफसाना बेगम पुत्री गुलाम मुर्तजा निवासी कमाल खान का हाता नई सड़क थाना बेगमगंज के साथ अपनी मर्जी से प्रेम विवाह किया था शादी से पूर्व सायरा उरूज उर्फ अफसाना की एक शादी पहले भी इसरार बेग निवासी चमनगंज के साथ हुआ था इसरार बेग से पुत्र दानिश व पुत्री आशी हुई थी इसरार बेग ने सायरा उरूज उर्फ अफसाना गलत चाल चलन के कारण सायरा उरूज अफसाना को तलाक दे दिया था तलाक के बाद सकील ने सारा उरूज प्रेम विवाह किया था सायरा उरूज की गलत हरकते हमारे परिवार वालो को मालूम थी इस कारण हमारे माता जी हम लोग परिवार सभी लोग सकील की शादी में शिरकत नही किए थे शायरा उरूज उर्फ अफसाना पत्नी शकील अहमद नि० 105/37 सी प्रेम नगर गूरूद्वारा के पास चमनगंज कानपुर एक स्वच्छंद विचारो की महिला थी और वह हमारे भाई के साथ अक्सर मारपीट करती थी और पैसे के लिए हमेशा उसको प्रताड़ित करती रहती थी उसके संबंध कई गैर मर्दो से थे इसलिए सायरा का हमारे घर मे आना जाना बन्द था इसी का फायदा उठाकर उसने मेरे भाई को बहुत परेशान किया और कई गैर मर्दो के साथ उसने अपने संबंध बढ़ाई मेरे भाई ने कई बार कहा था कि अब हम अपने पैतृक मकान मे रहेगे लेकिन सायरा ने हमेशा मना किया कभी किराए पर पूनम कपूर के मकान पाडू नगर, में कभी पटकापुर मे रही और नसर भाई के मकान चमनगंज मे रहने लगी थी मेरे भाई ने अपने पत्नी को खुश करने के लिए सारे जतन किये, लेकिन उसके गलत चाल चलन की वजह से गैर मर्दों के साथ उसका संपर्क होने का कारण समझाने पर मारपीट पर आमादा हो जाती थी। जिस कारण मेरा भाई परेशान रहता था। अपनी परेशानी की सारी बातें मुझसे बताई थी मैने अपनी भाभी को समझाया भी था। इस कारण मेरी भाभी मुझसे नाराज रहती थी। मेरी भाभी रजनीश सेठी पुत्र स्वर्गीय ओम प्रकाश सेठी निवासी 70/87 सूतर खाना थाना हरवंस मोहाल कानपुर नगर होटल ब्यू का मालिक जो अय्यास किस्म का आदमी था मेरी भाभी घंटो घंटो उस आदमी से बात किया करती थी। जिस कारण मेरा भाई काफी तनाव में रहता था। जिस कारण घर मे कई बार मार पीट की नौबत तक आ गई सायरा उरूज और रजनीश शेट्टी आदि लोगो ने भाई को इतना ज्यादा अपमानित किया किया कि आत्महत्या के लिए मेरे भाई को मजबूर कर दिया मेरे भाई को सायरा उरूज और रजनीश शेट्टी आदि आत्महत्या के लिए काफी उकसाया। कहती थी ये मर जाये तो मेरा रास्ता साफ हो जाये, मेरी भाभी फोन से गन्दी गन्दी बाते रजनीश से भाई को सुना सुना कर करती थी। जिससे मेरे भाई ने भाभी से कहा था कि अगर तुम अपनी आदत से बाज नही आओगी तो हम आत्महत्या कर लेगे तो भाभी ने कहा था कर लो तो रास्ता साफ हो जाये ये यही बात रजनीश को समझाया तुम अपनी आदत से बाज नही आओगे तो हम आत्महत्या कर लेगें तो रजनीश ने कहा था कर लो तो रास्ता साफ हो जाये ये बात भाई ने मुझसे बतायी थी। जो मेरे भाई ने अपने सुसाइड नोट में

लिखा है मेरे भाई के आत्महत्या करने दोनो दोषी है जो मैने अपने बयान में कहा है श्रीमान जी मेरा बयान है

6.4- बयान गवाह- हाजी सुहैल अहमद पुत्र हाजी अमानुल्लाह निवासी 98/202 बेकनगंज थाना बेकनगंज जनपद कानपुर नगर उम्र 40 साल बयान किया कि पूछताछ पर बताया कि शकील अहमद मेरा साडू है उसकी शादी 1989 मेरी साली सायरा उरूज उर्फ अफसाना पुत्री गुलाम मुर्तजा निवासी कमाल खान का हाता नई सड़क थाना बेकनगंज से हुई थी साइरा की पहली शादी इसरार बेग निवासी चमनगंज के साथ हुई थी लेकिन परिवारिक जीवन ठीक से न चलने के कारण दोनो के बीच मे तलाक हो गया था उनसे एक पुत्र दानिश हुआ था जो अपने साथ सायरा उरूज उर्फ अफसाना अपने साथ ले आई थी सायरा उरूज उर्फ अफसाना मेरी बड़ी साली है उसकी हरकते कुछ अच्छी नही थी इसलिए शकील अहमद के परिवारी जन ने अपने परिवार से उनको अलग कर दिया था सायरा उरूज उर्फ अफसाना और पति शकील अहमद किराए का कमरा लेकर कई जगह रहे है और मेरा साडू शकील अहमद केमिकल का अच्छा करोबारी था जब कानपुर में केमिकल का करोबार कुछ हल्का पड़ गया था तो वह दिल्ली चला गया था और वही से अपने पत्नी व परिवारी जन के लिए पैसा भेजता था सायरा उरूज उर्फ अफसाना का चाल चलन ठीक ना होने का कारण व दिन रात पराये मर्दो से बात करने की जानकारी जब शकील अहमद को हुई तो वह परेशान रहने लगा और उसने यह बात हमको बताए की इस बात की जानकारी जब हमको हुई थी तो हमने भी सायरा उरूज उर्फ अफसाना को समझाया था कि यह गलत बात है लाक डाउन से पहले मेरे साडू शकील अहमद दिल्ली से वापस आ गए थे और मकान नंबर 105/38 प्रेम नगर गुरूद्वारा के किराए का कमरा लेकर रहने लगे थे और बगल मे एक और मकान 105/37 सी वह भी साथ में किराए पर लिया था सायरा और स्वच्छंद विचारो वाली महिला थी वह अपनी ही मर्जी चलाती थी किसी का कहना नही मानती थी इसी कारण पति पत्नी से अक्सर मार पीट होती थी शकील अहमद को सायरा उरूज उर्फ अफसाना हमेशा प्रताड़ित करती रहती थी सायरा के संबंध कई मर्दो से थे इसलिए सायरा का हमारे घर मे भी आना जाना नही था हमने सख्ती से मना कर दिया था शकील अहमद ने अपनी पत्नी को खुश करने के लिए सारे जतन किए थे लेकिन चाल चलन गलत होने के कारण वह शकील अहमद की कोई बात नही मानती थी इसलिए शकील अहमद हमेशा परेशान रहता था उसके गलत संबंधो पराए मर्दो से होने की बात शकील अहमद ने हमसे बताई थी शकील अहमद ने रजनीश शेट्टी पुत्र स्वर्गीय ओम प्रकाश सेठी निवासी 70/87 सूतर खाना थाना हरवंस मोहाल ब्यू का मालिक जो अय्यास किस्म का व्यक्ति था सायरा घंटो घंटो बात करती थी जब शकील अहमद ने रजनीश सेठी को पत्नी सायरा से बात करने से मना किया और बताया कि अगर नही मानी तो मै आत्महत्या कर लूंगा तो रजनीश सेठी ने कहा तुझे मरना कल है तो तु आज ही मर जा लेकिन मैं बात करना बंद नही करूंगा और यही बात सायरा ने चिल्ला चिल्ला कर कहा कि तुझे मरना हो तो मर जा लेकिन मै रजनीश शेट्टी से बात करना मिलना जुलना बंद नही करूंगी इन लोगो ने मेरे साडू शकील अहमद को इतना ज्यादा अपमानित किया कि वह आत्महत्या के लिए मजबूर कर दिया मेरे साडू को इन लोगो ने आत्महत्या के लिए काफी उकसाया सायरा उरूज जब शकील अहमद को देखती थी तो रजनीश शेट्टी से गन्दी गन्दी बाते सुना सुना कर करती थी यह सारी बाते रजनीश और सायरा से की बाते शकील अहमद ने मुझसे बताई थी जो मैं आपको बता रहा हूँ और मेरे साडू की आत्महत्या करने मे उपरोक्त लोगो ने काफी उकसाया तब शकील अहमद ने आत्महत्या किया है यही मेरा बयान है

6.5- बयान गवाह- राजीव मल्होत्रा पुत्र केवल किशन मल्होत्रा निवासी 7/190 सी कानपुर स्वरूप नगर उम्र 55 साल मोबाइल नंबर 9336100014 पूछताछ पर बताया कि मै केमिकल का व्यापारी हूँ और टाटा नगर में मेरी फैक्ट्री है शकील अहमद मेरा दोस्त था और वह केमिकल का व्यापारी था केमिकल खरीदने बेचने के संबंध में हमारा उससे मिलना जुलना हुआ था और इसी संबंध में हमारा उनका विचारो का आदान प्रदान होता रहता था शकील अहमद ने अपने पत्नी का पराए मर्दो से संबंध के बारे में हमसे बताया था जिसमे एक व्यक्ति रजनीश शेट्टी पुत्र ओम प्रकाश से थी निवासी 70/87 सूतर खाना थाना हरवंस मोहाल होटल व्यू का मालिक जो जिससे मेरी पत्नी हमेशा बात करती थी और वह भी मेरी पत्नी से बात करता रहता था और आये दिन मेरी पत्नी उससे मिलती थी और वह मेरी पत्नी से मिलता था मैने दोनो को बहुत समझाया गलत हरकत अगर नही छोड़ी तो आत्महत्या करने की बात शकील अहमद ने उन लोगो से कहा था उन लोगो द्वारा कहा गया कि तुझे मरना कल है तो तु आज ही मर जा लेकिन हम लोग अपना मिलना जुलना नही छोड़ेगे यह सारी बाते शकील अहमद ने मुझसे बताई थी उपरोक्त दोनो लोगो ने शकील अहमद को आत्महत्या के लिए इतना ज्यादा प्रताड़ित किया इतना ज्यादा उकसाया शकील अहमद आत्महत्या करने पर मजबूर हो गया यही दोनो लोगो के द्वारा ही शकील अहमद ने आत्महत्या किया है शकील अहमद ने जो मुझको बताया था वह मैं आपको बता रहा हूँ हम दोनो एक अच्छे दोस्त है सुख दुख के साथ थे इसलिए शकील अहमद ने मरने के बाद अपने शरीर को अंतिम संस्कार के बारे में मुझे लिखा होगा। यही मेरा बयान, बयान के बाद गवाहान को ससम्मान रूखसत किया गया।

Discussion:

7- Having heard the argument of the learned counsel for the parties, this Court is of the view that for abetment of suicide, there must be a reasonable certainty to incite the consequence. The word suicide is nowhere defined in the Indian Penal Code. The meaning of suicide requires no explanation. 'Sui' means 'self' and 'cide' means 'killing', thus implying an act of self-killing. No standard or straight jacket formula can be laid down with regard to sensitivity of each individuals, because different people behave differently in same situation. Each person has his own idea of self esteem and self respect. Sometime a comment passed against a person on lighter side are taken very seriously by such persons, who are hyper-sensitive while other persons, who are not so sensitive, behave differently, they ignore even serious comment made against them and try their best to face the situation. Therefore, each case has to be decided on the basis of its own facts and circumstances. If the accused kept on irritating or annoying the deceased by words, deeds or conduct, which may provoke, urge or encourage the deceased to commit suicide is an abetment. To constitute abetment, the intention and involvement of the accused to aid or instigate the commission of suicide is imperative. In a case of suicide, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide.

8- It is well settled that every case turns on its own facts. Even one additional or different fact may make a big difference between the conclusion in two cases, because even a single significant detail may alter the entire aspect.

Finding:

9- Under the facts of the case, I found that there is a proximate link between the unfortunate incident in question and act of

the accused applicant. Though the deceased had died because of hanging, but facts of the case reflect that he was hyper-sensitive man and was very much depressed and feels himself humiliated among his family members, friends and in the society on account of bad habits, immoral act, misbehavior and illicit relation of his wife (applicant) with several other persons as well as his harassment by the applicant, as mentioned by him in his suicide note. From the materials on record, it also shows that despite the best effort and persuasion made by the deceased, the applicant was not willing to give-up her illicit relation with co-accused and other persons and kept on harassing the deceased adopting different modus-operandi. The said facts are corroborated by the statement of the witnesses as well as call details of the applicant with other persons as mentioned above. The deceased in his suicide note has specifically mentioned the aforesaid reasons and other compelling circumstances, which prevailed upon him for committing suicide. The Forensic Science Laboratory test report dated 01.03.2021 has confirmed that said suicide note has been written by the deceased. It is the basic principle of criminal jurisprudence that a man may tell a lie, but circumstances do not. In view of above, I find that allegations and materials against the applicant are of definite nature (not imaginary or inferential one), hence as on date, from the materials available in case diary of this case and as mentioned in preceding paragraph no.6, prima-facie case for abetment and instigation is made out against the applicant. As a fallout and consequence of aforesaid discussion, the submissions made on behalf of the applicant is not liable to be accepted.

Conclusion:

10- On the basis of aforesaid analysis, considering the facts and circumstances of the case, submissions advanced on behalf of parties, complicity of the applicant, gravity of the offence and severity of the punishment, I do not find any good ground to grant bail to the applicant at this stage.

Result:

11-Accordingly, the bail application is **rejected.**

12-However, it is made clear that the observation contained in the instant order is confined to the issue of bail and shall not effect the merit of the trial1-By means of this application, applicant Sayara Uruuz alias Afsana, who is involved in Case Crime No. 385 of 2020, under section 306 IPC, police station Chamanganj, district Kanpur Nagar, seeks enlargement on bail during the pendency of trial.

(2021)08ILR A455
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.07.2021

BEFORE

THE HON'BLE SHEKHAR KUMAR YADAV, J.

Criminal Misc. First Bail Application No. 20015 of 2021

Javed @ Jabid Ansari ...Applicant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Vivek Kumar Singh, Sri Pandey Balkrishna, Sri Mohd. Khalid, Sri Imran Ullah Khan

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

(अ) फौजदारी कानून - धर्म परिवर्तन कर व धर्म परिवर्तित कर जबारिया शादी - भारतीय दंड संहिता, 1860 - धारा 366, 368,120बी, दंड प्रक्रिया संहिता, 1973 - धारा 166 ,164 - उत्तर प्रदेश विधि विरुद्ध धर्म परिवर्तन अधिनियम, 2020 - धारा 5(1) ।

(ब) भारतीय संविधान,1950 - अनुच्छेद 25 - धर्म का आचरण और प्रचार की स्वतंत्रता , अनुच्छेद 26 - धार्मिक कार्यों के प्रबंध की स्वतंत्रता - देश में प्रत्येक नागरिक के लिए गारंटीकृत मौलिक अधिकार है किन्तु उसका यह अर्थ कदापि नहीं है कि लालच या भय से किसी का धर्मांतरण किया जाए। (पैरा - 17)

वर्तमान वाद में पीड़िता का धर्मांतरण दिनांक 18 11 2020 को हुआ - निकाहनामा दिनांक 28 11 2020 को हुआ - धर्मांतरण विवाह के लिए किया गया है और वह भी पीड़िता के इच्छा के विरुद्ध। (पैरा - 9)

निर्णय : अभियुक्त पहले से शादीशुदा था और झूठ बोलकर झांसी में रखकर पहले पीड़िता का विधि विरुद्ध धर्म परिवर्तन कराया और उसके बाद उर्दू कागजातों पर जिसे पीड़िता पढ़ना भी नहीं जानती थी फर्जी निकाहनामा तैयार किया और शादी कर लिया मानसिक शारीरिक शोषण किया। पीड़िता ने मजिस्ट्रेट के समक्ष अभियुक्तों के विरूद्ध बयान दिया जिसे अनदेखा नहीं किया जा सकता है। पीड़िता इतना डरी सहमी हुई है और जो कुछ उसके साथ हुआ वह हमारे आर्डर के बयान नहीं बताना नहीं चाहती है ।आवेदक को जमानत पर मुक्त करने का कोई पर्याप्त आधार नहीं पाया जाता है ।

(पैरा - 10,11)

जमानत आवेदन पत्र निरस्त । (E-6)

<u>उद्धृत मामलों की सूची :</u>

1 . रेव स्टैनिस्लास बनाम मध्यप्रदेश राज्य एवं अन्य, 1977 एo आईo आरo 908

2. रामजी लाल मोदी बनाम यूनानी राधा

3. अनूप घोष बनाम पश्चिम बंगाल राज्य

4. श्रीमती नूरजहां बेगम उर्फ अंजली बनाम उत्तर प्रदेश

(Delivered by Hon'ble Shekhar Kumar Yadav, J.)

1. यह दाण्डिक प्रकीर्ण जमानत प्रार्थना पत्र, आवेदक जावेद उर्फ जाबिद अंसारी की ओर से मुकदमा अपराध संख्या 513 वर्ष 2020, अन्तर्गत धारा 366, 368, 120बी., भा0 दं0 सं0 तथा धारा 5 (1) उत्तर प्रदेश विधि विरूद्व धर्म सपरिर्वतन अधिनियम, 2020, थाना जलेसर, जिला एटा में जमानत पर मुक्तकरने हेतु प्रस्तुत किया गया है।

2. आवेदक के विद्वान अधिवक्ता श्री इमरान उल्ला खा ँ तथा राज्य की ओर से श्री शिव कुमार पाल विद्वान शासकीय अधिवक्ता एवं श्री विभव आनन्द सिंह, विद्वान शासकीय अधिवक्ता को विस्तारपूर्वक सुना एवं पत्रावली का सम्यक परिशीलन किया।

3. संक्षेप में अभियोजन कथानक इस प्रकार है कि वादी प्रवीन कुमार पचोरी की पुत्री कुमारी आयुषी उम्र करीब 21 वर्ष जो जन्म से ही हिन्दू है। दिनांक 17–11–2020 को सुबह 6 बजे एटा बाजार करने जलेसर गयी थी, फिर वापस घर नहीं आयी, काफी तलाशने पर न मिलने पर गुमशुदगी की सूचना दी गयी जो कोतवाली सिटी एटा पर दिनांक 25–11–2020 को दर्ज हुई। वादी को ज्ञात हुआ कि मोहल्ला छतता जलेसर निवासी मो0 जावेद पुत्र रहीम उल्लाह, नाजिर पुत्र रहीम उल्लाह, निशानाज पत्नी मोहम्मद नाजिर, रोशन जहा ँ पुत्र रहीम उल्लाह, साजिद पुत्र रहीम उल्लाह, रिजवाना पत्नी मो0 साजिद दिनांक 17–11–2020 को दो अज्ञात व्यक्तियों के साथ करीब सुबह 7 बजे उसकी पुत्री आयुषी को जलेसर से करीब 7 बजे बहला फुसलाकर धोखा देकर धर्म परिवर्तन करने व धर्म परिवर्तित कर जबारिया शादी के उद्वदेश्य से अपहरण कर ले गये हैं जिन्हें ले जाते हुए सुनील मोहन, ओम प्रकाश सिंह ने देखा। वादी को ज्ञात हुआ है कि अपहरण कर ले जाकर बिना जिलाधिकारी को सूचित किये विधि विरूद्व तरीके से पुत्री आयुषी का मनोवैज्ञानिक दबाव से कपटपूर्ण ढंग से विवाह हेतु उसका हिन्दू धर्म से मुस्लिम धर्म में दिनांक 18–11–2020 को धर्म परिवर्तन कर दिया

गया है तथा जानकारी हुई है कि अवैधानिक रूप से धर्म परिवर्तित कराकर उसको मो0 जाविद पुत्र रहीम उल्लाह पत्नी के रूप में इस्तेमाल कर रहा है व शारीरिक शोषण किया जा रहा है।

4. आवेदक के विद्वान अधिवक्ता श्री इमरान उल्ला खा ँ द्वारा मुख्य रूप से यह तर्क प्रस्तुत किया गया कि आवेदक निर्दोष है उसे इस प्रकरण में झूंठा फसाया गया है। पीडिता ने अपनी स्वेच्छा से धर्म परिवर्तन किया है और मुस्लिम धर्म स्वीकार किया है तथा आवेदक के साथ मुस्लिम रीति के अनुसार विवाह किया है और अपना नाम आयुषी के स्थान पर आयशा रख लिया है। अपने तर्क के समर्थन में आवेदक ने धर्म परिवर्तन प्रमाण पत्र एवं निकाहनामा इस जमानत आवेदन पत्र के साथ अनुसंलग्नक 9 के रूप में संलग्न किया है। आवेदक के विद्वान अधिवक्ता द्वारा यह भी तर्क रखा गया कि घटना दिनांक 17–11–2020 की है। प्रथम सूचना रिपोर्ट दिनांक 17–12–2020 को थाने पर दर्ज करायी गयी है। पीडिता की बरामदगी दिनांक 22–12–2020 की है और उसका बयान अन्तर्गत धारा 161 दं0 प्र0 सं0 दिनांक 22–12–2020 को दर्ज किया गया है जिसमें उसने स्वीकार किया है कि वह आवेदक/अभियुक्त के साथ स्वेच्छा से गयी थी और धर्म परिवर्तन करके मुस्लिम धर्म स्वीकार करके आवेदक/अभियुक्त के साथ निकाह किया है। यह भी तर्क रखा गया कि धर्म परिवर्तन दिनांक 18–11–2020 को हुआ है और उत्तर प्रदेश विधि विरूद्व धर्म परिवर्तन अधिनियम का प्रभाव दिनांक 20–11–20.20 को हुआ है इसलिए उस पर उक्त अधिनियम प्रभावी नहीं है। ऐसी दशा में आवेदक का जमानत आवेदन पत्र स्वीकार होने योग्य है।

5. इसके विपरीत राज्य उत्तर प्रदेश की ओर से विद्वान अपर शासकीय अधिवक्ता श्री विभव आनन्द सिंह द्वारा जमानत आवेदन पत्र का पुरजोर विरोध किया गया एवं तर्क रखा गया कि आवेदक पहले से शादीशुदा है और उसने पीडिता को अपहरण करके तथा नशीला पदार्थ खिलाकर नशे की हालत में सादे कागज पर हस्ताक्षर बना लिया और जब उसे होश आया तो पुलिस को फोन करके पुलिस को बुलाया और मजिस्टे ्रट के समक्ष धारा 164 दं0 प्र0 सं0 का बयान आवेदक/अभियुक्त के विरूद्व दिया। यह भी तर्क रखा गया कि घटना के चश्मदीद गवाह सुनीत चौहान और उत्साह भारद्वाज ने कहा है कि उन्होनें पीडिता को अभियुक्त के साथ दिनांक 17–11–2020 को देखा था। वादी प्रवीन कुमार ने अपने बयान अन्तर्गत धारा 161 द्र0 प्र0 सं0 में यह कहा है कि अभियुक्त मो0 जावेदन के साले महफूज व फेजान ने पीडिता को अपने यहां छिपाये हुए थे। स्पष्ट है कि अभियुक्त पहले से शादीशुदा है और पीडिता का विधि विरूद्व धर्म परिवर्तन कराके गलत तरीके से निकाह किया है। यह भी तर्क रखा गया कि धर्म परिवर्तन के पूर्व जिलाधिकारी की अनुमति नहीं ली गयी और न ही कोई नोटिस ही जारी की गयी है। निकाहनामा केवल हिन्दू लडकी का मुस्लिम धर्म में परिवर्तन करने के लिए ही किया गया है जब कि आवेदक पहले से ही शादीशुदा है। यह भी तर्क रखा गया कि धारा 164 दं0 प्र0 सं0 के अन्तर्गत पीडिता का बयान मजिस्टे ्रट के समक्ष आने पर धारा 161 दं0 प्र0 सं0 के बयान का कोई महत्व नहीं रह जाता है। धारा 164 दं0 प्र0 सं0के बयान में पीडिता ने स्पष्ट कहा कि दिनांक 17–11–2020 को वह शाम 5–00 बजे मार्केट जा रही थी की अचानक दो या तीन आदमी आये और उसे गाडी में डालकर ले गये, मुंह बंद करके पकड लिया वह बेहोश हो गयी। अगले दिन वह दिल्ली के करकरडूमा कोर्ट में थी जहां सारे वकील थे और कोई नहीं था उन्होनें कुछ पेपर पर उससे हस्ताक्षर कराये वे ई३र्दू में थे और फिर पता नहीं कहां ले गये उसे होश नहीं रहता था और जब उसे होश आया तो उसने फोन करके पुलिस को बुलाया। यह भी तर्क रखा गया कि आवेदक के अधिवक्ता के इस तर्क में कोई बल नहीं है कि धर्म परिवर्तन अधिनियम पीडिता के धर्म परिवर्तन के दिन के बाद प्रभावी हुआ है। पीडिता का धर्म परिवर्तन दिनांक 18–11–2020 को हुआ और निकाहनामा दिनांक 28–11–2020 को हुआ है और ये सभी परिस्थितियां यह दर्शाती है कि निकाहनामा केवल धर्म परिवर्तन के लिए ही हुआ है वह भी पीडिता के इच्छा के विरूद्व जैसा कि पीडिता ने अपने अन्तर्गत धारा 164 दं0 प्र0 सं0 के बयान में कहा है। इस आधार पर आवेदक/अभियुक्त जमानत पाने का अधिकारी नहीं है और जमानत आवेदन पत्र खारिज किये जाने योग्य है। ऐसा न होने पर समाज के उन धर्म के ठेकेदारों को बल मिलेगा जो गलत रूप से गरीब और महिलाओं को डर, प्रलोभन व लालच देकर उनका धर्म परिवर्तन करते हैं। आये दिन ऐसे तमाम प्रकरण टी0 वी0 और समाचारपत्रों में देखने और पढने को मिलते है जो गरीब, असहाय, गूंगे,

बहरे महिलाओं आदि लोगों को लालच देकर ब्रेन वाश करके अपना उल्लू सीघा करते हैं। सबसे दुखद है कि ऐसे लोगों का प्रोत्साहन और फंडिंग विदेशों से किया जाता है, केवल देश को कमजोर करने के लिए।

6. मैनें उभय पक्षों के विद्वान अधिवक्तागण को विस्तारपूर्वक सुना और प्रपत्रों को ध्यानपूर्वक देखा तथा इस निष्कर्ष पर पहुंचा हूं कि धर्म परिवर्तन और विवाह करने के लिए देश का हर व्यस्क नागरिक स्वतन्त्र है और विधि के अनुसार अपना धर्म परिवर्तन कर सकता है और किसी भी व्यस्क नागरिक से विवाह कर सकता है। कानून में किसी भी प्रकार की कोई बाधा नहीं है। व्यक्ति चाहे हिन्दू हो, मुस्लिम हो, ईसाई हो, कोई भी किसी धर्म को स्वीकार कर सकता है। किसी भी धर्म की लडकी, लडके से विवाह कर सकती है, कोई भी पाबंदी कानून में नही है। सभी को स्वतन्त्रता का अधिकार हमारे भारतीय संविधान में प्रदत्त हैं। कभी–कभी ऐसा भी होता है कि डर, भय, व लालच से लोग धर्म परिवर्तन नहीं करते बल्कि उपेक्षा और अपमान के कारण स्वतः धर्म परिवर्तन करते हैं कि उन्हें दसू रे धर्मों मे सम्मान और इज्जत मिलेगी। इसमे कोई हर्ज नहीं है और भारतीय संविधान में सभी नागरिकों को सम्मान के साथ जीवन जीने का अधिकार है। जब अपने घर में व्यक्ति को सम्मान नहीं मिलता है, उपेक्षा मिलती है तो वह घर छोड देते हैं। इसी प्रकार अगर किसी धर्म में रहते हुए उसे वहां सम्मान नही मिलता है तो उसे पूरा अधिकार है कि वह धर्म परिवर्तन कर ले या फिर वे धर्म के ठेकेदार जो लोगों का जातीय कारणों से अपमान करते है वे अपने अन्दर सुधार ले आये अन्यथा किसी भी देश का बहुल्य नागरिक जब अपमानित होकर धर्म परिवर्तन करता है तो देश कमजोर होता है और इसका लाभ देश के विघटनकारी शक्तियों को प्राप्त होता है। जैसा कि पूर्व का इतिहास यह बताता है कि जब हम बंटे तभी देश पर आक्रमण हुए और हम गुलाम बने। भारतीय संविधान निर्माता डा0 भीम राव अम्बेडकर इसके अच्छे उदाहरण है जिन्होनें अपने प्रारम्भिक जीवन में काफी अपमान सहा, इसी कारण उन्होने धर्म परिवर्तन किया।

7. भारतीय संविधान के **अनुच्छेद 25 (1)** में देश के प्रत्येक नागरिक के लिए गारंटीकृत मौलिक अधिकार है किन्तु उसका यह अर्थ कदापि नहीं है कि लालच या भय से किसी का धर्मान्तरण किया जाए।

अनुच्छेद 25 (1) इस प्रकार हैः

25 (1) सार्वजानिक व्यवस्था, नैतिकता और स्वास्थ और इस भाग के अन्य प्राविधानों के अधीन सभी व्यक्ति समान रूप से अन्तरात्मा की स्वतन्त्रता और धर्म को मानने अभ्यास करने और प्रचार करने के अधिकार के समान हकदार है।

रेव स्टैनिस्लास बनाम मध्य प्रदेश राज्य एव ं अन्य के मामले में **1977 ए0 आई0 आर0 908** में माननीय सर्वोच्च न्यायालय द्वारा प्रतिपादित किया गया है कि हमें इसमें कोई सन्देह नहीं है कि **अनुच्छेद 25 (1)** में प्रचार शब्द का प्रयोग किया गया है जिसके लिए अन्य व्यक्तियों को अपने धर्म परिवर्तन का अधिकार है किन्तु सार्वजानिक व्यवस्था के हित में उनके द्वारा गारंटीकृत अधिकारों पर प्रतिबंध लगाया जा सकता है। यह याद रखना होगा कि **अनुच्छेद 25 (1)** प्रत्येक नागरिक को अन्तरात्मा की स्वतन्त्रता की गारंटी देता है न कि केवल एक विशेष धर्म के अनुयायियों के लिए और यह दर्शाता है कि किसी अन्य व्यक्ति को अपने धर्म में जबरन परिवर्तन करने का कोई मौलिक अधिकार नहीं है क्योंकि यदि कोई व्यक्ति अपने धर्म के सिद्वान्त को प्रसारित करने या फैलाने के प्रयास से अलग, जो देश के सभी नागरिकों के लिए समान है, कार्य करेगा इससे गारंटीकृत विवेक की स्वतन्त्रता को प्रभावित करेगा।

रामजी लाल मोदी बनाम यूनानी राधा के निर्णय के संदर्भ में माननीय सर्वोच्च न्यायालय ने माना है कि **संविधान के अनुच्छेद 25 और 26** द्वारा गारंटीकृत स्वतन्त्रता धर्म के अधिकार को स्पष्ट रूप से सार्वजानिक व्यवस्था, नैतिकता और स्वास्थ के अधीन बनाया गया है और यह भविष्यवाणी नहीं की धर्म की स्वतन्त्रता का सार्वजानिक व्यवस्था के रख रखाव परद कोई असर नहीं पड सकता है या धर्म संबंधी अपराध पैदा करने वाला कानून किसी भी परिस्थिति मे जनता के हित में अधिनियमित नहीं कहा जा सकता है उक्त दोनो अनुच्छेदों में इस बात पर विचार किया गया है कि सार्वजानिक व्यवस्था के हित में उनके द्वारा गारंटीकृत अधिकारों पर प्रतिबंध लगाया जा सकता है।

अनूप घोष बनाम पश्चिम ब ंगाल राज्य के निर्णय में भी माननीय सर्वोच्च न्यायालय ने माना

है उक्त प्रकार का कृत्य केवल एक व्यक्ति को प्रभावित नहीं करता यह सार्वजानिक व्यवस्था में गडबडी के समान होगा। उदाहरण के लिए किसी को जबरन उसके धर्म में परिवर्तित किया जाता है तो यह सभी संवभावनाओं में सार्वजानिक व्यवस्था के उल्लघंन की आशंका को जन्म देगी। धर्म आस्था का विषय है यह एक कर्तव्य निष्ठा, मार्मत और धर्म पराणयता की वस्तु है इसे किसी विशेष पूजा पद्वति से नहीं बांधा जा सकता। जिसका अच्छा उदाहरण सम्राट अकबर और उनकी पत्नी जोधाबाई से लिया जा सकता है।

8. माननीय सर्वोच्च न्यायालय ने भी माना है कि धर्म एक जीवन शैली है। आस्था और मार्मत, विश्वास को बाधा नहीं जा सकता है। भारत देश विभिन्न सम्प्रदायों के मानने वाला देश है। यहां धार्मिक कट्रता का कोई स्थान नहीं है और लालच, डर व भय का कोई स्थान नहीं है। यदि कोई ऐसा करके धर्म परिवर्तन करता है तो किसी भी धर्म में वह ग्राहय नहीं है और इसीलिए भारतीय संविधान भी इसकी इजाजत नहीं देता है। प्रत्येक पर्सनल ला के तहत विवाह एक पवित्र संस्था है और हिन्दू कानून के तहतविवाह एक पवित्र संस्कार है। लिली थामस के मामले में **माननीय सर्वोच्च न्यायालय ने पैरा 7, 8 और 40** में कहा है कि इस्लाम में विश्वास किसी वास्ताविक परिवर्तन के बिना और केवल शादी के लिए एक गैर मुस्लिम का धर्म परिवर्तन शून्य है। इलाहाबाद उच्च न्यायालय ने भी श्रीमती नूरजहां बेगम उर्फ अंजली बनाम उत्तर प्रदेश के मामले में अवधारित किया किया है कि केवल शादी के लिए धर्म परिवर्तन स्वीकार नहीं है।

9. वर्तमान वाद मे भी पीडिता का तथाकथित धर्मान्तरण दिनांक 18–11–2020 को हुआ है। निकाहनामा दिनांक 28–11–2020 को हुआ है। स्पष्ट है कि धर्मान्तरण विवाह के लिए किया गया है और वह भी पीडिता के इच्छा के विरूद्व।

10. प्रस्तुत मामले में पीडता ने कहा है कि आवेदक/अभियुक्त ने उससे झूंठ बोला था उसका और भी लडकियों से सम्बंध था। सादे कागज पर उससे हस्ताक्षर बनवाये गये थे और कुछ कागज ई३र्दू में थे जिसे वह पढना नहीं जानती थी। अन्य गवाहों के बयानों में आया है कि अभियुक्त पहले से शादीशुदा था और झूठ बोलकर झांसे में रखकर पहले पीडिता का विधि विरूद्व धर्म परिवर्तन कराया और उसके बाद ई३र्दू कागजातों पर जिसे पीडिता पढना भी नहीं जानती थी, फर्जी निकाहनामा तैयार किया और शादी कर लिया, मानसिक, शारीरिक शोषण किया। अवसर पाने पर पीडिता ने पुलिस को बुलाया और मजिस्टे ट के समक्ष अभियुक्तों के विरूद्व बयान दिया जिसे अनदेखा नहीं किया जा सकता है। पीडिता के बयान अन्तर्गत धारा 164 दं0 प्र0 सं0 को देखने से लगता है कि पीडिता इतनी डरी व सहमी हुई है और जो कुछ उसके साथ हुआ वह मारे हया और डर के बताना नहीं चाहती है। उपरोक्त परिस्थितियों को ध्यान में रखते हुए आवेदक/अभियुक्त जमानत पाने का अधिकारी नहीं है और उसका जमानत आवेदन पत्र निरस्त किये जाने योग्य है।

11. प्रकरण के समस्त तथ्य एवं परिस्थितियों को दृष्टिगत रखते हुए मेरे विचार से आवेदक को जमानत पर मुक्त करने का कोई पर्याप्त आधार नही पाया जाता है तदनुसार आवेदक का यह जमानत आवेदन पत्र बलहीन है एवं निरस्त किये जाने योग्य है।

12. तदनुसार आवेदक **जावेद उर्फ जाबिद अंसारी** का यह जमानत आवेदन पत्र निरस्त किया जाता हैं।

(2021)08ILR A459
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Bail Application No. 22149 of 2021

Akash ...Applicant

Versus

State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Sohan Lal Yadav, Smita Singh Deo

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

(A) Criminal Law - Bail - Indian Penal Code, 1860 - Sections 370-A(2),376D, 342, 34, 506 - The Code of Criminal Procedure, 1973 - Section 161 - Protection of Children from Sexual Offences Act - Section 5/6 - The Immoral Traffic (Prevention) Act 1956 - Sections 3, 4, 5, 6, 7(1)(a), 7(2)(b) - Human trafficking and immoral activities are an organized crime and are done adopting different modus-operandi by a group of persons with their different role extending full cooperation to each other for illegal pecuniary benefits.(Para - 7)

F.I.R lodged by Sub-Inspector - against seven accused persons - allegation - information received from the informer that prostitution is being done by taking three girls hostages in a building - used as Hotel/Guest House - raid conducted by joint team of police force and Anti-Human Traffic Unit - stated before the police - accused persons forcibly indulged girls in the prostitution - committed rape upon them - victims after conducting medical examination were sent to Women Rehabilitation Centre.

HELD:- Such persons, who are involved in immoral trafficking activities also cause a deleterious effect on the society as a whole. They are hazardous to the civilized society at large, and therefore, in order to control and eradicate this proliferating and booming devastating menace, such persons are not entitled for any sympathy in the criminal justice delivery system. No good ground to grant bail to the applicant.(Para - 7)

Bail application rejected. (E-6)

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

1- By means of this application, applicant, who is involved in Case Crime No. 144 of 2021, under Sections 370-A(2),376D, 342, 34, 506,IPC, Sections 3, 4, 5, 6, 7(1)(a), 7(2)(b), The Immoral Traffic (Prevention) Act 1956 and Section 5/6 Protection of Children from Sexual Offences Act, police station Sector 24 NOIDA, district Gautam Budh Nagar, seeks enlargement on bail during the pendency of trial.

2- As per the prosecution case, in brief, first information report has been lodged on 28.02.2021 by Sub-Inspector Manoj Kumar in respect of occurrence, which took place on 27.02.2021 for the offence under sections 370-A (2), 376, 342, 34, 506 IPC, sections 3, 4, 5, 6, 7(1)(a), 7(2)(b), The Immoral Traffic (Prevention) Act 1956 and section 3/4 of Protection of Children from Sexual Offences Act, against seven accused persons, namely, Vishal Kamboj, Vipul alias Mitthu, Rajan Shah alias Rajan Gupta, Rizwan, Dayal, Sumit Kumar and Akash (applicant), alleging inter alia that on the information received from the informer that prostitution is being done by taking three girls hostages in a building situated at I-24 Sector 12 NOIDA, which was used as Hotel/Guest House, a raid was conducted by joint team of police force and Anti-Human Traffic Unit. The F.I.R. further alleges that accused persons, Vishal Kamboj, Vipul alias Mitthu, Rajan Shah alias Rajan Gupta, Rizwan, Dayal, Sumit Kumar and Akash have been arrested from the place of occurrence and four girls have been freed from their captivity, who have stated before the police that the accused persons were forcibly indulged them in the prostitution and also committed rape upon them. The accused persons have disclosed that the owner of the building is one Kirti Trivedi. The accused persons have stated before the police that they have indulged in the activities of forcible prostitution done by aforesaid four girls in the said building. The recovered materials from the rooms of

the alleged building, were sealed and arrest memo of the accused persons was prepared by the police at the spot. The aforesaid four victims after conducting medical examination were sent to Women Rehabilitation Centre.

3- Heard learned counsel for the applicant, Mr.Virendra Kumar Maurya learned Additional Government Advocate assisted by Mr. Rajmani Yadav, learned Brief Holder representing the State and perused the material placed on record.

4- It is argued by learned counsel for the applicant that the applicant is absolutely innocent and has falsely been implicated in the present case with some ulterior motive. It is further submitted by learned counsel for the applicant that applicant has started doing job in the said building/guest house prior to one week of the alleged occurrence. He does not have any knowledge that in the said building the girls have been forcefully indulged in doing prostitution by the other accused persons. The allegation of committing rape upon the victims is false. The victims in their statements did not make allegation of forceful rape against the applicant. Other co-accused of this case are main accused and his case stands at a different pedestal. There is no recovery from the possession of the applicant. It is also submitted that the applicant has no criminal antecedent to his credit and is facing detention since 28.02.2021. It is next contended that there is no chance of the applicant of fleeing away from the judicial process or tampering with the prosecution evidence. Learned counsel for the applicant lastly submitted that if the applicant is released on bail, he will not misuse the liberty of bail and will cooperate in the early disposal of the case.

5- Per contra, learned Additional Government Advocate vehemently has opposed the bail prayer of the applicant by contending that:-

(i)-on a raid conducted by joint team of police force and Anti-Human Traffic Unit, all the seven accused persons including the applicant were apprehended along-with four girls/victims from the aforesaid building, which was used as Hotel/Guest House.

(ii)-recovered girls have stated before the police that they were forcibly indulged into the prostitution by the accused persons.

(iii)-victim Neeru, aged about 17 years in her statements disclosed inter-alia that she is resident of Bihar. She came in the contact of co-accused Rajan through Keshav Thakur and Manish Patel, who were her school mates. She on account of love affair with co-accused Rajan left her house on his insistence and came at NOIDA with him in December 2020, where Rajan married her and made physical relation with her. She had stayed at hotel for about two months, thereafter Rajan compelled her for prostitution and started sending new customers in her room for making sexual relation with them, who have forcefully committed rape on her. Other employees were also aware about the prostitution and they also made physical relation with her. They also used to send her out to their customer's place to satisfy their lust. On making resistance, Rajan tried to kill her. On getting a chance, she told everything to the police. She in her second statement has also stated that Rajan Shah alias Rajan Gupta, Mitthu, Vishal, Rizwan, Santosh, Pintu, Dayal, Sumit and

Akash (applicant) used to commit forceful rape on her.

(iv)-victim Sneha has stated inter-alia that she is a resident of district Muzaffarnagar. She was called by co-accused Rajan Gupta and Vishal through escort service on the pretext of modeling. Victim Dimpi and Meetthu stated inter-alia that they are resident of West Bengal. They were called by co-accused Rajan Gupta and Vishal through escort service for giving massage service at NOIDA, but on reaching there, they were held hostage by the accused persons and by extending threat enmeshed them in the prostitution /flesh trade. They also alleges that co-accused Rajan Gupta, Vishal Kamboj and Vipul @ Mitthu committed rape on her and enmeshed them into prostitution. They used to send them out to make sexual relation with new people and in the rooms of hotel also all the accused persons including the applicant compelled them to make sexual relation with their customers giving threat to their life.

(v)-on coming into light some new facts during investigation, second statement of the victims under Section 161 Cr.P.C. were also recorded to elicit the truth. One Kirti Trivedi is owner of the guest house in question, which was taken by co-accused Vishal Kamboj on rent. Co-accused Vipul @ Mitthu is manager, Dayal is cook, Sumit and Akash (applicant) were employed for house keeping work and Rizwan is caretaker of the building/guest house. The girls were brought by Rajan Shah @ Rajan Gupta and Vipul @ Mitthu in the guest house for the purpose of prostitution alluring them adopting different modus-operandi. All the accused persons have made forceful sexual relation with the victims. They snatched their mobile phones and kept with them. On making protest by the girls, they used to beat them. Recovered girls had been trafficked and forcibly kept in the guest house against their wishes and were forced into prostitution.

(vi)-it is also pointed out that accused persons in their statements under Section 161 Cr.P.C. have also confessed that they were indulged in the immoral traffic activities/ sex trade. Prostitution was allowed in the hotel rooms and big customers were given a better deal. Co-accused Vishal Kamboj disclosed that the building in question was taken by him on rent at the rate of Rs. 70,000/- per month and they used to charged Rs. 2,000/- to 5,000/- per hour for a girl in the hotel/ Guest house and upto Rs. 35,000/- for two hours, on sending the girls out of hotel at the customer's place. Customers were charged heavily for providing cigarette, hukka, liquor, bear etc. in the hotel and they earns much more by illegal act of prostitution. Guest house workers including applicant were being paid Rs. 15,000/- per month. It is further submitted that victims have been rescued from the clutches of the accused and handed over to their family members. The Charge sheet has been submitted in this case against the applicant and co-accused and it cannot be said that accused persons were unknown of the consequences of their act, ergo the innocence of the applicant cannot be adjudged at pre trial stage. Lastly, it is submitted that in case, the applicant is released on bail, he will misuse the liberty of bail. Considering the facts and circumstances of the case, the applicant does not deserve any indulgence, as the offence is against the society.

6- Having heard the argument of the learned counsel for the parties, I found that the applicant was caught by the police from the guest house along with other co-

accused of this case. Victims were also recovered at that time. As per the statements of the victims, all the accused persons in collusion with each other were deeply involved with their different role in getting the prostitution done in the guest house. There is specific allegations of immoral activities against all the accused persons of this case. Victim Neeru in her second statement under Section 161 Cr.P.C. has also levelled allegation of making forceful sexual intercourse/rape on her against the applicant along with other co-accused. The victim Sneha, Dimpi and Meethu also clearly stated that co-accused Dayal, Sumit, Akash (applicant) and Rizwan, have also compelled them for prostitution by extending threat. All the recovered girls/victims have stated that they were detained in the said premises for the purpose of prostitution and they have been sexually exploited by the accused persons for commercial purposes. The applicant was having knowledge about immoral traffic activities/prostitution and was deliberately engaged in facilitating the sex trade in the public place.

7- Immoral trafficking activities are a very complex and multidimensional phenomenon. Recovery of innocent victims is a long, painstaking and dexterous process, hence it requires a multidisciplinary approach. Human trafficking and immoral activities are an organized crime and are done adopting different modus-operandi by a group of persons with their different role extending full cooperation to each other for illegal pecuniary benefits. Hotel and restaurant workers are paid additional amount in such matters for keeping mum and facilitating sex trade. Prostitution has connotations of criminality and immorality. Though there are various factors behind the increasing trend of immoral activities, but in majority cases, the innocent girls/victims got involved in sex trade/prostitution fraudulently against their wishes creating an atmosphere of terror by the antisocial elements and on account of their high connections, influences, money and muscle power, generally a common men do not dare to raise voice against them. The daughters are pride and honor of the family in a civilized society. The sudden disappearance of girls and their remaining untraced for a long period of time causes pain and trauma to their families throughout. Such people who are enmeshing the innocent girls into prostitution/sex trade for their pecuniary gain, instead of empowering them not only ruin whole life of the victims, but also take away the happiness of victim's family. Such incidents are being increased day by day. This Court is of the view that such persons, who are involved in immoral trafficking activities also cause a deleterious effect on the society as a whole. They are hazardous to the civilized society at large, and therefore, in order to control and eradicate this proliferating and booming devastating menace, such persons are not entitled for any sympathy in the criminal justice delivery system.

8- In view of above considering the facts and circumstances of the case, submissions advanced on behalf of parties, gravity of the offence and severity of the punishment, I do not find any good ground to grant bail to the applicant. Accordingly, the bail application is **rejected**.

9- However, it is made clear that the observations contained in the instant order is confined to the issue of bail and shall not effect the merit of the trial.

10- Office is directed to send the copy of this order to the informant and concerned Court below within two weeks.

(2021)08ILR A464
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.08.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Bail Application No. 22430 of 2021

Bulle ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Anil Kumar Tripathi, Sri Arun Kumar Pandey

Counsel for the Opposite Party:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 161-Bail - Examination of witnesses by police - 1st and 2nd proviso to Section 161(3) - statement of the victim/prosecutrix recorded by woman police officer & by audio-video means - Section 164 - Recording of confessions and statements .

Statement under Section 164 Cr.P.C. of victim recorded on 04.12.2020 - made allegation of rape against applicant and co-accused - thereafter investigating officer has recorded the second statement of victim under Section 161 Cr.P.C.on 07.12.2020, in which she has assigned the role of committing rape only against the applicant .

HELD:- Second statement of the victim/prosecutrix not recorded by, a woman police officer, audio-video means & no explanation has been given for not following the provisions provided in 1st and 2nd proviso to Section 161(3) Cr.P.C..It is common argument on behalf of the prosecution in all such cases that there is no bar for recording the second statement under section 161 Cr.P.C. of the victim/prosecutrix. In the opinion of this Court, the statement under Section 164 Cr.P.C. will prevail over the statement under Section 161 Cr.P.C. (Para - 9)

Bail application of the applicant to be listed on 02.09.2021 for hearing . (E-6)

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

1- Heard Mr. Anil Kumar Tripathi, learned counsel for the applicant and Mr. M. C. Chaturvedi, learned Additional Advocate General assisted by Mr. Rajesh Mishra, learned A.G.A. appearing on behalf the State of U.P. and perused the record.

2- On 30.07.2021, the following order was passed:

It is pointed out by learned counsel for the applicant that the statement under Section 164 Cr.P.C. of the victim was recorded on 04.12.2020, wherein she has made allegation of rape against the Bulle (applicant) and co-accused Badal, but thereafter investigating officer has recorded the second statement of victim on 07.12.2020, in which she has assigned the role of committing rape only against the applicant and so far as co-accused Badal is concerned, she has stated that she earlier had made allegation of rape against co-accused Badal on the advice of her counsel. On the said statement, co-accused Badal has been charge sheeted only under Section 366 I.P.C.

It has been vehemently urged by learned counsel for the applicant that after recording statement under Section 164 Cr.P.C., there was no occasion for the investigating officer to record the second statement of the victim under Section 161

Cr.P.C. The investigating officer has not conducted fair investigation and he in collusion with co-accused Badal, in order to minimize the gravity of offence against him, recorded the second statement of the victim on 07.12.2020. It is also argued that under the facts and circumstances of the case, as mentioned above, statement of victim cannot be said to be reliable as the same does not inspire confidence in the eyes of law. Therefore, the applicant is also entitled to be released on bail.

In response, learned A.G.A. opposed the bail, but could not point out any statutory provision that after recording the statement under Section 164 Cr.P.C., investigating officer can record the second statement of the victim under Section 161 Cr.P.C.

Put up this case on 04.08.2021.

On the next date, investigating officer of this case shall appear in person before this Court and file an affidavit, explaining that why the second statement of the victim was not recorded by audio-video electronic means.

The instant order shall be communicated by the learned A.G.A. to the concerned investigating officer within 72 hours.

3- Pursuant to above order dated 30.07.2021 of this Court, Mr. Raj Kishore/Investigating Officer of this case (Presently posted as Station House Officer, Police Station- Phoolpur, District Prayagraj), who is personally present before this Court, has filed an affidavit of compliance dated 03.08.2021 and an application dated 09.08.2021 seeking exemption of his personal appearance in this case, through Mr. Rajesh Mishra, learned A.G.A.

4- Mr. M.C. Chaturvedi, learned Additional Advocate General appearing for the State of U.P. submits that after recording the statement under Section 164 Cr.P.C. of the victim/prosecutrix on 04.12.2021, her second statement under Section 161 (1) Cr.P.C. was recorded on 07.12.2021 by the Investigating Officer in good faith in discharge of his duty as provided in paragraph no. 107 of the Police Regulations. He also submits that there is no bar for recording second statement of the victim/prosecutrix. On putting specific query regarding compliance of 1st and 2nd proviso to Section 161(3) Cr.P.C., Mr. Chaturvedi has fairly conceded that in this case, second statement under Section 161 of the Cr.P.C. of the victim/procecutrix has not been recorded by any woman police officer, but the same has been recorded by Mr. Raj Kishore/Investigating Officer. He further admits that second statement of the victim was also not recorded by any audio-video electronic means. He next submitted that now Investigating Officer realizing his mistake tendered his unconditional written apology and he will be careful in future. Lastly, he insisted for not taking any action against the Investigating Officer assuring the Court that matter in hand will be examined and considered by the higher authorities and an appropriate action will be taken in the matter.

5- Per contra, learned counsel for the accused-applicant submits that Investigating Officer did not conduct a fair investigation. He in order to extend undue favour to co-accused Badal, himself recorded the second statement under Section 161 Cr.P.C. of the victim in the case diary on 07.12.2020, showing that victim in her second statement

under section 161 Cr.P.C. has alleged that she in her statement under Section 164 Cr.P.C. had made allegation of rape against co-accused Badal on the advice of her Advocate, but Investigating Officer neither asked the victim to disclose the name of that Advocate nor recorded the statement of victim's Advocate.

6- Before delving into the matter, here it would be useful to quote the Section 161 of the Code of Criminal Procedure, which reads thus:-

"161. Examination of witnesses by police.

(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

Provided that statement made under this sub-section may also be recorded by audio-video electronic means.

Provided further that the statement of a woman against whom an offence under section 354, section 354-A, section 354-B, section 354C, secton 354D, section 376 (section 376A, section 376AB, section 376-B, section 376-C, section 376-D, section 376-DA, section 376 DB), section 376E or section 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer."

7- Having heard the argument of the learned counsel for the parties and on perusing the affidavit dated 03.08.2021 of the Investigating Officer, I find that :-

(i)-Second statement dated 07.12.2020 of the victim/prosecutrix was not recorded by a woman police officer, but the same was recorded by Mr. Raj Kishore (I.O.).

(ii)-Second statement of the victim was also not recorded by audio-video means.

(iii)-In the affidavit dated 03.08.2020, no explanation has been given for not following the provisions provided in 1st and 2nd proviso to Section 161(3) Cr.P.C.

(iv)-In paragraph nos. 9 and 11 of the affidavit dated 03.08.2021, it is mentioned that Investigating Officer has complied the provisions of Section 161(3) Cr.P.C., but the same is not correct averment, which are false on the face of record itself as well as in the light of statement of Mr. Chaturvedi given at the bar, as mentioned above.

8- In a criminal offence one of the established canons of just, fair and transparent investigation is the right of accused as well as victim, therefore high responsibility lies upon the Investigating Officer not to conduct an investigation in tainted and unfair manner, which may legitimately lead to a grievance of accused that unfair investigation was carried out with an ulterior motive. It must be impartial, conscious and uninfluenced by any external influences. Avoiding any kind of mischief, effort should be made to bring the guilty to law as nobody stands above the law. It is not only the responsibility of the Investigating Officer but as well as that of Courts to ensure fair investigation. The purpose and object of case diary is to maintain fairness in the investigation, transparency and record for ensuring proper investigation. The proper investigation is one or the essentials of the criminal justice system and an integral facet of rule of law. The investigation is a delicate painstaking and dexterous process, therefore ethical conduct is also essential and investigation should be free from objectionable features or legal infirmities.

9- It would be relevant to mention that 1st and 2nd proviso to Section 161(3) Cr.P.C had been inserted by Act 5 of 2009 (w.e.f. 31.12.2009) and Act 13 of 2013 (w.e.f. 2.03.2013) respectively, but this Court has been noticing that in majority of cases, the said provisions are not being followed by the Investigating Officers in true sense and practice of recording second statement under section 161 Cr.P.C. of the victim/prosecutrix after recording her statement under Section 164 Cr.P.C. is on higher side and in some cases, conclusions are drawn by the Investigating Officer on the basis of second statement under section 161 Cr.P.C., ignoring the statements under Section under Section 164 Cr.P.C. This Court also found that it is common argument on behalf of the prosecution in all such cases that there is no bar for recording the second statement under section 161 Cr.P.C. of the victim/prosecutrix. In the opinion of this Court, the statement under Section 164 Cr.P.C. will prevail over the statement under Section 161 Cr.P.C.

10- High Courts are sentinels of justice with extraordinary powers to ensure that rights of citizen are duly protected. Since Mr. Chaturvedi has fairly conceded that 1st and 2nd proviso to Section 161(3) Cr.P.C. has not been followed in this case and assured this Court that higher authority will certainly look into the matter, therefore this Court is not taking any action leaving it upon the authorities concerned to take appropriate action in the matter. In view of above, personal appearance of Mr. Raj Kishore (Investigating Officer of this case) is dispensed with.

Exemption application No. 5 of 2021 dated 09.08.2021 is disposed of.

11- Let a copy of this order be sent to the Director General of Police, U.P., Lucknow and Principal Secretary, Home U.P. Lucknow within two weeks, who shall issue necessary directions/guidelines to all the Senior Superintendent of Police regarding compliance of statutory provisions provided in 1st and 2nd proviso to Section 161 (3) Cr.P.C. within two months.

12- Copy of this order be also sent to the Senior Superintendent of Police, Prayagraj for examining the conduct of the Investigating Officer of this case and taking appropriate action in the matter.

13- The order passed by the Senior Superintendent of Police, Prayagraj and

directions/guidelines issued by the Director General of Police, U.P. Lucknow, as directed above, shall be communicated to this Court through the Registrar General, High Court Allahabad within eleven weeks.

Order on bail application

List this case on 02.09.2021 for hearing the bail application of the applicant.

(2021)08ILR A468
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Misc. Bail Application No. 27194 of 2021

Javed Ansari ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Ram Ker Singh

Counsel for the Opposite Parties:
Sri Hausila Prasad

(A) Criminal Law - Indian Penal Code, 1860 - Sections 376(2)(i), 506 - Protection of Children from Sexual Offences Act - Section 3/4 - In the legal field, professional ethics are a fundamental requirement, because it is an important tool that establishes rule of law and keeps the legal profession and the legal institutions on a high pedestal - Vakalatnama is a valuable document in legal profession, which empowers a lawyer to act for or on behalf of his client - confers wide authority/power upon a lawyer - "Vakalatnama" must be beyond the shadow of any doubt. (Para - 6,7)

Forged Vakalatnama has be filed on behalf of informant/complainant to surreptitiously obtain bail.

HELD :- Direction issued to place copy of this order before Registrar General of this Court, who shall forward the certified copy of this order to the Chairman, Bar Council of Uttar Pradesh for taking appropriate action/decision in the matter in accordance with law. Copy of this order be circulated to all the Hon'ble sitting judges of this Court as well to the president, Allahabad High Court Bar Association and Advocates' association. This order, be placed by the Registrar General before Hon'ble the Acting Chief Justice for necessary directions in the matter. A notice be issued to the informant/opposite party No. 2, through Chief Judicial Magistrate concerned, who will ensure service of notice upon the informant/opposite party No. 2.

Case be listed before the appropriate Bench. (E-6)

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

1- Today, when the case is taken up, Mr. Ram Ker Singh, learned counsel, (Enrollment No. UP 4309 of 1980, Advocate Roll No. A/R0784/2012, Chamber No. 9. Tribhuwan Upadhyay Hall IInd Floor, High Court Allahabad, Mobile Nos. 9451302056 and 9807344717), has appeared in this case on behalf of the applicant, whereas Mr. Hausila Prasad, learned Advocate, (Enrollment No. UP 3754/1994,Advocate Roll No. A/H 0127/2012, Mobile No. 9450704504, Chamber No. 9, Tribhuvan Upadhyay Hall IInd Floor, High Court, Allahabad, resident of 475 Rajapur, near police booth, Prayagraj, 211001) has appeared on behalf of opposite party No. 2/informant, Gurdeep Verma, who is father of the victim/prosecutrix aged about 15 years.

2- Learned counsel for the applicant after advancing his argument at some length, stated that Mr. Hausila Prasad, learned counsel for the informant/complainant also has no objection in granting bail to the applicant. On being enquired by this Court, Mr. Hausila Prasad, learned Advocate did not oppose the submissions of learned Counsel for the applicant. In the meantime, Mr. Vivek Kumar Singh, learned Advocate (Enrollment No. A/V-0571/2012, U.P.B.C. No. 2590 of 1998, Mobile No. 9412207892) appeared in this case and by raising a preliminary objection, apprised the Court that in fact only he has the instructions on behalf of informant, Gurdeep Verma S/o Heman Verma, resident of Mohalla Sarai Gosain, police station Kotwali City, district Bulandshahr and not Mr. Hausala Prasad, Acvocate, who has filed forged Vakalatnama on behalf of the informant. He also pointed out that Mr. Hausila Prasad, Advocate has filed his Vakalatnama on 26th of July, 2021 through E-mode in collusion with Mr. Ram Ker Singh, learned counsel for the applicant only to obtain bail by hook or crook and in fact the said Vakalatnama is a forged document, whereas the fact is that the informant/complainant, Gurdeep Verma has not engaged him.

3- When Mr. Hausila Prasad was confronted with the submissions of Mr. Vivek Kumar Singh, Advocate that he has instructions on behalf of the informant/complainant, Mr. Hausila Prasad, learned Advocate stated at the bar that the said Vakalatnama has been provided to him by Mr. Ram Ker Singh, learned counsel for the applicant. It is also submitted by Mr. Hausila Prasad that he is associated with Mr. Ram Ker Singh, learned counsel appearing for the applicant. It is further submitted that his fee to appear in this case on behalf of the informant has also been given by Mr. Ram Ker Singh, learned counsel for the applicant. He was engaged by Mr. Ram Ker Singh, for the reason that the Hon'ble Court may not issue the notices to the informant/complainant, Gurdeep Verma and victim of this case, because the present matter pertains to offence under Section 376(2)(i), 506 IPC and 3/4 Protection of Children from Sexual Offences Act, registered as Case Crime No. 434 of 2021 at police station Kotwali Nagar, district Bulandshahr and grant bail to the applicant.

4- From the aforesaid statements made by Mr. Hausila Prasad, learned Advocate at the bar, who has appeared in this case on behalf of informant/complainant, it is ostensibly clear that forged Vakalatnama has been filed on behalf of informant/complainant to surreptitiously obtain bail. Hard copy of the aforesaid "Vakalatnama" in question is made part of the record.

5- At this stage, Mr. Hausila Prasad learned counsel has tendered his unconditional apology by stating that in future he will take care of such things and will not repeat such mistake in future and also stated that he wants to withdraw his aforesaid Vakalatnama, whereas Mr. Ram Ker Singh, learned counsel did not tender his apology and stated at the bar that it is not a new thing but it is a common practice in the High Court. This statement of Mr.Ram Ker Singh advocate is very shocking and painful to the conscious which creates a stir compelling one to ponder over the matter. The conduct of Mr. Ram Ker Singh and Mr. Hausila Prasad, Advocates who are having a long standing experience of more than 40 years and 26

years of the practice respectively, is highly deplorable. This Court denounces/condemns the conduct of both the Advocates as they made effort to tarnish the image of noble profession of advocacy.

6- It is very painful to see the downfall in moral values of noble legal profession. In the legal field, professional ethics are a fundamental requirement, because it is an important tool that establishes rule of law and keeps the legal profession and the legal institutions on a high pedestal. In the legal profession, in order to maintain the sanctity of faith between the Bar and the Bench, ethics are important factor, which contains the elements of discipline, fairness, trust, moral values, help to colleagues, respect and responsibilities, etc. It creates confidence between the Bar and the Bench. Lawyers play a crucial role in justice delivery system and in my view, professional ethics are the back bone of legal profession, which is self regulating profession and it is moral duty of the Bar and the Bench both to maintain the sanctity of legal profession and the institution.

7- Vakalatnama is a valuable document in legal profession, which empowers a lawyer to act for or on behalf of his client. Sometimes it confers wide authority/power upon a lawyer, therefore in the opinion of this Court, "Vakalatnama" must be beyond the shadow of any doubt.

8- Since, Mr. Hausila Prasad learned advocate realizing his mistake has accepted his guilt before the Court, therefore, this Court is not taking any action against him and on his request, he is permitted to move an appropriate application to withdraw his Vakalatnama from this case, whereas Mr. Ram Ker Singh, learned counsel for the applicant, who had provided forged Vakalatnama of the informant and had also given fee to Mr. Hausila Prasad, as per disclosure made by him, neither tendered an oral apology nor did he feel regret on his conduct. Under the facts and circumstances of the case, this Court can not act as a silent spectator and has no option left, except to refer the issue of filing the forged Vakalatnama of the informant as mentioned above to the Bar Council of Uttar Pradesh for taking appropriate action/decision in the matter.

9- The issue of filing a forged Vakalatnama of any person in a Court proceeding is not a small one but it is serious issue, because it may adversely affect the valuable legal right and interest of the persons/litigants concerned, ergo keeping in view, the larger interest of the litigants/victims,complainants or aggrieved persons specially in criminal matters and members of the bar, who believe in professional ethics, this Court feels that now it is high time to adopt some remedial measures, so the litigants or aggrieved persons are not deprived of their legal rights. This Court proposes that along with Vakalatnama, self attested copy of any identity proof (preferably Aadhar Card) mentioning mobile number of the person concerned should also be filed or any other method may be adopted in the interest of litigants and the institution.

10- In view of above, the following directions are issued:-

(i)-Let a copy of this order be placed before the Registrar General of this Court within a week, who shall forward the certified copy of this order to the Chairman, Bar Council of Uttar Pradesh within two weeks thereafter for taking

appropriate action/decision in the matter in accordance with law.

(ii)-The copy of this order be circulated to all the Hon'ble sitting judges of this Court as well to the president, Allahabad High Court Bar Association and Advocates' association.

(iii)-The aforesaid proposal as mentioned in paragraph no. 9 of this order, be placed by the Registrar General before Hon'ble the Acting Chief Justice for necessary directions in the matter.

(iv)-A notice be issued to the informant/opposite party No. 2, Gurdeep Verma through Chief Judicial Magistrate concerned, who will ensure service of notice upon the informant/opposite party No. 2 and submit report by the next date fixed in the matter.

11- Let this case be listed on 7th of September, 2021 before the appropriate Bench.

(2021)08ILR A471
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2021

BEFORE

THE HON'BLE NAVEEN SRIVASTAVA, J.

Criminal Misc. Ist Bail Application No. 27936 of 2021

Aslam ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Ramesh Kumar

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

A. Criminal Law-Code of Criminal Procedure,1973-Section 439 & Narcotics Drugs & Psychotropic Substances Act, 1985-Section 8/20-application-rejection-1.5 kg charas recovered from the applicant possession which is more than commercial quantity and he was apprehended from the spot-more so, applicant had been involved in four cases of same nature-no enmity between the applicant and police-false implication is a stereotyped defence raised by the applicant. (Para 1 to 14).

B. The scheme of the section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained u/s 439 of the Cr.P.C., but is also subject to the limitation placed by section 37 which commences with non-obstante clause. The operative portion of the said section is in negative form prescribing the enlargement of bail to any person accused of commission of an offence under the act, unless twin conditions are satisfied. the first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. if either of these two conditions is not satisfied, the ban for granting bail operates.(Para 6 to 8)

The application is rejected. (E-5)

List of Cases cited:

1. St. of Ker. Vs. Rajesh (2020) AIR SC 721

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

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

2. By means of this application the applicant who is involved in Case Crime

No.232 of 2021, under Section 8/20 N.D.P.S. Act, Police Station Bilaspur, District Rampur, is seeking enlargement on bail during pendency of trial.

3. In nutshell, the facts which led to the prosecution of accused are that on 14.06.2021, informant, sub-Inspector, Sanjay Kumar lodged first information report at Police Station Bilaspur, District Rampur against one accused, Aslam alleging inter alia that on 14.06.2021 when he alongwith other police personnel were busy in checking of vehicles, he received information through informer that some persons having illegal and suspicious goods, can be arrested if quick action be taken. On such information, he after giving information to the higher officers, proceeded for the place of occurrence alongwith other police personnel and they reached at village Alinagar. Thereafter, by using the necessary force, the police team arrested the applicant on the spot. On questioning, he disclosed about the transportation of illegal Charas. On search of bag, 1.5 kg. of Charas was recovered from accused, Aslam and from the bag of accused, Farid 2280 Alpramed tablet, Avil injection and 1 kg. Charas from the possession of three persons, as such total 2.5 kg. Charas, 2280 Alpramed tablet, Avil injection, three syringe have been recovered in this case. The accused could not show the authorization of keeping the same. On the basis of aforesaid recovery, a case was registered against the accused at Case Crime No.232 of 2021, under Section 8/20 N.D.P.S. Act, Police Station Bilaspur, District Rampur.

4. Learned counsel for the applicant argued that as per prosecution case, total 2.5 kg. illegal Charas is said to have been recovered in this case, out of which 1.5 kg. Charas was recovered from the bag of applicant, Aslam and 1 kg. was recovered from accused, Wasim. It is next submitted that Investigating Officer has not followed the procedure of Narcotic Drugs and Psychotropic Substances Act (for short the "N.D.P.S. Act"), the alleged recovery has been planted and accused has been falsely implicated. It is submitted that the applicant may be released on bail.

5. Per contra, learned A.G.A. appearing on behalf of the State vehemently opposed the aforesaid statement of learned counsel for the applicant by contending that recovered 2.5 kg. Charas in this case is much more than commercial quantity, out of which 1.5 kg. Charas was recovered from the possession of the applicant. There is no enmity between the applicant and police team, therefore, allegation of false implication upon the applicant is without any basis and against the evidence on record. The amount which has been recovered from the possession of the accused cannot be falsely planted. The mandatory requirement as provided under the N.D.P.S. Act has been followed by the officer concerned. The applicant is also involved in five other cases i.e. Case Crime No.141 of 2006, involving in N.D.P.S. Act, Case Crime No.1569 of 2011, under Sections 395, 397 I.P.C., Case Crime No.403 of 2017, involving in N.D.P.S. Act, Case Crime No.4018 of 2018, involving in N.D.P.S. Act and Case Crime No.139 of 2019, under Section 8/20 N.D.P.S. Act, Police Station Bilaspur, District Rampur, therefore, the bail application of the applicant is liable to be rejected.

6. There is no dispute that commercial quantity of Charas is 1 kg., recovered and seized total 2.5 kg. of Charas and out of

which 1.5 kg. has been recovered from the applicant, Aslam is more than commercial quantity, therefore, provisions of Section 37 of N.D.P.S. Act is attracted in this case, which is in addition to Section 439 of Cr.P.C. and mandatory in nature. In view of Section 37 of N.D.P.S. Act before granting bail for the offence of N.D.P.S. Act till conditions as provided Section 37 (1) (b) (i) (2) had to be satisfied. Section 37 of N.D.P.S. Act is quoted as below:-

"37. Offences to be cognizable and non-cognizable. -- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)?

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

(b) no person accused of an offence punishable for [offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless?

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

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

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

7. On several occasion, the Apex Court has considered the issue relating to provision of Section 37 of N.D.P.S. Act and in recent decision of Apex Court in **State of Kerala Vs. Rajesh** reported in **AIR 2020 Supreme Court 721**. Paragraph nos.20 and 21 of the aforesaid judgment is extracted below:-

"20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the Cr.P.C., but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

21. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the Cr.P.C. or any other

law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the N.D.P.S. Act is indeed uncalled for."

8. The provisions of Section 37 of the N.D.P.S. Act provide that the legal norms which have to be applied in determining whether a case for grant of bail has been made out. There is specific statutory presumption in relation to contraband that comes within the ambit of N.D.P.S. Act. In view of Section 54 of the N.D.P.S. Act presumption shall be drawn against the accused unless and until the contrary is proved. The expression "unless and until the contrary is proved", clearly imposes the burden of proving that possession of prohibited substance is legal on the accused himself.

9. Further, no material has been brought on record by the applicant to show that there was any prior ill-will or enmity of the applicant with the police personnel concerned.

10. Illicit trafficking is an organized crime and are done adopting different modus operandi by a group of persons with their different role. So far as plea of false implication is concerned, in my view, it is a stereo typed defence raised in every case, where accused are found in possession of contraband. In such a situation, this kind of plea of false implication without any basis is not liable to be accepted at this stage. The devastating effects of narcotic drugs and psychotropic substance on any person who comes to its touch are well known.

11. It is also well settled that a proper administration of the criminal justice delivery system, requires balancing the rights of the accused and the prosecution.

12. Undoubtedly rights of the accused are important, but equally important is the societal interest for bringing the offender to book and for the system to send right message to all in the society. Undue sympathy for offender would be more harm to justice system to undermine the public confidence in the efficacy of law.

13. In the light of the above-mentioned facts and considering the recovery of 1.5 kg. Charas, coupled with the fact that the applicant was apprehended from the spot, and was having conscious and constructive possession over the recovered Charas, I do not find any reasonable ground in terms of Section 37 of the N.D.P.S. Act to hold at this stage that applicant is not guilty of an offence and he is not likely to commit any offence while on bail.

14. It is also made clear that the Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything said in this order.

15. In view of the above, I do not find any good ground for enlarging the applicant on bail at this stage. The bail application of the applicant is accordingly, rejected.

(2021)08ILR A474
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.08.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No 631 of 2001

Chanda ...Appellant

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sampurnanand, D.K. Singh Chauhan, R.B.S. Rathaur

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure,1973 - Section 374(2) - Indian Penal Code, 1860 - Section 376-challenge to-conviction- The medical report does not corroborate the prosecution case-There was no injury on the body of the prosecutrix-testimony of the prosecutrix is self contradictory regarding the place of occurrence and the manner of assault and commission of the crime- the investigating officer found stain of sperm on the peticot, however, he did not send it for chemical examination- it does not inspire confidence- It needs some corroboration or at least something short of corroboration which is not present in the present case-the prosecution has failed to prove its case beyond reasonable doubt-considering the totality of facts and circumstances as well as the law laid down by the Apex Court, it will not be safe to convict the appellant and to uphold the impugned conviction.(Para 1 to 12)

B. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence.ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication.there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.(Para 9)

The appeal is allowed. (E-5)

List of Cases cited:

1. Narendra Kumar Vs St. (NCT of Delhi) (2012)7 SCC 171

2. Jai Krishna Mandal Vs St. of Jharkhand (2010)14 SCC 534

3. Raju Vs St. of M.P (2008) 15 SCC 133

4. Tameezuddin Vs St. (NCT of Delhi (2009)15 SCC 566.

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

1. This appeal is directed against the judgment and order dated 2.8.2001 passed by Additional Sessions Judge/FTC Court No.2, Raebareli, whereby and whereunder the appellant has been convicted under section 376 I.P.C. and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.2,000/-, with default stipulation.

2. Heard learned counsel for the appellant, learned Additional Government Advocate and perused the record.

3. The prosecution case as per written report dated 8.3.2000 is that on 6.3.2000, while the prosecutrix was looking after the peas sowed in her field, then around 5.00p.m., Chandan of her village came near her and forcibly caught her hand and dragged her into her wheat field and forcibly put her down and committed rape, and said that if she would raise alarm, he

will kill her. After committing rape, he went away. Her father-in-law and husband were not at home at that point in time. Yesterday evening, when her father-in-law came, she told him of the incident. On the written report, chik first information report was lodged which, during trial was exhibited as Ext.Ka-5. Written report is Ext. Ka-1.

4. The investigating officer recorded the statements of the witnesses, made recovery memo of wearing apparel, i.e. peticot of the prosecutrix on which stains of semen were present. He prepared the site plan, Ext. Ka-7, made entry in the G.D.. He filed the charge-sheet. The case was committed vide order dated 1.11.2000 to the Court of Sessions. Charges under Section 376 I.P.C. read with section 506 I.P.C. were framed against the accused appellant.

To prove its case, the prosecution has produced P.W.1 Heera Devi, P.W.2 Dr Geeta Bhatia, P.W.3 Dr. S.L. Sharma, Radiologist, P.W.4 HC Bramhdeen Chaudhary, P.W.5 F.S. Zafri, A.S.I. The prosecution has also exhibited written report Ext.Ka.1, F.I.R. Ext.Ka.5, recovery memo Ext. Ka-8, Site plan Ext. Ka-7, G.D. entry Ext. Ka.6 and charge-sheet. Statement under section 313 CrPC of the accused was recorded in which his case was of denial and he clearly stated that he has been falsely implicated due to enmity with father in law of the prosecutrix.

5. The prosecutrix was examined as P.W.1. In her examination in chief, she reiterated the prosecution story as mentioned in the written report and stated that she was raped by Chandan who caught her hand and forcibly dragged her in the wheat field and raped her. While committing rape, he threatened to kill if she raised alarm. In her cross examination, she has stated that the place of occurrence is at one bigha distance from her home. She is new for the village. Adjacent to the field, there is a public path on which the people used to come and go. She again stated that the incident took place in her field. In the field of peas, Chandan has committed rape. Then she says that Chandan has not held her hand, nor dragged her. She went to lodge the report on the fifth day of the incident to the police station. She denied the suggestion that her father in law and and Sundarlal of her village have inimical terms with the accused appellant.

Dr. Reeta Bhatia has been produced as P.W.2 who had medically examined the prosecutrix. She has not found any injury on private part of the prosecutrix in the internal examination. Hymen was torn, old and was changed with loose tag. Slide of vagina was prepared and was sent for forensic examination. She proved the medical examination report, Ext. Ka.2, Supplementary report was also prepared. In the laboratory report No.87 of 2000, in the vaginal slide, no sperm was found. From the report, it was found that all the joints were fused. The joint of wrist was also fused. On the basis of this analysis, she opined that the age of the prosecutrix is more than 18 years. No clear opinion about rape has been given by her. She proved Ext.Ka.3, i.e. the supplementary report.

Dr. S.L. Sharma, Radiologist has been examined as P.W.3. He proved X-ray report Ext.Ka.4.

P.W.4 HC Bramhadeen Chaudhary has proved chik report Ext. Ka.5 and also G.D. entry, Ext. Ka.6.

P.W.5 ASI F.S. Zafri, investigating officer has stated that he has

taken the peticot of the prosecutrix on which the stains of sperm were found. He has prepared the site plan and has proved it as Ext. Ka.7. The recovery memo is Ext. Ka.2 which is also proved by him. He has also proved the charge-sheet Ex.Ka.9. He has shown his ignorance regarding the fact whether semen stained peticot of the prosecutrix was sent for chemical examination to the laboratory or not. He stated that when the prosecutrix came to the field of peas, nobody from the village has come.

6. Learned counsel for the appellant submits that the testimony of the prosecutrix is self contradictory. The prosecutrix has changed the place of occurrence. The peticot has not been sent for chemical examination. The testimony of the prosecutrix is not reliable and it is highly improbable.

7. Learned A.G.A., on the other hand, submits that the conviction of the appellant accused can be made on the basis of sole testimony of the prosecutrix. No corroborative material is required nor any other witness of fact is required.

8. On due consideration of the arguments advanced by appellant's counsel and learned A.G.A., it appears that the place of occurrence has been mentioned as wheat field in the written report as also in the first information report. The prosecutrix in her examination in chief has also stated the place of incident as wheat field. However, in the cross-examination, the place of occurrence has been changed by the prosecutrix and now she has stated that the place of incident is field of peas. The investigating officer in the site plan has also shown place of occurrence in the wheat field. Thus, this part of the statement of the prosecutrix has become doubtful in view of the change of place of the occurrence. In the examination in chief, the prosecutrix says that she was dragged by the accused by pulling her hands, however, in the cross-examination, she says that he had not caught hold of her hand, nor he dragged her. She further says that on the fifth day of the incident, she went to lodge a report wherein in the written report, the date of incident is of 6.3.2000 and the written report is dated 8.3.2000 and the first information report is dated 8.3.2000.

According to the statement of the prosecutrix, the first information report/written report was given on the fifth day of the incident. Thus, the incident must have taken place five days before the written report, i.e. on 3.3.2000 and not on 6.3.2000 as has been mentioned by the prosecutrix in her written report. The prosecutrix has stated that the appellant threatened her to kill. It is not disputed that no weapon was used by the appellant for threatening the prosecutrix. The place of occurrence is only one bigha away from home which is quite a short distance and is clearly visible from her home. Still no one saw the incident. The place of occurrence is adjacent to a public path on which according to the prosecutrix, people used to pass till 5/6.00 p.m. The incident took place at 5.00p.m.. Still no one saw the incident. It was day time at 5.00p.m. She further stated that she was new to the village. She had not met Chandan prior to the date of incident. It has not been clarified by her that when she did not know Chandan as she was new for the village, then how she recognised Chandan at the time of alleged commission of crime. It was the second marriage of the prosecutrix. She denied the suggestion that her father in law and Sunderlal have enmity with the accused.

P.W. 5 F.S. Zafri has not sent peticot of the prosecutrix for chemical examination which he should have given to prove the case of the prosecution. The medical report does not corroborate the prosecution case. There was no injury on the body of the prosecutrix. On overall evaluation of the evidence of the prosecution witnesses, it appears that the testimony of the prosecutrix is self contradictory regarding the place of occurrence and the manner of assault and commission of the crime. The testimony of the prosecutrix being self contradictory as the place of occurrence has been changed coupled with the fact that in the statement of the accused under Section 313 CrPC, it is the case of the accused that he has been falsely implicated due to enmity with the father in law of the prosecutrix, does not inspire confidence. It needs some corroboration or at least something short of corroboration which is not present in the present case. The medical examination does not corroborate the prosecution case. On this kind of improbable, shaky testimony of the prosecutrix, it can be safely said that the prosecution has failed to prove its case beyond reasonable doubt.

9. Hon'ble Supreme Court in (2012)7 SCC 171 **Narendra Kumar versus State (NCT of Delhi)** held that where the evidence of the prosecutrix is found suffering from inconsistencies and infirmities with other material, no reliance can be placed thereon. The relevant para 22 is reproduced as under :

"Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide Suresh N. Bhusare v. State of Maharashtra (1999) 1 SCC 220)"

In (2010)14 SCC 534 **Jai Krishna Mandal** versus **State of Jharkhand,** Supreme Court reiterated that the improbable statement of the prosecutrix cannot be believed. Relevant portion of para 4 is reproduced as under :

"4.....The only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

In **Raju** versus **State of M.P** (2008) 15 SCC 133, Hon'ble Supreme Court held that no doubt, a false allegation of rape can cause equal distress, humiliation and damage to the accused as well and interest of the accused must also be protected. Relevant portion of paras 10 and 11 are reproduced as under :

"10..... that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary.

"11.....It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication..... there is no presumption or

any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

Similar view has been taken by Hon'ble Supreme Court in Tameezuddin versus **State (NCT of Delhi** (2009)15 SCC 566.

10. There is of course circumstance like recovery of clothing apparel belonging to the victim. However, such recovery of peticot by itself, in the absence of any other material evidence on record pointing towards the guilt of the accused, cannot be termed sufficient to hold that the case was proved beyond reasonable doubt, more so in view of the fact that albeit the investigating officer found stain of sperm on the peticot, however, he did not send it for chemical examination. The medical report does not corroborate the prosecution case. The prosecutrix has changed the place of occurrence and the statement of the prosecutrux is not corroborative by any evidence. Thus in view of the above, since the testimony of the prosecutrix is self contradictory, it does not inspire confidence. Some corroborative material is needed which is absent in this case.

11. In view of the aforesaid discussion, considering the totality of facts and circumstances as well as the law laid down by the Apex Court, it will not be safe to convict the appellant and to uphold the impugned conviction and sentence of the accused on this kind of evidence.

12. I, therefore, allow this appeal and set aside the order of conviction and sentence recorded against the appellant. The appellant be set at liberty forthwith, unless his custody is required in connection with any other crime. The appellant is on bail, his bail bonds stand discharged.

Let lower court's record be sent back.

(2021)08ILR A479
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.08.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No 650 of 2003

Guddu @ Gokaran ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Farhan Alam Osmany, Rama Pati Shukla

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure,1973 - Section 374(2) - Indian Penal Code, 1860 – Dowry Prohibition Act,1961 - Sections 498A, 304B, 201 & Section 3/4 - challenge to-conviction-set aside- From the statement of PW3, it appears that the deceased died due to cholera. According to the statement of PW2 and DW1, the deceased was cremated in the presence of informant and other family members of the deceased. The informant in filing application under Section 156(3) Cr.P.C has not come with clean hand. He has suppressed this fact also. There is no evidence that the deceased was subjected to cruelty or harassment soon before her death although PW2, in her examination-in-chief, has stated that the informant has given Rs.10,000/- cash and goods worth Rs.2000 at the

time of marriage. However in the later part of her statement rather in her entire statement, it has nowhere been stated by PW2 who was residing with the deceased for the last one month that soon before her death the deceased was subjected to cruelty. There is no allegation leveled by her that any of the family members of the appellant or the appellant himself has demanded dowry. Likewise DW1 out rightly has rejected such case of cruelty or dowry. He has not supported the prosecution story. The witnesses i.e. DW1 and PW2 remained intact even after the prolonged cross examination. In this case, prosecution has failed to prove that the deceased died within seven years of her marriage. It has also failed to prove that the death was under abnormal circumstances as the PW3 has clearly opined that the deceased was suffering from dyscentry and vomiting. She was treated at his clinic for three hours and thereafter referred to District Hospital, where she died. As per the statement of PW1 deceased was subjected to cruelty and harassment by the appellant. However, there is no such evidence by the PW2 or DW1 or any other prosecution witness except PW1 that such cruelty or harassment had any connection with the demand of dowry. The evidence of PW1 is wholly unreliable and cannot be believed. The evidence of cruelty and harassment alone is not sufficient to bring application under Section 304 B Indian Penal Code.There is no evidence given by PW2 or DW1 that there was any demand of dowry soon before her death and the allegation of cruelty and harassment by the PW2 is not with respect to the dowry demand and the same have not been proved by cogent evidence by the prosecution hence the accused appellant is also acquitted under Section 3/4 of the Dowry Prohibition Act. (Para 1 to 30)

B. If Section 304-B IPC is read together with Section 113-B of the Evidence Act, a comprehensive picture emerges that if a married woman dies under unnatural circumstances at her matrimonial home within 7 years from her marriage and there are allegations of cruelty or harassment upon such married woman for or in connection with demand of dowry by the husband or relatives of the husband, the case would squarely come under "dowry death" and there shall be a presumption against the husband and the relatives.(Para 20)

The appeal is allowed. (E-5)

List of Cases cited:

1. Baljeet Singh & anr. Vs St. of Har. (2004) 3 SCC 122

2. Appasaheb & anr. Vs St. of Mah. (2007) 9 SCC 721

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

1. Heard Shri R.P.Shukla, learned counsel for the appellant and Shri Jayant Singh Tomar, learned A.G.A. for the State and perused the record.

2. The present appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 has been preferred by the accused/appellant Guddu alias Gokaran against the judgment and order dated 10.04.2003 passed by the Special Sessions Judge, Sitapur in Sessions Trial No. 487 of 1997 arising out of Case Crime No. 196 of 1996, under Sections 498A, 304B, 201 of the Indian Penal Code and Section 3/4 of the Dowry Prohibition Act, Police Station Ramkot, District Sitapur, whereby the appellant was convicted under Section 3/4 of the Dowry Prohibition Act and sentenced to undergo one year rigorous imprisonment and a fine of Rs.1000/- and in default of fine to undergo two months' additional imprisonment; and also convicted under Section 304-B I.P.C. and

sentenced to undergo ten years' rigorous imprisonment and a fine of Rs.2000/- and in default of fine to undergo three months' additional imprisonment. It was further directed that both the sentences will run concurrently.

3. The prosecution story, in brief, as per First Information Report (Exhibit Ka 4), is that prior to about six years ago from 19.08.1996, the informant Baburam (P.W.1) married her daughter Smt. Saraswati (deceased) with accused/appellant Guddu alias Gokran, wherein he gave Rs.10,000/- cash as well as goods worth Rs.10,000/- as per his status. The accused/appellant and his family members were not happy with the given cash and goods and, after marriage, repeatedly demanded one buffalo and cash worth Rs.10,000/- towards dowry. On account of non-fulfillment of aforesaid demand of dowry, his daughter (Smt. Saraswati) was not allowed to use the goods given by the informant; accused was used to give trouble to her to eat and drink; was used to torture her for dowry in various ways; and also accused Guddu had beaten her. Prior to one month from 19.08.1996, accused persons had exerted pressure to give buffalo and 10,000/- rupees as dowry and his daughter was tortured and threatened her for life. On 8.8.1996, Jagdish, son of Jagat Narain, resident of Rahmatpur informed him that due to dowry, after killing his daughter, the accused had burnt the dead body of his daughter. Upon receiving this information, he went to the house of in-laws of his daughter, where his grand daughter Reeta, aged about 11 years, told him that the accused/appellant, after killing his daughter, burnt her dead body in Nimsar. Thereafter, the informant- Baburam went to police station Ramkot and submitted an application for lodging First Information Report but his report was not written. Therefore, informant- Baburam had filed the aforesaid application for lodging First Information Report under Section 156 (3) Cr.P.C. (Exhibit Ka 2) before C.J.M., Sitapur, upon which an order was passed for lodging First Information Report. On the basis of this typed report, First Information Report was lodged at Police Station Ramkot on 23.08.1996 at 21:50 hours, which was registered as Case Crime No. 197 of 1996, under Sections 498A, 304 B, 201 I.P.C. and Section 3/4 of the Dowry Prohibition Act.

4. The investigation of the case was conducted by Circle Officer, City Sitapur Sri S.N. Bhardwaj (P.W.4), who, in his deposition, has stated that on 24.08.1996, he was posted as Circle Officer, City Sitapur. The information regarding investigation of the case was received from the office of Police Station Ramkot on 24.08.1996. After obtaining copy of the chik F.I.R. and G.D., he had started investigation of the case w.e.f. 24.08.1996. Firstly, he obtained chik report from case diary and G.D. and thereafter recorded the statement of Head Moharrir Tej Bhan Singh. Thereafter, he reached at the house of the deceased Saraswati Devi situated at Village Itaunja from police station Ramkot with police personnel and recorded the statement of witnesses Bechelal and Chedu etc. Thereafter, he inspected the place of occurrence and prepared site plan (Ext. Ka.1). After conclusion of the investigation, he has filed the charge-sheet (Ext. Ka. 3) before the competent Court.

5. Initially, an application under Section 156(3) Cr.P.C. was given by the informant. Thereafter by the order of Court, the First Information Report was lodged

and after completing the investigation, charge sheet was filed. The committal order was passed on 17.3.1997 and the case was committed to the court of Sessions' Judge, where the learned Sessions' Judge has framed charges under Sections 498A, 304B, 201 Indian Penal Code and Section 3/4 Dowry Prohibition Act against the accused/appellant, who denied the charges and claimed to be tried.

6. Learned Sessions Judge, vide impugned order, while convicting the accused appellant under Section 3/4 Dowry Prohibition Act and sentencing him for one years rigorous imprisonment with fine of Rs.1000/- and for ten years rigorous imprisonment under Section 304-B Indian Penal Code with fine of Rs.2000/-, acquitted him under Sections 201 and 498A of the Indian Penal Code.

7. In order to prove its case, the prosecution has produced the application under Section 156(3) Cr.P.C. as exhibit Ka2, site plan as exhibit Ka1, First Information Report as exhibit Ka4, charge-sheet as exhibit Ka3 and copy of the general diary as Ka5. The prosecution has produced P.W.1-Baburam (informant), who is the father of the deceased Saraswati Devi, P.W.2 Reeta, who is grand daughter of informant, P.W.3 Dr. Ramchandra Mishra, who is the private practitioner, P.W.4 S.N. Bhardwaj, who conducted the investigation of the case. In defence, the accused has produced D.W.1 Khusiram, who is the cousin brother of the informant Baburam.

8. In his statement recorded under Section 313 Cr.P.C., the accused has admitted the fact that marriage of the deceased Saraswati took place with Guddu alias Gokaran in the year 1985 but denied the other allegation of the prosecution and stated that deceased Saraswati died on account of disease and he has been falsely implicated due to enmity.

9. P.W.1 Baburam, who is the father of the deceased Saraswati, in his deposition, has stated that the marriage of Saraswati took place with Guddu alias Gokaran ten and a half years ago. In the marriage, he gave Rs.10,000 cash and goods worth Rs.10,000/-., for which, his son-in-law Guddu, the father-in-law of his daughter Tejram, his wife Rampa, Surendra and his wife and Mahendra were not happy. After marriage, the aforesaid persons have repeatedly demanded Rs.10,000/- cash and one buffalo. One and a half months before the death of his daughter, again Rs.10,000/- and buffalo were demanded by the appellant and his family members, which he could not fulfill. Thereafter, they, after killing his daughter, burnt her dead body. The information regarding the death of his daughter was given by one Jagdish s/o Jairam. Upon receiving this informatioin, he went to the house of the appellant, where his grand daughter Reeta, who was there with the deceased for the last one month before her death, informed that they have killed his daughter and burnt her in Nimsar. He further stated in the cross-examination that at the time of death of his daughter, Reeta was living with his daughter, who was about 10 to 11 years old. He further stated that he lodged the information regarding death of his daughter one day after cremation. He also said that he does not know Jagat Narain, father of Jagdish. He stated that he cannot identify Jagdish. He also stated that his daughter was killed by burning her as per the information given by Jagdish and thereafter he says that Reeta told him that deceased was poisoned. He also stated that he did not

mention the fact of poison having been given to her daughter in the application filed under Section 156(3) Cr.P.C. as he was not aware about this at that time. He denied the suggestion that the deceased was married on 26.2.1985.

10. P.W.2 Reeta, who is the grand daughter of the informant, on 20.7.2001, in her examination in chief, has stated that the deceased was married 10 to 11 years ago. In the marriage Rs.10,000/- cash and goods worth Rs.2,000/- was given and buffalo was demanded by appellant and others as dowry, which could not be given by the informant. Then she states that the deceased was administered poison. In the cross examination, she stated that upon receiving the information of death, her mother, grand daughter Shiv Ratan and his father came and after seeing the dead body of Saraswati (deceased), all of them said that she has been killed by giving poison. In the cremation, her father Shiv Ratan went to Nimsar; at the time of the death of the deceased, she was 15-16 years old; and she was not born at the time of the marriage of the deceased, therefore, she cannot say what was given in the marriage. Then, she said that the informant, her grandfather also went to the matrimonial home of the deceased and, thereafter, she told them that Saraswati ate pakodas on saying of her mother-in-law in her room and after eating, she went in front of the house, she vomitted there, then, she was taken by neighbours to Dr. Virendra. The dead body of the deceased Saraswati came at 3.30p.m. to her home and on the next date, information was sent to her village Niyazpur. From there tractor trolley came and from that tractor trolley, the dead body of the deceased Saraswati was taken to Nimsar. She further said that she went to live with the deceased 15 days before her death. One day prior to the death, the deceased was looking lethargic, then, her grand mother wanted to take Bablu (the son of the deceased) along with her which was refused by the appellants and his family members, therefore, her family members were angry with them. She again says that poison was not given in front of her. One month before death, the deceased told that she was not given proper meal. People told her about poison. The deceased was taken to the Doctor, who opined that she was suffering from Cholera. She again said that grand mother wanted to take Bablu, which was refused by the appellant and her family members.

11. P.W.3-Dr. Ramchandra Mishra, who is the private practitioner, was examined and in the examination-in-chief, he stated that one Tejram (father-in-law of the deceased) took the deceased to him for treatment and along with them, appellant and two other ladies were there. He was told that she was suffering from vomiting and dysentery, then, he gave initial treatment by administering glucose and injection "gentamicin". When her position did not became stable, then, he referred her to District Hospital, Sitapur. Later on, he came to know that she died. In the cross-examination, he stated that he treated her for three hours and while she was treated, she was having symptoms of cholera. Apart from cholera, there was no possibility of poisoning appeared to him.

12. D.W.1- Khusi Ram was examined on 20.2.2003 and he stated that the marriage with the appellant and the deceased was solemnized by his mediation. The marriage took place on 28.2.1985. No dowry was agreed upon nor any party demanded dowry. He was in touch with the deceased but she never complained and she

told him that she was living happily. He went to the cremation of the deceased. After hearing the death of the deceased, Baburam (PW1), his wife, his sons Shiv Ratan, Virendra and their wives went to the house of the deceased through tractor trolley and he met with them there. After they reached, the cremation of the deceased was done. He also went in the dasvi and terahvi ceremony of the deceased, then, again Baburm (PW1) met him and returned along with him. While returning, he was saying that since his grand son has not been sent along with him, he will falsely implicate these peoples in the dowry case. He denied the suggestion that he is telling the date of marriage on his own and without any evidence.

13. Learned counsel for the appellant submits that no offence under Section 304-B of the Indian Penal Code is made out nor any offence under Section 3/4 Dowry Prohibition Act has been made out. Death has not taken place within seven years from the date of the marriage, hence the provisions of Sections 113-A and 113-B of the Evidence Act, 1872 are not attracted. Except the charge under Section 304 B of the Indian Penal Code and Section 3/4 Dowry Prohibition Act, no alternative charge have been framed. There is no evidence of cruelty soon before the death for demand of dowry. He relied on the judgement of Hon'ble Supreme Court of India reported in 2004(3) SCC 122, **Baljeet Singh and another vs. State of Haryana** and emphasis has been laid on paras 8, 9, 10 and 17 of the judgement.

14. On due consideration to arguments advanced by the parties' counsel and perusal of record it appears that the statement of P.W.1 is contrary to what has been said in the application under Section 156(3) Cr.P.C. In his statement, he has alleged that the deceased was poisoned, whereas in the application under Section 156 (3) Cr.P.C., his case was that she was burnt. His statement that the deceased was married 10 and a half years ago, has been falsified by Reeta, who has stated that at the time of the death of the deceased, she was 15-16 years old and she was not born at the time of her marriage, which means that the deceased was married way back and ultimately beyond 7 years from her death as the statement was given on 20.7.2001. This statement of Reeta has been corroborated by DW1, who has stated that the deceased was married on 28.2.1985, and both DW1 and PW2 have contradicted the testimony of PW1 that the deceased died within 7 years of her marriage. Further the other story of PW1 that he received the information regarding death of deceased daughter one day after the cremation, has again been contradicted by PW2 who has stated that the informant and his family members went to the house of the appellant upon the death of the deceased and on the next day, the dead body was taken to Nimsar on her tractor which came from Niyazpur. In the cremation, her father and Shiv Ratan went to Nimsar. This testimony of PW2 has been corroborated by DW1, who has stated that the informant and his family members as well as their wives all participated in the cremation of the deceased Saraswati. Not only this, DW1 himself as well as the informant had participated in *dasvi* and *terhvi* of the deceased, where informant met him and returned with him and while returning he was saying that since his grand son (bablu) has not been sent/has not been given to him therefore he will falsely implicate them. From these testimonies of the DW1 and PW2, the story of PW1 is falsified. The entire story crafted by him

under Section 156(3) Cr.P.C. as well as the statement of PW1 is false and not corroborated with the testimony of PW2 and DW1. He knew about the death of his daughter and not only knew but he went there and took part in the cremation. The participation of the informant in dasvi and terhvi after ten days of the incident as per statement of DW1 and also took part in cremation are also evident from statement of the PW2, therefore, this part of evidence of PW1 is not trustworthy, hence discarded.

15. The statement of DW1 that while returning Baburam PW1 said since his grand son was not sent with him by accused persons therefore he will falsely implicate them, found support and corroborate from the statement of PW2 Reeta, who also has said that since Bablu (grand son of the PW1) has not been sent with her grand mother, therefore, his family members got annoyed. This may be cause of lodging First Information Report. According to statement of DW1, there was no allegation of dowry nor anybody demanded dowry nor the same was fixed in the marriage nor even the deceased did complaint regarding dowry with him. PW2, in her cross examination, has stated that regarding dowry, no one has talked to her although in examination-in-chief, she has stated that Rs.10,000/- and a buffalo was being demanded by the appellant and his family members, thus, again regarding the demand of dowry, the statement of PW1 is not corroborated with the statement of other witnesses PW2 and DW1, hence this also cannot be relied on.

16. PW1, in his cross examination, has stated that at the time of the death of deceased, Reeta PW2 was 10 to 11 years old. PW2 has stated that she was not born at the time of marriage of the deceased. Thus conjoint reading of statement of DW1 and PW2, it appears that the deceased was married at least more than 11 years ago before date of her death. This fact is further corroborated by the statement of DW1, who says that the deceased was married on 26.2.1985. The entire testimony of the PW1 either it is regarding the manner of death of the deceased, time of marriage of the deceased, information of death of the deceased, is not corroborated with the statement of DW1 and PW2, rather has been contradicted. The testimony of the PW1 is also not trustworthy because as per his own statement, Jagdish son of Jairam, informed him about the incident, then, he says grand daughter Reeta, who informed him, then, in the cross-examination, he says that he does not know Jagat Narain, father of Jagdish. He also says that he cannot identify Jagdish, who has informed him regarding the incident, although he happens to be the relative. False and contradictory testimony of PW1 does not inspire confidence. The same is not corroborated by the testimony of PW2 and DW1.

PW4 is investigating officer who has proved exhibit ka 1, Ka 2, Ka3, Ka4 and Ka5.

17. In this case considering the testimony of PW1 which is nothing but a lie in every piece of the testimony. The testimony of PW1 has been contradicted from the testimony of PW2 and DW1. It is evident that marriage took place beyond seven years of her death and as such she was married at least for more than 11 years ago. From the statement of PW3, it appears that the deceased died due to cholera. According to the statement of PW2 and DW1, the deceased was cremated in the presence of informant and other family members of the deceased. The informant in

filing application under Section 156(3) Cr.P.C has not come with clean hand. He has suppressed this fact also. There is no evidence that the deceased was subjected to cruelty or harassment soon before her death although PW2, in her examination-in-chief, has stated that the informant has given Rs.10,000/- cash and goods worth Rs.2000 at the time of marriage. However in the later part of her statement rather in her entire statement, it has nowhere been stated by PW2 who was residing with the deceased for the last one month that soon before her death the deceased was subjected to cruelty. There is no allegation leveled by her that any of the family members of the appellant or the appellant himself has demanded dowry. Although the allegation of cruelty has been leveled by PW2, however, the said cruelty or harassment was not in connection with the demand of dowry as per the statement of PW2. Likewise DW1 out rightly has rejected such case of cruelty or dowry. He has not supported the prosecution story. The witnesses i.e. DW1 and PW2 remained intact even after the prolonged cross examination. In this case, prosecution has failed to prove that the deceased died within seven years of her marriage. It has also failed to prove that the death was under abnormal circumstances as the PW3 has clearly opined that the deceased was suffering from dyscentry and vomiting. She was treated at his clinic for three hours and thereafter referred to District Hospital Sitapur, where she died. As per the statement of PW1 deceased was subjected to cruelty and harassment by the appellant. However, there is no such evidence by the PW2 or DW1 or any other prosecution witness except PW1 that such cruelty or harassment had any connection with the demand of dowry. The evidence of PW1 is wholly unreliable and cannot be believed. The evidence of cruelty and harassment alone is not sufficient to bring application under Section 304 B Indian Penal Code, the basic ingredients to attract the provisions of Section 304-B I.P.C., are as under:-

"(1) The death of a woman should be caused by burns or fatal injury or otherwise than under normal circumstances;

(2) Such death should have occurred within seven years of her marriage;

(3) She must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

(4) Such cruelty or harassment should be for or in connection with demand for dowry."

18. Alongside insertion of Section 304B in IPC, legislature also introduced Section 113B of Evidence Act, which lays down the question as to whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

19. Explanation appended to Section 113-B of the Indian Evidence Act lays down that "for the purpose of this section 'dowry death' shall have the same meaning as in Section 304 B of Indian Penal Code".

20 . If Section 304-B IPC is read together with Section 113-B of the Evidence Act, a comprehensive picture emerges that if a married woman dies under

unnatural circumstances at her matrimonial home within 7 years from her marriage and there are allegations of cruelty or harassment upon such married woman for or in connection with demand of dowry by the husband or relatives of the husband, the case would squarely come under "dowry death" and there shall be a presumption against the husband and the relatives.

21. In this case I find that there is practically no evidence to show that there was any cruelty or harassment for or in connection with the demand of dowry. This deficiency in evidence is fatal for the prosecution case. Even otherwise mere evidence of cruelty and harassment is not sufficient to bring in application of Section 304B IPC. It has to be shown in addition that such cruelty or harassment was for or in connection with the demand for dowry. (See: Kanchy Ramchander v. State of A.P. (1996 SCC (Crl.) 31). Since the prosecution failed to prove that aspect, the conviction as recorded cannot be maintained.

22. Since the aforesaid basic ingredients to attract the provision under Section 304-B could not be proved by the prosecution therefore there is no occasion for this court to presume that the accused has caused the dowry death and for this reason Section 113 of the Evidence Act cannot be invoked in this case. Therefore, the accused is acquitted of the charge under Section 304-B Indian Penal Code so far as the conviction under Section 3/4 Dowry Prohibition Act is concerned the same is also not proved as per testimony of PW1 and DW1. PW2 only has stated that at the time of marriage goods worth Rs.2000/- and Rs.10,000/- were given by her grandfather. However, she has not given any evidence to attract the definition of dowry under Dowry Prohibition Act.

23. Section 2 of Dowry Prohibition Act,1961 reads as under :-

"2. Definition of "dowry".--In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly—

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before [or any time after the marriage] [in connection with the marriage of the said parties, but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies."

24. This demand of Rs.2,000/- cannot be said to be in connection with the marriage of the party to the marriage. From the evidence on the record it is clear that even if it is believed that the accused/appellant demanded Rs.10,000, this demand was made in the third year of the marriage after the baby boy was born out of the wedlock. This demand of Rs.10,000/- was not in connection with the marriage and, therefore, does not come within the definition of dowry demand under Section 2 of the Dowry Prohibition Act 1961.

25. The Supreme Court of India in the case of **Appasaheb and Anr versus State of Maharastra (2007) 9 SCC 721,** in para 11 has held as under:-

"11. In view of the aforesaid definition of the word "dowry" any property or valuable security should be given or agreed to be given either directly or indirectly at or before or any time after the marriage and in connection with the marriage of the said Aparties. Therefore, the giving or taking of property or valuable security must have some connection with the marriage of the parties and a correlation between the giving or taking of property or valuable security with the marriage of the parties is essential. Being a penal provision it has to be strictly construed. Dowry is a fairly well known social custom or practice in India. It is well settled principle of interpretation of Statute that if the Act is passed with reference to a particular trade, business or transaction and words are used which everybody conversant with that trade, business or transaction knows or understands to have a particular meaning in it, then the words are to be construed as having that particular meaning. (See Union of India v. Garware Nylons Ltd., AIR (1996) SC 3509 and Chemicals and Fibres of India v. Union of India, AIR (1997) SC 558). A demand for money on account of some financial stringency or for meeting some urgent domestic expenses of for purchasing manure cannot be termed as a demand for dowry as the said word is normally understood. The evidence adduced by the prosecution does not, therefore, show that any demand for "dowry" as defined in Section 2 of the Dowry Prohibition Act was made by the appellants as what was allegedly asked for was some money for meeting domestic expenses and for purchasing manure. Since an essential ingredient of Section 304-B IPC viz. demand for dowry is not established, the conviction of the appellants cannot be sustained. "

26. A sum of Rs.10,000/- at the time of marriage and goods worth Rs.2,000/- that was given at the time of marriage was long back. There is no evidence given by PW2 or DW1 that there was any demand of dowry soon before her death and the allegation of cruelty and harassment by the PW2 is not with respect to the dowry demand and the same have not been proved by cogent evidence by the prosecution hence the accused appellant is also acquitted under Section 3/4 of the Dowry Prohibition Act.

27. On due consideration to the submission advanced and evidence on record it is clear that prosecution has not been able to prove beyond reasonable doubt the ingredients of Section 304B I.P.C. for holding the accused appellant guilty for the offense of dowry death.

28. For the reasons mentioned herein-above, the appellant is acquitted of the charges under Section 304-B Indian Penal Code and Section 3/4 Dowry Prohibition Act.

The impugned judgment and order dated 10.04.2003 passed by the Special Sessions Judge, Sitapur in Sessions Trial No. 487 of 1997 arising out of Case Crime No. 196 of 1996, under Sections 498A, 304B, 201 of the Indian Penal Code and Section 3/4 of the Dowry Prohibition Act, Police Station Ramkot, District Sitapur, is set aside.

The appellant is acquitted of all the charges. The bail bonds are canceled. Sureties are discharged.

29. The appellant is directed to be released if he is not wanted in any other case.

30. The instant appeal is, accordingly, **Allowed.**

31. Let a copy of this judgment along with the lower court record be sent to the learned trial court concerned by the Registry.

(2021)08ILR A489
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.08.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No 1148 of 2001

Nanhey Lal Yadav ...Appellant
Versus
The State of U.P. ...Opposite Party

Counsel for the Appellants:
J.S.Tomar, Ajay Kumar

Counsel for the Opposite Party:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure,1973 - Section 374(2) - Indian Penal Code, 1860- Sections 376, 506(2) - challenge to-conviction-The medical evidence contradicts oral evidence as according to the first information report, the prosecutrix was 14 years of age whereas in the medical examination her age has been found to be 18 years. No mark of injury has been found on the body and also on the private part of the prosecutrix whereas in her testimony P.W.1 has stated that she had received scratches over her body and mouth. Thus, this part of the evidence of the prosecution is falsified by the medical report. The prosecutrix has been found to be used to sexual intercourse. The Doctor has not given any opinion about rape. Even the investigating officer has not corroborated the prosecution story as he has not found any broken Jwar plants as stated by the prosecutrix. He has also contradicted the statement of P.W.2 to the extent that it is P.W.2 who showed the place of occurrence to him and then he prepared the site plan, whereas P.W.2 says that he never returned to the place of occurrence again. Every part of evidence of P.W.1 is contradictory, improbable and not corroborated by any other piece of evidence. The accused appellant cannot be convicted on this kind of contradictory, shaky and improbable evidence of the prosecutrix. the prosecution has failed to prove its case beyond reasonable doubt. Every part of the testimony of the prosecutrix is infirm, doubtful and contradictory as well as improbable which does not pose confidence. There is no corroborative evidence in support of the testimony of the prosecutrix. Five important and available witnesses have been withheld by the prosecution from the Court, therefore, it is hard to convict the appellant on this quality of evidence and it is a fit case to draw adverse inference against the prosecution for withholding five important eye-witnesses from the Court. (Para 1 to 13)

B. It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a

case the Court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself - whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise.

The appeal is allowed. (E-5)

List of Cases cited:

1. Mohd. Ali @ Quddu Vs St. of U.P. (2015)7 SCC 272

2. Takhaji Hiraji Vs Thakore Kubersing Chamansing & ors. (2001) SC Cri.L.J. 2602

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

1. This criminal appeal has been preferred against the judgment and order dated 29.11.2001 passed by Additional Sessions Judge (FTC-IV), Lucknow in Sessions Trial No.610/2001, Crime No.176 of 2000, P.S. Malihabad, Lucknow whereby the appellant has been convicted and sentenced to eight years rigorous imprisonment and a fine of Rs.2000/-, with default provision, under section 376 I.P.C.. The appellant has been further convicted and sentenced to six months rigorous imprisonment under section 506(2) I.P.C.. Both the sentences were directed to run concurrently.

2. The prosecution case as per written report dated 11.7.2000 is that on 10.7.2000 at about 7.00p.m., the daughter of the informant Basanti aged about 14 years went to ease herself. All of a sudden, Nanhey Lal son of Kallu of the same village came and caught hold of the daughter of the informant and threatened that if she raises alarm, he will kill her. By saying this, Nanhey Lal put knife on the chest of the prosecutrix and committed rape on her. After returning home, the prosecutrix told the incident while she was weeping. Since it was late night, therefore, the informant did not go to the police station and as such on the next day, i.e. on 11.7.2000, he went to the police station. The written report is Ex.Ka-1. Thereafter, the prosecutrix was medically examined on the same day, i.e. on 11.7.2000. The medical examination report is Ex.Ka-2. A supplementary medical report was also prepared which is Ex.Ka-3. Chik FIR was prepared which is Ex.Ka-6. Thereafter, site plan was prepared by the investigating officer which is Ex.Ka-4. The investigating officer after completing the formalities and taking statements of the prosecution witnesses under section 161 CrPC submitted charge-sheet which is Ex.Ka-5. The prosecution to prove its case has produced five witnesses, viz. P.W.1 prosecutrix, P.W.2 complainant, P.W.3 Dr. Sadhna Devi who had medically examined the prosecutrix and prepared medical report as well as supplementary report, P.W.4 SI Phool Dev and P.W.5 HC Vednath Verma.

3. P.W. 1 in her examination-in-chief has repeated the story, narrated in the written report. In the cross-examination, she has stated that in her statement given before the Magistrate, she has stated her age to be 18 years. She has further stated that her father has applied for compensation from the government. She also stated that her house is at 30 ft. distance from the house of Nanhey Lal . The elder son of Nanhey Lal is 16 years, Pinki is of 14 years, Renu is 11 years of age and the age of Jitendra is 8 years. In front of the house of Nanhey Lal , there is a field of Gaya Prasad where the incident took

place and from where the house of the appellant is visible. In the field of Gaya Prasad, crop of Jwar was standing. After sitting in the crop, nobody could see anything in the farm. She stated that she is not aware about inch or feet. She stated that she did not go again to the place of occurrence.

A private lawyer was also engaged who has submitted report of the incident in the police station and she also went with him to the police station. She stated that at the time of incident, there was a little sunlight. She stated that in case somebody raises alarm loudly from the field of Gaya Prasad, then it may be heard from her house. She cried loudly at the time of incident, however, nobody came. Then she stated that wife of Nanhey Lal came out but she was standing there. She was seeing the incident, however, did not come to her rescue. The children of Nanhey Lal were playing outside the house. They also kept watching the accused, raping the prosecutrix but did not came to her rescue.

She denied the suggestion that on the date of incident, she had collided with buffalo of Nanhey Lal and Nanhey Lal slapped her twice. She further stated that the brother of Nanhey Lal, Siyaram resides in the same village which is adjacent to the house of the appellant and her two maternal uncles Ganga Ram and Chhutakey have also their houses. She denied the suggestion that there was fight between Siya Ram and her maternal uncles and cross cases were lodged by both the sides. She further stated that she reached police station at about 5-6 a.m. on the next day of the incident. Then she was sent for medical examination at about 8-9 p.m. During the course of incident of rape, she was scratched at several places by finger nails and finger nail(s) scratches had also come on her mouth. Prior to the incident, she was never raped. During the course of rape, her clothes had become dirty with latrine. Therefore, she washed them after returning home. At the place where she was thrown, 20-25 Jwar plants were broken. She was also injured due to Jwar plants. While committing rape her both hands were pressed, therefore, she could not resist/beat the appellant. On the next day, she had shown the torn arms of her Kurta to the investigating officer. Salwar was not torn. The investigating officer did not take the clothes. She denied the suggestion that she has lodged the report just to harass the appellant and to extract money from the government.

4. P.W.2 Puttu Lal repeated the same story in the examination in chief. In the chief, he has also stated that due to the fact that knife was pointed on the prosecutrix she could not cry. In the chief he has stated that on the second day, he got the written report written by somebody and then got it typed at Malihabad. The contents were read over to him and he signed it. He went to the police station along with the prosecutrix where his report was written. Thereafter, the prosecutrix along with a Peon was sent to Mahila police station for medical examination where she was medically examined and x-ray was conducted. On the third day, they returned home. Since it was a matter of girl, therefore, the report was lodged at Mahila police station. For two days, he remained at Mahila thana, then, he said that while returning from Lucknow, he did not go to Malihabad Thana. Regarding this incident, he never met again to any of the police personnel of police station Malihabad. He admitted the fact that prior to the incident, there was a fight between Siyaram and his brothers in law. Both the

parties were injured and cross cases were filed. He was also made accused. Thereafter, compromise took place.

He denied the suggestion that the prosecutrix had brawl with the appellant relating to the collusion with the appellant's buffaloes and the appellant slapped the prosecutrix twice. Prior to the incident, the appellant supported different candidate in the election and he supported another person Virendra neta. He further stated that he waited for the appellant till 11.00p.m. in the night that if he apologises then he shall not lodge the report. He stated that Nanhey did not care for 10000 rupees. Nanhey did not apologise therefore, the report was lodged on the second day. In case he had apologised, then he would not have lodged the report. He denied the suggestion that the report has been lodged due to village partibandi and enmity with the appellant and also to extract money from the government.

5. P.W.3 Dr Sadhna Devi has medically examined the prosecutrix . In the external examination, she has not found any mark of injury on the body or any sign. In the internal examination also, no injury has been found on the private part. Hymen was old torn and healed. She could not give any opinion about rape. The prosecutrix was habitual of sexual intercourse. The radiological age according to X-ray report of the prosecutrix was stated to be 18 years.

6. P.W. 4 S.I. Phool Dev is the investigating officer of the case and is a formal witness. After completing the investigation, he submitted charge-sheet, Ex.Ka.5.

7. P.W. 5 Head Constable Vednath Verma who is also a formal witness has proved Ex.ka-6 as also Ex.Ka-7 the general diary of 11.7.2000 of police station Malihabad. In the statement under section 313 CrPC, the case of the appellant is of denial. He has stated to have been falsely implicated due to previous enmity. It is further stated by him that a buffalo pushed the prosecutrix on which she started abusing him and he gave 2-3 slaps to her on account of which her father Puttilal lodged a false report against him.

8. Learned counsel for the appellant submits that the story put forth by the prosecution is highly improbable and untrustworthy. The report has been lodged at Malihabad whereas P.W.1 has stated that after the incident, she and her lawyer went to the police station to lodge the report whereas P.W. 2 has stated that report was lodged at Mahila thana which is far of, from Malihabad and in Lucknow district headquarter. P.W. 2 has stated that he did not go to Malihabad thana after returning from Lucknow nor met any police personnel of police station Malihabad. He submits that the evidence of P.W.1 and P.W.2 regarding lodging of the report is extremely doubtful. It is not clear from the prosecution case whether the report was lodged by lawyer as according to the statement of P.W.2, the appellant was in Mahila Thana for two days and report was lodged at Mahila thana. The prosecutrix did not suffer any injury. The testimony of the prosecutrix is highly improbable as according to her, wife and four children of the accused saw him committing rape. The appellant has been falsely implicated just to extract Rs.10000/- and also due to village partibandi.

It is lastly submitted that the medical evidence does not corroborate the prosecution story. The statement of P.W.1

and P.W.2 regarding lodging of the report is totally contradictory. Testimony of the prosecutrix is not worthy of credence and there is no corroborative material with the prosecution.

9. Learned A.G.A. while opposing the argument of the appellant's counsel and supporting the prosecution case has submitted that the testimony of the prosecutrix is alone sufficient to convict the appellant. No corroborative material is needed.

10. Having heard parties' counsel and after perusal of the record, it appears that the statement of P.W.1 regarding broken jwar plants have been contradicted by P.W.3 investigating officer. The site plan also does not corroborate this part of the evidence where no broken Jwar plants have been shown. The investigating officer has clearly denied that any broken Jwar plants were found on the site. P.W. 1 stated that after the incident, she went along with lawyer and lodged the report in the police station whereas P.W. 2 states that he went along with prosecutrix and there is no mention of any lawyer. It is then said that he went to Mahila Thana and the report was lodged there. For two days, he remained in Mahila thana along with the prosecutrix and after returning from Mahila thana, he never met in police station again. Hence, this part of the evidence is also doubtful.

The statement of the prosecutrix that the incident of rape was witnessed by the wife and four children of the appellant is also improbable as according to the prosecutrix, the incident had taken place in the field of Gaya Prasad which was in front of house of Gaya Prasad. She further stated that while the appellant was committing rape, wife of the appellant was watching the appellant. Four children were playing in the field, however, none of then came to her rescue. The statement of the prosecutrix is highly doubtful as the appellant is a married person having four children out of whom two are grown up. It is doubtful for two reasons. No prudent man will commit the alleged crime in front of his wife and four children as also no married lady would allow her husband committing rape of a lady in front of her four children. Thus, this part of the evidence of the prosecutrix appears to be highly improbable and does not inspire confidence.

The prosecutrix in her statement has stated that after the incident, she did not go to the place of occurrence again. P.W. 2 also stated the same whereas the investigating officer in his statement has said that he prepared the site plan on the pointing out of P.W.2. Thus, the statement of P.W.2 as well as the statement of P.W.4 regarding the site plan are totally contradictory and thus are doubtful.

According to the statement of the prosecutrix, at the place of incident, there is Panchayat Bhawan and a government water tank, still no one saw the appellant committing rape. In addition, as per the site plan, there is a house of Saktu and Virendra neta and after that there is a abadi of the village. Still nobody heard the screams, although in the statement, P.W.1 has stated that she cried loudly. Contrary to it, P.W.2 in his statement has stated that P.W.1 did not raise any alarm. In regard to the brawl between the appellant and the prosecutrix on the date of incident regarding the collusion with his buffalo and also there was enmity between the brother of the appellant and brother in laws of P.W.2, cross cases were lodged by both the parties

which do not rule out the possibility of false implication by P.W.2, coupled with the fact that P.W.2 stated on oath that the appellant did not care for Rs.10000/-. He waited for the appellant till 11.00p.m. and since he did not tender apology, report was lodged. It appears that P..W.2 was expecting Rs.10000/- from the appellant which he did not give. He also did not apologise for giving slaps to her daughter, therefore, he may have lodged the report by falsely implicating the appellant.

The medical evidence also contradicts oral evidence as according to the first information report, the prosecutrix was 14 years of age whereas in the medical examination her age has been found to be 18 years. No mark of injury has been found on the body and also on the private part of the prosecutrix whereas in her testimony P.W.1 has stated that she had received scratches over her body and mouth. Thus, this part of the evidence of the prosecution is also falsified by the medical report. The prosecutrix has been found to be used to sexual intercourse. The Doctor has not given any opinion about rape Thus, the medical evidence does not corroborate the prosecution story. Even the investigating officer has not corroborated the prosecution story as he has not found any broken Jwar plants as stated by the prosecutrix. He has also contradicted the statement of P.W.2 to the extent that it is P.W.2 who showed the place of occurrence to him and then he prepared the site plan, whereas P.W.2 says that he never returned to the place of occurrence again. Every part of evidence of P.W.1 is contradictory, improbable and not corroborated by any other piece of evidence. The accused appellant cannot be convicted on this kind of contradictory, shaky and improbable evidence of the prosecutrix as held by Hon'ble Supreme Court in **Mod. Ali alias Quddu** versus **State of U.P.** (2015)7 SCC 272. Relevant paragraph 29 is quoted below :

"29. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. ***The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non- examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. "*** *(Emphasised by me)*

11. The prosecution case also becomes doubtful as according to the

prosecutrix, the incident was seen by the wife of the appellant and his four children. Since the evidence of P.W.1 is shaky, infirm, not reliable and not worthy of credence, therefore, under these facts and circumstances, it was necessary for the prosecution to have examined the wife of the appellant and his four children. It is not the case of the prosecution that these witnesses were not available to be examined as they have been withheld from the court. Therefore, the question of drawing adverse inference arises against the prosecution as held by Supreme Court in 2001 Criminal Law Journal 2602 **Takhaji Hiraji** versus **Thakore Kubersing Chamansing and others**. Relevant paragraph 19 is reproduced as under :

"19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. ***It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself - whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coning from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses. In the present case we find that there are at least 5 witnesses whose presence at the place of the incident and whose having seen the incident cannot be doubted at all. It is not even suggested by the defence that they were not present at the place of the incident and did not participate therein.*** *The injuries sustained by these witnesses are not just minor and certainly not self-inflicted. None of the witnesses had a previous enmity with any of the accused persons and there is apparently no reason why they would tell a lie. The genesis of the incident is brought out by these witnesses. In fact, the presence of the prosecution party and the accused persons in the chowk of the village is not disputed. How the vanity of Thakores was hurt leading into a heated verbal exchange is also not in dispute. Then followed the assault. If the place of the incident was the chowk then it was a sudden and not pre-meditated fight between the two parties. If the accused persons had reached their houses and the members of the prosecution party had followed them and opened the assault near the house of the accused persons then it could probably be held to be a case of self-defence of the accused*

persons in which case non-explanation of the injuries sustained by the accused persons would have assumed significance. The learned Sessions Judge has on appreciation of oral and the circumstantial evidence inferred that the place of the incident was the chowk and not a place near the houses of the accused persons. Nothing more could have been revealed by other village people or the party of tight rope dance performers. The evidence available on record shows and that appears to be very natural, that as soon as the melee ensued all the village people and tight-rope dance performers took to their heels. They could not have seen the entire incident. The learned Sessions Judge has minutely scrutinised the statements of all the eye-witnesses and found them consistent and reliable. The High Court made no effort at scrutinising and analysing the ocular findings arrived at by the Sessions Court. With the assistance of the learned counsel for the parties we have gone through the evidence adduced and on our independent appreciation we find the eye-witnesses consistent and reliable in their narration of the incident. In our opinion non-examination of other witnesses does not cast any infirmity in the prosecution case. " **(Emphasised by me)**

12. Thus, in view of the aforesaid discussion, the prosecution has failed to prove its case beyond reasonable doubt. Every part of the testimony of the prosecutrix is infirm, doubtful and contradictory as well as improbable which does not pose confidence. There is no corroborative evidence in support of the testimony of the prosecutrix. Five important and available witnesses have been withheld by the prosecution from the Court, therefore, it is hard to convict the appellant on this quality of evidence and it is a fit case to draw adverse inference against the prosecution for withholding five important eye-witnesses from the Court.

13. In view of what has been stated hereinabove, the criminal appeal is allowed and the judgment and order of conviction and sentence dated 29.11.2001, passed by Additional Sessions Judge (FTC-IV), Lucknow in Sessions Trial No.610/2001, Crime No.176 of 2000, P.S. Malihabad, Lucknow is set aside. The appellant is acquitted of the charges levelled against him.

This Court by its order dated 13.12.2001 had admitted the appellant to bail. He be discharged of his bail bonds.

14. Let a copy of this judgment be transmitted to the learned trial Court as well as Superintendent, Jail concerned, for compliance. The lower court records be also sent back to the lower court.

(2021)08ILR A496
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE NAVEEN SRIVASTAVA, J.

Criminal Appeal No 1414 of 2012

Mohd. Moin @ Lala & Anr.
...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Hari Bans Singh, Sri Deepak Kumar Srivastava, Deepak Singh, Sri Ganesh Shanker Srivastava

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

Criminal Law - Code of Criminal Procedure,1973 - Section 374(2) - Indian Penal Code, 1860 - Scheduled Caste & Scheduled Tribes Act, 1989 - Sections 376 & 3(2)5 SC/ST Act - challenge to-conviction- The sexual assault took place inside a room of the house of DW-1-DW-1 is the sister-in-law of PW-5, while latter is friend and colleague of PW-1.-Against this background presence of PW-1 in the house of DW-1 is not highly unlikely. The two accused chased the two ladies and entered the house of DW-1 forcibly wherein accused forcibly dragged PW-1/ the victim in a room and sexually assaulted her at gunpoint, while the other was guarding the room and they also extended threats to the inmates that if they dare to raise alarm, they would be eliminated-so far the testimony of PW-1/ the victim is concerned, same does not suffer from any infirmity, which also stands corroborated with that of PW-5, coupled with the fact that it is highly unlikely that a working lady (married) would go to the extent of foisting a case of sexual assault on her only with a view to extract compensation. Thus it can be safely said that the prosecution has been successful in establishing the offence of rape against the accused-appellants-PW-1 feigns complete ignorance as to the identity of both the accused, while PW-5 is familiar with both of them-the accused inquired from PW-5 as to the identity of PW-1/ the victim to which PW-5 only replied that she happens to be her colleague-no evidence that the accused had any previous knowledge as to the identity of PW-1/ the victim therefor it can be said with reasonable certainty that the alleged offence was not committed on the ground that the victim belongs to SC/ST community-so far the conviction of appellants under Section 3(2)(v) of SC/ST Act is concerned, same cannot be sustained while conviction under Section 376 and 506 IPC is liable to be maintained-Consequently, the appeal is liable to be allowed in part. (Para 1 to 19)

The appeal is partly allowed. (E-5)

List of Cases cited:

1. Ramdas & anr .Vs. St. of Mah. (2007) 2 SCC 170

2. Asharfi Vs. St. of U.P. (2018) 1 SCC 742

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

This Criminal Appeal is preferred against the judgment and order dated 30.3.2012 passed by Special Judge, SC/ST Act, Kanpur Nagar in S.T. No. 1122 of 2007 (State vs. Rais Dear and others), convicting/sentencing the appellants under Section 376 IPC read with Section 3(2)5 SC/ST Act to life with fine of Rs.20,000/- and under Section 506 IPC to 1 year imprisonment. Both sentences to run concurrently.

1. The prosecution case in brief is as under: -

(i) PW-1, informant / victim along with her friend PW-5, while returning from their workplace on 12.2.2007 at about 4:00 P.M, came across accused Mohd. Moin @ Lala and accused Rais @ Dear near Nai Basti. PW-5 in order to return a carry bag of her sister-in-law (DW-1) went to her house along with PW-1. Both the accused chased PW's-1 and 5, entered the house forcibly and sexually assaulted PW-1 at gunpoint in a room, while PW-5 was extended threats that if either of them dare to report, they would be done away with.

(ii) Post occurrence, PW-1 was escorted by PW-5 to her house, where she narrated the incident to her mother and sister (PW-3). They decided to lodge a

report same day and while they were on their way to lodge a report they were obstructed by the accused, who slapped PW-3, then PW-1 along with PW-3 could muster courage to lodge a report only next evening, i.e, 13.2.2007 on the basis of a written report (Ex.- Ka-1) scribed by one Deepak Saini as Case Crime no. 112/ 2007 under Sections 376, 506 IPC and 3(2)(v) SC/ST Act at 5 PM at P.S. Chakeri, Kanpur Nagar, against above named accused persons.

(iii) During investigation, PW-1 was medically examined by PW-2/ the doctor on 14.2.2007 at about 1:45 P.M, in police custody. The statement of the victim under Section 164 CrPC was also recorded on 3.4.2007. The I.O, after recording of the statements of witnesses and carrying out other investigational formalities submitted a charge sheet against both the accused under aforesaid provisions.

(iv) The Special Court, while taking cognizance of the offences, framed charges under Sections 376, 506 IPC and 3(2)(v) of SC/ST Act against both the accused, which they denied and claimed to be tried.

(v) The prosecution in order to establish its case examined PW-1/ the victim; PW-2/ the doctor; PW-3/ the sister of PW-1, who accompanied PW-1 to lodge a report, PW-4/ the I.O, PW-5/ friend of PW-1, an alleged eye-witness and PW-6/ the Head Moharrir, who reduced the contents of the FIR in the G.D.

(vi) The accused in their statements under Section 313 CrPC denied the occurrence and alleged false implication and in support thereof produced DW-1, owner of the house, who denied the occurrence having taken place inside her house.

(vii) The trial court after evaluating the evidence on record convicted the appellants as above.

2. We have heard Sri Deepak Singh, learned counsel for the appellants and Sri A.N. Mulla, and Sri V.S. Rajbhar, the learned A.G.A's.

3. Learned counsel for the appellants raised the following contentions:-

(i) FIR is delayed with no explanation, which is also not proved as the scribe (a stranger) was not examined.

(ii) Conviction under SC/ST Act is not sustainable as there is no evidence to indicate that the victim was sexually assaulted only for the reason that she belongs to SC/ST Community, coupled with the fact that PW-1 (the victim) had no prior knowledge of the identity of the accused and vice-versa.

(iii) PW's-1 and 5 tendered contradictory statements as to sequence of occurrence and the number of witnesses.

(iv) DW-1 owner of the house completely denied the occurrence having taken place inside her house.

(v) Prosecution was launched malafidely only with a view to extract compensation.

4. Shri A.N. Mulla, the learned A.G.A controverted the above submissions as under:-

(i) Prosecution has given a satisfactory explanation for delayed lodging of the FIR, coupled with the fact that in a case involving sexual offence, delay is not of much consequence, if the case is otherwise established. Mere non-examination of the scribe/ author of the FIR could not dent the case of prosecution.

(ii) PW-1 in her testimony alleged that the accused sexually assaulted her knowingly that she belongs to a SC Community, thus conviction under SC/ST Act cannot be faulted.

(iii) No major contradiction between PW's 1 and 5, so as to doubt the veracity of prosecution story.

(iv) DW-1 was a charge-sheet witness, who appears to have been won over subsequently.

5. The sexual assault at gunpoint by both the accused on PW-1 (victim) is alleged to have taken place on 12.2.2007 at around 6 in the evening inside the house of DW-1 (sister-in-law of PW-5). An attempt is made by PW's 1, 3 and 5 to lodge an FIR same evening but they were obstructed by the accused. PW-1 along with her sister PW-3 could lodge the FIR only next day at 5 P.M. However, PW-1 under Section 164 CrPC had deposed that once they were obstructed on 12.2.2007 from lodging the FIR, she telephonically contacted one Saleem, a constable, who got the accused arrested, whereas she was also stating that the FIR was lodged next day, i.e, on 13.2.2007 at around 5 P.M, after a written report was scribed one Deepak with whom she had no previous familiarity and who did not even read out the contents as dictated by PW-1. We in the above background are of the view that lodging of the FIR is shrouded with suspicious circumstances, but that alone would not be sufficient to belie the prosecution case.

6. The sexual assault took place inside a room of the house of DW-1. DW-1 is the sister-in-law of PW-5, while latter is friend and colleague of PW-1. Against this background presence of PW-1 in the house of DW-1 is not highly unlikely. The two accused chased the two ladies and entered the house of DW-1 forcibly wherein accused Moin @ Lala forcibly dragged PW-1/ the victim in a room and sexually assaulted her at gunpoint, while the other was guarding the room and they also extended threats to the inmates that if they dare to raise alarm, they would be eliminated, thereafter it was accused Rais @ Dear, who ravished her. Both the accused came out of the house extending threats. PW-1 in cross-examination could not be dented on the vital aspects of the case.

7. PW-3 is the sister of PW-1. She stated that on the date of occurrence itself she along with PW-1 attempted to lodge the FIR, but accused prevented them. She stated that accused Moin @ Lala armed with an unlicensed weapon had slapped her and prevented them from lodging the FIR. The sisters return to their home without lodging any FIR as the report could be lodged next day at 5 in the evening.

8. PW-5 by and large has supported the sexual assault on PW-1 by both the accused inside the house of DW-1.

9. The sexual assault on PW-1 is alleged to have taken place inside the room at gunpoint by the accused. Admittedly, the house belongs to DW-1, sister-in-law of PW-5. PW-1 at page-17 of the paper-book

is emphatic, when she states that when they reached the house, DW-1 was not present, rather her children were present while PW-5 at page 39 was affirming that in the said house, DW-1 along with others including tenants were present.

10. Much stress was laid on behalf of the appellants on the testimony of DW-1 as she denied the very occurrence having taken place inside her house. We lest not forget that DW-1 was enlisted as a charge-sheet witness to support the prosecution but she appeared as a defence witness and denied the occurrence. We do not attach much significance to her testimony as the testimony of PW-1 / the victim has undoubtedly established that she was raped by the accused in the house of DW-1, which is also corroborated with the testimony of PW-5 and the possibility of DW-1 having been won over by the accused cannot be ruled out as initially DW-1 in her statement under Section 161 CrPC supported the prosecution story.

11. We, after carefully perusing the evidence of witnesses, are of the view that in so far the testimony of PW-1/ the victim is concerned, same does not suffer from any infirmity, which also stands corroborated with that of PW-5, coupled with the fact that it is highly unlikely that a working lady (married) would go to the extent of foisting a case of sexual assault on her only with a view to extract compensation. Thus it can be safely said that the prosecution has been successful in establishing the offence of rape against the accused-appellants.

12. We now proceed to examine as to whether the sexual assault of the victim would entail a graver punishment under Section 3(2)(v) of the SC/ST Act.

13. Section 3(2)(v) of the SC/ST Act at the relevant time read as under:

"Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,--

(i) .....

(ii) .....

(iii).....

(iv) .....

(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine,"

14. A perusal of the aforesaid provision manifests that to establish a conviction under Section 3(2)(v), the prosecution has to establish that an offence was committed against a person or property on the ground that such person or property belongs to SC/ST community.

15. The Apex Court in ***Ramdas and Anr Vs. State of Maharashtra (2007) 2 SCC 170***, held as under:

"At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim happened to be a girl belonging to a scheduled caste does not attract the provisions of the Act. Apart from the fact

that the prosecutrix belongs to the Pardhi community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prosecutrix belongs to a scheduled caste community. The conviction of the appellants under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside."

Similarly, in ***Asharfi Vs. State of U.P. (2018) 1 SCC 742*** the Apex Court also held as under:

"6. In respect of the offence under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act, the appellant had been sentenced to life imprisonment. The gravamen of Section 3(2)(v) of SC/ST Prevention of Atrocities Act is that any offence, envisaged under Indian Penal Code punishable with imprisonment for a term of ten years or more, against a person belonging Scheduled Caste/Scheduled Tribe, should have been committed on the ground that "such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member". Prior to the Amendment Act 1 of 2016, the words used in Section 3(2)(v) of the SC/ST Prevention of Atrocities Act are ".....on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe".

7. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act has now been amended by virtue of Amendment Act 1 of 2016. By way of this amendment, the words ".....on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe" have been substituted with the words ".....knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". Therefore, if subsequent to 26.01.2016 (i.e. the day on which the amendment came into effect), an offence under Indian Penal Code which is punishable with imprisonment for a term of ten years or more, is committed upon a victim who belongs to SC/ST community and the accused person has knowledge that such victim belongs to SC/ST community, then the charge of Section 3(2)(v) of SC/ST Prevention of Atrocities Act is attracted. Thus, after the amendment, mere knowledge of the accused that the person upon whom the offence is committed belongs to SC/ST community suffices to bring home the charge under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act.

8. In the present case, unamended Section 3(2)(v) of the SC/ST Prevention of Atrocities Act is applicable as the occurrence was on the night of 8/9.12.1995. From the unamended provisions of Section 3(2) (v) of the SC/ST Prevention of Atrocities Act, it is clear that the statute laid stress on the intention of the accused in committing such offence in order to belittle the person as he/she belongs to Scheduled Caste or Scheduled Tribe community.

9. The evidence and materials on record do not show that the appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence

proving intention of the appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the appellant under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained."

16. We in the light of above parameters examine as to whether in the instant case an offence under Section 3(2)(v) of SC/ST Act is made out or not.

17. PW-1 feigns complete ignorance as to the identity of both the accused, while PW-5 is familiar with both of them. We hasten to add that it was the case of prosecution that the accused were also not aware of as to the identity of PW-1 (victim) as it was the case of prosecution that the accused inquired from PW-5 as to the identity of PW-1/ the victim to which PW-5 only replied that she happens to be her colleague. We thus do not find any shred of evidence to infer that the accused had any previous knowledge as to the identity of PW-1/ the victim therefor it can be said with reasonable certainty that the alleged offence was not committed on the ground that the victim belongs to SC/ST community.

18. We in the light of above discussion are of the considered view that in so far the conviction of appellants under Section 3(2)(v) of SC/ST Act is concerned, same cannot be sustained while conviction under Section 376 and 506 IPC is liable to be maintained. Consequently, the appeal is liable to be allowed in part.

19. The appeal is **allowed in part**. The judgment and order dated 3.10.2016 is set aside to the extent it convicts and sentences the appellants under Section 3(2)(v) of the SC/ST Act. Conviction under Section 376 and 506 IPC is maintained.

20. Appellant no.1 has admittedly served incarceration for more than 9 years from the date of impugned judgment, while appellant no.2 is in jail for more than 14 years. We are thus of the view that appellants are liable to be released on sentence undergone.

Appellants be released forthwith unless wanted in any other case.

Let a copy of this judgment along with records be sent to the judgeship concerned for ensuring compliance under intimation to this Court.

(2021)08ILR A502
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.07.2021

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No 1768 of 2018

Anita Devi Pal ...Appellant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Sudhir Kumar Singh, Santosh Kumar

Counsel for the Opposite Parties:
Govt. Advocate, Umesh Singh

A. Criminal Law - Code of Criminal Procedure,1973 - Section 374(2) - Indian Penal Code, 1860- Scheduled Caste & Scheduled Tribes Act, 1989 - Sections 147/323/504 & 3(1)(Da & (Dha) and 2(V)(Ka) - challenge to-*subsequent FIR*- the first FIR was lodged by the complainant on 8.11.2017

against the present appellant and other co-accused Mahila Thana, and subsequent FIR was lodged by the complainant on 29.11.2017 on G.R.P. Charbagh against appellant as u/s 147, 323 504 IPC and Section 3 (1) (Da & Dha) and 3 (2) (v) of the SC/ST Act by making improvement in FIR. It is alleged that accused uses caste abusive word "Pasi and Chamar" intimidating her with filthy language. Any further complaint by the same complainant against the same person on same set of fact subsequent to the registration of the case is invalid. Subsequent to the lodging of FIR on the same set of fact against same accused amounts to double jeopardy and it is also hit by Article 20 (2) of the Constitution of India, which states as under: "No person shall be prosecuted and punished for the same offence more than once." Since the second FIR is relating to the same date, time and place of occurrence, so the second FIR is not permissible under law, Hence, subsequent FIR is liable to be quashed.(Para 1 to 15)

The appeal is allowed. (E-5)

List of Cases cited:

1. T.T. Antony Vs St. of Ker. & ors. (2001) (6) SCC 181

2. Surender Kaushik & ors. Vs. St. of U.P. & ors. (2013) 5 SCC 148

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

1. Vide order dated 04.09.2019, this Court passed the following orders:-

"Vakalatnama filed by Sri Umesh Singh, Advocate, on behalf of opposite party no. 2, is taken on record.

Heard learned counsel for the appellant, learned counsel for opposite party as well as learned A.G.A. appearing for the State, pertaining to the prayer of bail of the appellant.

This criminal appeal has been filed by the appellant under Section 14A (1) of the Schedule Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to quash the summoning order 10.07.2018 and charge sheet dated 28.03.2018, in S.T. No. 270/2018, pending before the Court of Special Judge, SC/ST Act, Lucknow on the basis of F.I.R. lodged by the opposite party no. 2 at Police Station Charbagh, District Lucknow, which is registered as Case Crime No. 614/2017, under Section 147/323/504 I.P.C. and 3(1)(Da & (Dha) and 2(V)(Ka) of SC/ST Act.

It is submitted by learned counsel for the appellant that opposite party no. 2 initially had lodged the F.I.R. registered as case crime No. 0162/2017, Police Station Mahila Thana, District Lucknow, under Sections 147, 323 and 504 I.P.C. in which charge sheet has been filed and the petitioner has been enlarged on bail. Thereafter opposite party no. 2 maliciously lodged the second F.I.R. for the same incident which was registered as case crime No. 0614/2017, Police Station G.R.P. Charbagh, under Section 147/323/504 I.P.C., and Section 3(1)(Da and Dha) and 2(V)(Ka) of SC/ST Act.

It is contended on behalf of the appellant that from the perusal of both the first information reports, the second F.I.R. has been lodged by the complainant only to harass the appellant and false accusation under S.C. and S.T. Act has been levelled. It is next contended that the petitioner is already facing trial in the Court of Special C.J.M., (A.P), Lucknow for the same incident, therefore, the second F.I.R. for the

same incident she cannot be compelled to face the second trial and in this regard the petitioner counsel has relied on the judgment of Hon'ble Supreme Court reported in "(2001)(6) SCC 181 T.T. Antony Vs. State of Kerala and others", wherein the Hon'ble Court has held that the second F.I.R. for the same incident is not permissible and consequently the investigation made pursuant thereto has no legal consequences and was pleased to quashed the second F.I.R.

In view of the above, the proceedings of Case Crime No. 614/2017, under Section 147/323/504 I.P.C. and 3(1)(Da & (Dha) and 2(V)(Ka) of SC/ST Act, Police Station G.R.P. Charbagh, District Lucknow pending before the Court of Special Judge, SC/ST Act, Lucknow, shall remain stayed till the next date of listing.

Learned counsel for opposite party no. 2 prays for and is granted four weeks time to file counter affidavit.

Rejoinder, if any, may be filed within two week's thereafter.

List on 24.10.2019."

2. After 04.09.2019, the case was fixed on 2.7.2019, on that date, the case was ordered to be listed for today i.e. 26.07.2021.

3. Case called out. Only learned counsel for appellant as well as learned A.G.A. is present for the State. No one has put in appearance on behalf of the opposite party no. 2.

4. Heard learned counsel for appellant, learned A.G.A. for the State and perused the material available on record.

5. This appeal has been preferred under Section 14 (A) (1) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 against impugned summoning order dated10.7.2018 passed by learned Special Judge, (SC/ST Act), Lucknow in S.T. No. 270 of 2018 arising out of Case Crime No. 614 of 2018, under Sections 147, 323, 504 IPC and Section 3 (1) (DA & Dha) and Section 3 (2) (V) (Ka) of SC/ST Act as well as charge sheet dated 28.03.2018 submitted by the police in the aforesaid case crime number.

6. The main contention of learned counsel for the petitioner is that earlier an FIR was lodged against the appellant and six other persons in Mahila Thana on 08.11.2017 as Case Crime No. 162 of 2017, under Sections 147, 323 and 504 IPC. After investigation, charge sheet was filed against the appellant on 19.01.2018 under Section 173 (2) Cr.P.C. and all other named co-accused persons exonerated. In pursuance of this charge sheet, cognizance order was passed against the appellant on 17.03.2019.

7. Since the offence was bailable and the appellant has obtained bail on 02.05.2018, on the basis of same allegation, same substance and same set of fact another FIR was lodged by the first informant on 29.11.2017 against the appellant and other accused persons under Sections 147, 323, & 504 IPC and Section 3 (1) (x) of the SC/ST Act. After lodging the FIR on 29.11.2017, charge sheet was filed against the appellant and other co-accused persons on 28.03.2018 under Sections 147, 323, & 504 IPC and Section 3 (1) (Da & Dha) and 3 (2) (v) (Ka) of the SC/ST Act. In pursuance of the charge sheet dated 28.03.2018, the learned Special Judge (SC/ST Act), took cognizance on

10.7.2018 and passed summoning order against the appellant and other accused-persons.

8. Being aggrieved with the summoning order dated 10.07.2018, the instant criminal appeal has been preferred with the prayer that since the appellant is already facing trial in the court of learned Special Chief Judicial Magistrate, C.B.I. (A.P.), Lucknow for the same offence, then the appellant cannot be forced to face trial for same offence, for which the summoning order dated 10.7.2018 has been passed by learned Special Judge (SC/ST Act), Lucknow.

9. In support of his submission, learned counsel for appellant has drawn the attention of this Court towards the authority of Hon'ble Supreme Court in the case ***of T.T. Antony Vs. State of Kerala and others*** reported in ***(2001) (6) SCC 181*** wherein in paragraph no. 35 ot has been held as under:-

"35. For the aforementioned reasons, the registration of the second FIR under Section 154 CrPC on the basis of the letter of the Director General of Police as Crime No. 268 of 1997 of Kuthuparamba Police Station is not valid and consequently the investigation made pursuant thereto is of no legal consequence, they are accordingly quashed. We hasten to add that this does not preclude the investigating agency from seeking leave of the Court in Crimes Nos. 353 and 354 of 1994 for making further investigations and filing a further report or reports under Section 173(8) CrPC before the competent Magistrate in the said cases. In this view of the matter, we are not inclined to interfere with the judgment of the High Court under challenge insofar as it relates to quashing of Crime No. 268 of 1997 of Kuthuparamba Police Station against the ASP (R.A. Chandrasekhar); in all other aspects the impugned judgment of the High Court shall stand set aside."

10. Learned counsel for appellant has further drawn the attention of this Court towards the authority in the case of **Surender Kaushik and others vs State of Uttar Pradesh and others** reported in (2013) 5 SCC 148 wherein in paragraph no. 25, it has been held as under:-

"25. In the case at hand, the appellants lodged FIR No. 274 of 2012 against four accused persons alleging that they had prepared fake and fraudulent documents. The second FIR came to be registered on the basis of the direction issued by the learned Additional Chief Judicial Magistrate in exercise of power under Section 156(3) of the Code at the instance of another person alleging, inter alia, that he was neither present in the meetings nor had he signed any of the resolutions of the meetings and the accused persons, five in number, including Appellant 1 herein, had fabricated documents and filed the same before the competent authority. FIR No. 442 of 2012 (which gave rise to Crime No. 491 of 2012) was registered because of an order passed by the learned Magistrate. Be it noted, the complaint was filed by another member of the governing body of the Society and the allegation was that the accused persons, twelve in number, had entered into a conspiracy and prepared forged documents relating to the meetings held on different dates. There was allegation of fabrication of the signatures of the members and filing of forged documents before the Registrar of Societies with the common intention to grab the property/funds of the Society. If

the involvement of the number of accused persons and the nature of the allegations are scrutinised, it becomes crystal clear that every FIR has a different spectrum. The allegations made are distinct and separate. It may be regarded as a counter-complaint and cannot be stated that an effort has been made to improve the allegations that find place in the first FIR. It is well-nigh impossible to say that the principle of sameness gets attracted. We are inclined to think so, for if the said principle is made applicable to the case at hand and the investigation is scuttled by quashing the FIRs, the complainants in the other two FIRs would be deprived of justice. The appellants have lodged the FIR making the allegations against certain persons, but that does not debar the other aggrieved persons to move the court for direction of registration of an FIR as there have been other accused persons including the complainant in the first FIR involved in the forgery and fabrication of documents and getting benefits from the statutory authority. In the ultimate eventuate, how the trial would commence and be concluded is up to the court concerned. The appellants or any of the other complainants or the accused persons may move the appropriate court for a trial in one court. That is another aspect altogether. But to say that it is a second FIR relating to the same cause of action and the same incident and there is sameness of occurrence and an attempt has been made to improvise the case is not correct. Hence, we conclude and hold that the submission that the FIR lodged by the fourth respondent is a second FIR and is, therefore, liable to be quashed, does not merit acceptance.

11. The fact of this case is squarely covered by the above-cited precedent of Hon'ble the Apex Court.

12. Therefore, the opinion of this Court is that any further complaint by the same complainant against the same person on same set of fact subsequent to the registration of the case is invalid. Subsequent to the lodging of FIR on the same set of fact against same accused amounts to double jeopardy and it is also hit by Article 20 (2) of the Constitution of India, which states as under:

"No person shall be prosecuted and punished for the same offence more than once."

13. In the present case, the first FIR was lodged by the complainant on 8.11.2017 against the present appellant and other co-accused persons under Section 147, 323, and 504 IPC, in Police Station Mahila Thana, Lucknow and subsequent FIR was lodged by the complainant on 29.11.2017 on G.R.P. Charbagh against appellant as Case Crime No. 614 of 2017, under Sections 147, 323 504 IPC and Section 3 (1) (Da & Dha) and 3 (2) (v) of the SC/ST Act by making improvement in FIR. It is alleged that accused uses caste abusive word "Pasi and Chamar" intimidating her with filthy language.

14. Since the second FIR is relating to the same date, time and place of occurrence, so the second FIR is not permissible under law as propounded by Hon'ble Supreme Court referred above. Consequently, summoning order dated 10.7.2018 passed in subsequent FIR and charge sheet dated 28.3.20018 submitted by the police in Sessions Trial No. 270 of 2018, arising out of Case Crime No. 614 of 2018 under Sections 147, 323 & 504 IPC and Section 3 (1) (Da) (Dha) & 3 (2) (v) (ka) of the SC/ST Act pending in the court of learned Special Judge (SC/ST Act),

Lucknow is liable to be quashed but earlier case bearing Case Crime No. 162 of 2017, under Sections 147, 323 and 504 IPC, Police Station Mahila Thana, Lucknow pending before Special C.J.M. (A.P.) Lucknow shall continue. If any grievance to the first informant, then she may approach through Investigating Officer under Section 173 (8) Cr.P.C.

15. In view of the above discussions, **this appeal is hereby allowed**.

16. Learned Special Judge (SC/ST Act), Lucknow is hereby directed to pass fresh order in accordance with law.

(2021)08ILR A507
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.08.2021

BEFORE

THE HON'BLE SUBASH CHANDRA SHARMA, J.

Criminal Appeal No 2293 of 1983

Sadan Yadav & Anr. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri R.Pande, Sri Anand Prakash Paul, Sri P.K. Singh, Sri B.B. Paul

Counsel for the Opposite Party:
A.G.A., Sri Jai Bahadur Singh

(A) Criminal Law - The Indian Penal Code, 1860 - Section 307 - The Code of criminal procedure, 1973 - Section 207,313 - appeal against conviction -Testimony of sole witness is to be considered with care and caution - evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein - the evidence of injured witness, being a stamped witness, is accorded a special status in law - For the conviction under this section more importance has been given to mens rea or intention than the actus reus or the actual act itself.(Para - 21,22,23,35)

Dispute between appellants and informant - informant gave some money to appellant - for liquor and not returning it to him - appellant got annoyed - appellant assaulted him - hurled bombs on him - fell near his legs and exploded causing injuries on his both legs - no repetion - simple injuries - not dangerous to life - Bomb not hurled on head or some other vital part of the body of informant.

HELD:-There was no intention of the accused appellant to kill the injured . Injured sustained simple injuries on non-vital part of his body. Conviction of the appellant under Section 307 IPC cannot be sustained but appellant is liable to be convicted for the offence under Section 324 IPC. Conviction & sentence imposed on the appellant under Section 307 IPC is set aside instead convicted under Section 324 IPC.(Para - 40, 41,43)

Criminal Appeal partly allowed. (E-6)

List of Cases cited:-

1. St. of U.P. Vs Naresh & ors., (2011) 4 SCC 324

2. Mamo Dutt Vs St. of U.P. , (2012) 4 SCC 79

3. Balwan Singh & ors.Vs St. Of Har. ,(2014) 13 SCC 560

4. St. Of Mah. Vs Balram Bama Patil , AIR 1983 SC 305

5. Jage Ram Vs St. of Har. , (2015) 11 SCC 366

6. St. of M.P.Vs Kanha @ Om Prakash , Crl. A. No. 1589 of 2018

7. Ramesh Vs St. of U.P. , AIR 1992 S.C. 664

8. Merambhai Punjabhai Khachar & ors. Vs St. Of Guj. , 1996 AIR 3236

9. Neelam Bahal & anr. Vs St. of Uttarakhand , 2010 (2) SCC 229

(Delivered by Hon'ble Subash Chandra Sharma, J.)

1. This criminal appeal has been preferred against the judgment and order dated 26.09.1983 passed by Xth Additional Sessions Judge, Allahabad in Session Trial No. 251 of 1983 (State Vs. Sadan Yadav) arising out of Crime No. 1093 of 1981, Police Station Colonelganj, District Allahabad by which appellants (Sadan Yadav and Govind Patel) have been convicted under Section 307 of Indian Penal Code and sentenced to undergo rigorous imprisonment for a term of six years and fine of Rs. 1000/- for each in default to undergo additional rigorous imprisonment for six months.

2. During pendency of appeal, appellant no. 2 Govind Patel has died, therefore, appeal on his part stood abated.

3. The prosecution case in brief is that there was dispute between appellants and informant Ashok Kumar relating to money taken by the appellant Sadan for liquor and not returning it to him. On 29.12.1981 at about 6 p.m. informant Ashok Kumar was returning his house. In the way he heard some foot steps behind him. As he turned, he saw two persons Sadan Yadav and Govind Patel. They hurled bombs on him, those fell near his legs and exploded causing injuries on his both legs. His pant/trouser also got burnt. On his cry Ram Dei, Lalla and Pappu came there and witnessed the incident. Meanwhile, both the appellants fled away. Informant Ashok Kumar lodged an F.I.R. on the same day at the police station about 18.30 hours as crime no. 1093 of 1981 under Sections 307/427 IPC. Majroobi Chitthi was prepared by the constable clerk and injured Ashok Kumar was sent to Tej Bahadur Sapru, Hospital, Allahabad for medical examination. Following injuries were found on his person:-

I. Multiple lacerated wounds of various sizes in an area of 17 cm x 4 cm in front of the right leg from right knee joint to right ankle joint. Fresh bleeding present from the wounds.

II. Multiple lacerated wounds of various sizes in an area of 16 cm x 5 cm in front of the left leg from the lower part of the left knee joint up to the ankle joint. Fresh bleeding present from the wounds. Foreign bodies present in the wounds and there are redness all round the wounds.

III. Abrasion 1 cm x ½ cm on the posterior aspect of the right forearm 2 cm below the right elbow joint.

The Doctor was of the opinion that injury no. 1 and 2 were caused by some blust (Probably the word intended to be used was blast). Injury no. 3 was caused by friction. Duration of injuries fresh.

4. The investigation of the case was handed-over to Sub-Inspector Rama Shankar Tiwari, who investigated the case, collected the evidence and submitted charge sheet under Sections *307/427* IPC against the appellants.

5. The court concerned, took cognizance of the offence and after complying the provisions of Section 207 Cr.P.C, committed the case to the court of Sessions for trial.

6. The learned trial court framed charge under Section 307 IPC against the appellants on the basis of material on record which was read-over and explained to the appellants. They did not plead guilty but claimed for trial.

7. In support of its case prosecution examined P.W.1 Ashok Kumar who is informant, P.W.2 Lalla, P.W. 3 Santosh @ Pappu as witness of fact, P.W.4 S.I. Rama Shankar Tiwari, (Investigating Officer). P.W.5 Shobh Nath Chaudhary, pharmacist, P.W.6 constable Kaptan Singh who was posted with head-muharrir who lodged the F.I.R. and made entry in G.D.

8. After conclusion of prosecution evidence statement of appellants under Section 313 Cr.P.C. was recorded in which they stated the incident to be false and witnesses to be inimical. They did not adduce any evidence in defence.

9. After hearing the arguments for accused/appellant as well as the State, learned trial court passed the impugned judgment dated 26.09.1983 while convicting and sentencing the appellants as aforesaid.

10. Being aggrieved with the conviction and sentence this criminal appeal has been preferred by the appellants but owing to the death of appellant Govind Patel during pendency of appeal, his appeal was abated.

11. Heard Shri P. K. Singh, learned counsel for appellant- Sadan Yadav and Shri Jai Bahadur Singh, learned counsel for complainant as well as learned A.G.A. for State and perused the record.

12. Learned counsel for the appellant submits that he is innocent and has falsely been implicated in this case. The conviction and sentence passed against him is against weight of evidence on record which is bad in law. He further submitted that in this case, incident took place at 6.00 p.m. in the month of December when it becomes dark, therefore, no person can be identified. Doctor who examined the injuries of informant, has not been examined before the court by the prosecution but on his place pharmacist. Likewise, constable clerk who lodged the F.I.R. and made entry in the G.D. has also not been examined. There are material contradictions in the testimony of witnesses which make their testimony unreliable. He further submits that the nature of injuries caused to the person of informant is not grievous. All of them are simple in nature and found on legs. Injury no. 3 is in the nature of abrasion caused by friction against some hard and blunt object which cannot be said to be caused with bomb. In addition to this, the circumstances of the case does not infer the intention of appellant to commit murder which is required for the constitution of offence under Section 307 IPC. In this way offence does not fall within the ambit of Section 307 IPC but it may fall within the ambit of Section 324 IPC as well. Learned trial court has not considered all these facts while passing the judgment but convicted and sentenced the appellant arbitrarily which is illegal and not based on the evidence on record, therefore it is liable to be set aside and appeal be allowed.

13. Learned counsel for complainant as well as learned A.G.A. vehemently opposed the contentions made by learned counsel for the appellant and submitted that in this case there was enmity between informant and appellant about money. This was the motive for appellant to cause hurt to the informant as a result, he made an attempt to cause death of informant by

hurling bomb on him in company of his friend. Fortunately, injuries were caused on legs and hands of the informant. At that time, there was electric light in which he identified the appellant. Witnesses P.W.2 and P.W.3 also came at the place of occurrence on the call of informant and saw the incident. They have stated about the incident lucidly during their examination before the court. There are no material contradictions in their testimony which could be said to make it unreliable. Doctor who examined injury on the person of informant was died that was the reason pharmacist was examined before the court who identified his handwriting. The prosecution has proved its case beyond reasonable doubt before the trial court as a result learned trial court, after considering the evidence on record convicted and sentenced the appellant. There is no any error of fact or law in the impugned judgment but the appeal lacks merit which is liable to be dismissed.

14. Before dealing with the contentions raised by learned counsel for the appellant, it will be convenient to take note of the evidence as adduced by the prosecution.

15. P.W.1 informant Ashok Kumar is the injured witness. He has stated that appellants Sadan and Govind are known to him, both of them are fast friends. Prior to one month of the incident Sadan took money from him for drinking. When he asked to return, he was ready to quarrel. On 29th of December at about 6 p.m. he was going to his house from Colonelganj crossing and when he arrived near the house of Ram Dei, he heard sound of foot steps from behind. He turned and saw appellants Sadan and Govind. Meanwhile, appellant Sadan hurled a bomb at him and accused Govind exhorted and also hurled other bomb at him. First bomb fell at the distance of one feet from him and thereafter other bomb fell down. He fell down on the side of elbow, both bombs blasted and he got injuries on his both legs. Incident was seen by Santosh, Lalla and Ram Dei. There was light of electric bulb which was fixed on the outer barja of his house. His house is situated at the distance of 2-3 steps from the house of Ram Dei. Appellants, after committing the incident, fled away. He got Tahreer prepared by Dileep Kumar on the spot and after hearing the contents, he signed it which he proved as Ext. Ka-1 before the court. He gave the report in the police station Colonelganj where F.I.R. was lodged and he was sent to Beli Hospital for medical examination. Investigating Officer took his trouser and shoes in his custody and then returned it to him.

16. P.W.2 Lalla and P.W.3 Santosh @ Pappu have also been examined, they have not supported the prosecution version. P.W.2 Lalla stated that he could not see assailants but Ashok Kumar was crying that Sadan and Govind assaulted him. This witness was declared hostile and cross-examination was done by learned A.D.G.C. but nothing came in his statement to support the prosecution story. P.W.3 Santosh @ Pappu has also stated that incident took place at about 8 p.m. in the night. He was sipping tea in his drawing room. He heard sound of bomb blast and came out. There was too much smoke. He went to that side after a while police came there. He saw Ashok injured. This witness also turned hostile and cross-examination was done by learned A.D.G.C. but he expressly stated that he did not see any one while running because there was too much smoke. He has also denied the statement given by him to the Investigating Officer.

17. P.W.4 S.I. Rama Shankar Tiwari had investigated the case. He had proved the investigation and papers prepared by him during investigation.

18. P.W.5 Shobh Nath Chaudhary (pharmacist) has proved the handwriting of Dr. B.K. Sen who conducted medical examination of injured Ashok Kumar and prepared injury report as Ext. Ka-11 in his hand-writing and signature. P.W.5 has also stated that Dr. B.K. Sen has died. He has proved the injury report by comparing with Medico Legal Register brought by him.

19. P.W. 6 constable Kaptan Singh has proved the hand-writing of head *muharrir hasan* imam who was posted with him at police station on 29.12.1981 and also proved G.D. as Ext. Ka-11 in which entry of F.I.R. was made.

20. From perusal of statements as deposed by P.Ws. 2 & 3, it is evident that both of them had not seen the occurrence. They came there after incident took place and appellant fled away. Their testimony is of no use to the prosecution.

21. P.W.1 Ashok Kumar is informant as well as injured witness. Testimony of sole witness is to be considered with care and caution. Since he is injured witness, therefore his presence on the spot cannot be denied. The reliability of injured witness has been explained by the Hon'ble Apex Court in the case of **State of U.P. Vs. Naresh and others (2011) 4 SCC 324**. Para no. 23 is quoted as under:

.....The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence.

Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [Vide: Jarnail Singh v. State of Punjab, (2009) 9 SCC 719; Balraje @ Trimbak v. State of Maharashtra, (2010) 6 SCC 673; and Abdul Sayad v. State of Madhya Pradesh, (2010) 10 SCC 259].

22. In another decision of ***Mamo Dutt vs. State of U.P. (2012) 4 SCC 79***, Hon'ble the Apex Court observed about the evidentiary value required to be attached to the evidence of an injured witness:

"Normally, an injured witness would enjoy greater credibility because he is the sufferer himself and thus, there will be no occasion for such a person to state an incorrect version of the occurrence, or to involve anybody falsely and in the bargain protect the real culprit.".....

23. Again in the case of ***Balwan Singh & others vs. State Of Haryana (2014) 13 SCC 560*** Hon'ble the Apex Court observed thus:

"It is trite law that the evidence of injured witness, being a stamped witness, is accorded a special status in law. This is as a consequence of the fact that injury to the witness is an inbuilt guarantee of his presence at the scene of the crime and because the witness would not want to let actual assailant go unpunished."

24. P.W.1 injured Ashok Kumar is still acquainted with the appellants from before occurrence. He has clearly stated during cross-examination that Sadan Yadav was his tenant in his house, so he knew him very well and other appellant Govind was his fast friend. Further, he has also stated that at the time of incident there was electric light from the bulb which was fixed on the outer barja of his house. In the electric light, he identified the appellant when he heard the sound of foot steps, he turned and saw the appellants then they hurled bomb at him. In this way, it cannot be said that informant Ashok Kumar could not identify the appellant in darkness at evening in lack of light. The fact of electric light and bulb has also been verified by Investigating Officer who had visited the site on the same day night. In the site plan Ext. Ka-5 the place of bulb had also been shown by Investigating Officer which is not to much distant from the place of occurrence. As a result there remains no suspicion regarding identification of appellants by the informant. Remnants of bombs were collected from the place of occurrence by Investigating Officer during investigation, this also supports the statement of informant relating to the use of bomb by appellant.

25. Learned counsel for the appellant has argued that there was enmity relating to tenancy and non-payment of rent between the appellant and the informant, that was the reason he had been falsely implicated in this case. In this regard, it is worth mention that P.W.1 Ashok Kumar has stated that though appellant was tenant in his house and he did not pay rent for some period but for recovery of rent, no proceedings were initiated on his part and no any dispute was there between them. Further, it has also to note that appellant was tenant prior to a long period, so it cannot be said that on account of non-payment of rent, informant has implicated falsely.

26. The statement made by informant also gets support with the injuries caused to him and with medical report which was prepared by doctor conducting his medical examination instantly just after the incident at about 07.15 p.m. i.e. after one hour and fifteen minutes from the occurrence. F.I.R. was also lodged at the police station at 6.30 just after 30 minutes, which is very prompt and cannot be said to be belated.

27. During medical examination two injuries were found on his legs, those are caused by bomb blast. As per the opinion of the doctor, injury no. 3 caused by friction. Foreign body were also found in wounds which shows that injuries found on the legs of informant Ashok Kumar were caused by bomb not otherwise.

28. During investigation, remnants of bombs were also collected by Investigating Officer and Fard was prepared on the spot which has been proved as Ext. Ka-4 by Investigating Officer, it also gives support to the prosecution version.

29. In this way, the testimony as deposed by P.W.1 informant Ashok Kumar is wholly reliable and it gets support with the medical report.

30. On considering the facts and evidence on record, it is proved beyond

reasonable doubt that appellant hurled bomb on 29.12.1981 at 6 p.m. On informant Ashok Kumar causing simple injuries on his legs. So finding recorded by learned trial court to this extent, holding guilty to appellant is correct and it requires no interference.

31. So far as, conviction of the appellant under Section 307 IPC is concerned, it is expedient to examine the main ingredients of Section 307 IPC. which are (I) the act attempted should be of such nature that if not prevented or intercepted it would lead to the death of victim, (ii) the intention or mens rea to kill is needed to be proved clearly without doubt. For this purpose the prosecution can make use of the circumstances like attack by dangerous weapon on vital part of body, however, the intention to kill cannot be gauged simply by seriousness of the injury caused, (iii) the intention and knowledge of the result of the act being done is the main thing that is needed to be proved for conviction under Section 307 I.P.C.

32. In this regard, in the case of **State Of Maharashtra vs Balram Bama Patil AIR 1983 SC 305**, Hon'ble the Apex Court held in para 9:

"To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof."

33. In the case of **Jage Ram Vs. State of Haryana (2015) 11 SCC 366,** Hon'ble the Apex Court held that:

12. For the purpose of conviction under Section 307 IPC, prosecution has to establish (i) the intention to commit murder and (ii) the act done by the accused. The burden is on the prosecution that accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given etc.

34. Again it was reiterated in the Case of **State of Madhya Pradesh Vs. Kanha @ Om Prakash, Crl. A. No. 1589 of 2018.**

35. For the conviction under this section more importance has been given to mens rea or intention than the actus reus or the actual act itself. The attempt should arise out of a specific intention or desire to murder the victim. The nature of weapon used, the manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injuries inflicted, all are taken into consideration to determine the intention.

36. In this case, in the F.I.R. it has not been stated by the informant that appellant had expressed his intention at any time to kill him. What he said is that he gave some money to appellant for drinking which was not returned to him. On asking for the money, appellant got annoyed, that was the reason, appellant assaulted him. Even at the time of incident, nothing was uttered by the appellant which could disclose his intention to kill him. No any such statement has been made by the informant during his examination before the court. The bomb which was hurled by the appellant fell on the ground near the place of informant which caused injuries of his legs. He did not repeat it again. All the injuries are simple in nature. These were not dangerous to life. Bomb was not hurled on the head or some other vital part of the body of informant. This also does not infer the intention of appellant to kill the informant. The manner of committing the offence shows that appellant had intent to cause voluntarily simple hurt to informant but not to commit his murder.

37. In the case of **Ramesh Vs. State of U.P. AIR 1992 S.C. 664** where a single injury was found in the back of the neck of injured, appellant who was tried alongwith two others under Section 307/34 IPC and he was sentenced to undergo rigorous imprisonment for four years while two other were acquitted, appeal was partly allowed by Hon'ble the Apex Court. His conviction was altered into Section 324 IPC and sentence was reduced to the period already undergone with fine of Rs. 3000/- which was to be paid to the complainant as compensation.

38. In the case of **Merambhai Punjabhai Khachar & Ors vs. State Of Gujarat, 1996 AIR 3236,** there was an attempt to commit murder with fire arm and injury was by a pellet that struck the head, Hon'ble the Apex Court held that Section 307 IPC cannot be held to have been satisfied and conviction was altered to Section 324 IPC.

39. In the case of **Neelam Bahal and another Vs. State of Uttarakhand 2010 (2) SCC 229** where conviction and sentence of appellant under Section 307 IPC was converted into Section 326 IPC simplicitor. Incident took place in the year 1987 and appellant was about 25 years old. Considering the facts and circumstances of the case, Hon'ble the Apex Court, reduced the sentence to the period already undergone by him.

40. In the present case, as regards the injuries, there is no evidence on record to show that these injuries could be fatal for life of the injured or that injuries were caused by the appellant with intention to kill the injured. Besides, injuries on the body of injured were not on vital part of the body i.e. legs. Thus, it clearly shows that there was no intention of the accused appellant to kill the injured. The injured

sustained simple injuries on non-vital part of his body.

41. In these circumstances of the case, this court is of the view that conviction of the appellant under Section 307 IPC cannot be sustained but appellant is liable to be convicted for the offence under Section 324 IPC.

42. Again it is noteworthy that the incident took place in the year 1981 i.e. 40 years ago and it is said that now appellant is above 60 years old person. Record does not show that the appellant has any criminal antecedent and learned counsel for appellant has also submitted the same which could not be rebutted by learned counsel for the State.

43. To sum up, the conviction & sentence imposed on the appellant under Section 307 IPC is set aside instead he is convicted under Section 324 IPC and the period of sentence is reduced to the period of sentence already undergone by him besides a fine of Rs. 5000/- in default to undergo rigorous imprisonment for one month. The amount so deposited be paid to the complainant as compensation.

44. Accordingly, the appeal is **partly allowed**.

(2021)08ILR A515
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.03.2021

BEFORE

THE HON'BLE SUBASH CHAND, J.

Criminal Appeal No 3452 of 2019

Yameen ...Appellant(In Jail)

Versus

State of U.P. ...Opposite Party

Counsel for the Appellant:
Sunil Kumar

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

(A) Criminal Law -The Indian Penal Code, 1860 - Sections 304B, 316 & 498A - The Code of Criminal Procedure, 1973- Sections 161 & 313 - Dowry prohibition Act,1961 - Section 4 - appeal against conviction –

Informant moved a written information - on ground of additional demand of dowry his sister was bitterly beaten - subjected to physical and mental cruelty - sister of informant dragged by accused persons - poured kerosene oil over the body of his sister set her ablaze - 80% burnt - record of dying declaration - one before Naib Tehsildar - another under section 161 Cr.P.C.

(B) Criminal Law - Indian Evidence Act, 1872 - Section 32 - Dying declaration - where there are more than one statement in nature of dying declaration, the one first in point must be preferred - if there are several dying declaration the dying declaration which is trustworthy and reliable has to be accepted - Held **-** First dying declaration which was recorded by Naib Tehsildar on 13.06.2015 on the very next day of occurrence is found to be more trustworthy and reliable - corroborated with the second dying declaration, which is in the form of statement of injured under Section 161 Cr.P.C ,which corroborates with the first dying declaration, same is not contradictory - No discrepancy on the material point so as to ascertain the role of committing dowry death by the husband of the victim.(Para - 29,30)

(C) Criminal Law - Indian Evidence Act, 1872 - Section 113B - Presumption as to dowry death -presumption under Section 113B of Evidence Act is the presumption of the law which is mandatory - Once the ingredients of Section 304B of I.P.C is made out the accused is deemed to have

committed the dowry death of the women - Accused is entitled to rebutt the statutory presumption - husband is the beneficiary in case of dowry demand hence he is liable to dowry death and to give the explanation as to how the death has occurred. (Para - 33)

HELD:- Ingredients of Section 304B of I.P.C are fulfilled as the death of deceased took place within seven years of marriage and death of deceased was not in normal circumstances rather it was homicidal, thermal burn and there is also evidence in regard to demand by the husband of deceased and also the evidence that for non fulfillment of the same she was subjected to cruelty. Harassment and cruelty indicate that demand of dowry is found to be continuous soon before the death, as is evident from the evidence adduced by the prosecution. Offence under Section 304B of I.P.C is proved beyond reasonable doubt. Impugned judgment of conviction and sentence passed by the court below does not bear any infirmity and needs no interference.(Para - 31,35)

Criminal Appeal dismissed. (E-6)

List of Cases cited:-

1. Pawan Kumar Vs St. of Har. , (1998) 3 SCC 309 (para 6)

2. Kansraj Vs St. of Punj. , (2005) SCC 207 (para 9)

3. Heera Lal Vs St. (Govt. of NCT of Delhi) , (2003) 8 SCC 80 (para 8)

4. Bakshish Ram Vs St. of Punj. , (2013) 4 SCC 131 (para 14)

5. Suresh Kumar Vs St. of Har. , (2013) 16 SCC 553

6. St. of A..P. Vs Raj Gopal Asawa , AIR 2004 SCW 1566

7. Ashok Kumar Vs St. of Har. , AIR 2010 2839 SC

8. Sher Singh @ Pratap Vs St. of Har. , AIR 2015 SC 980

9. Satbir Singh Vs St. of Punj. , AIR 2001 SC 2828

10. Rajendra Prasad Vs Darshan Devi Uchattam Nyaylaya Nirnaya , Saar 2001 at 501

11. Mukeshbhai Gopalbhai Barot Vs St. of Guj. , A.I.R 2010 SC 3692

12. Lakhan Vs St. of M.P , (2010) 3 SCC Criminal 942

13. Mohanlal & ors. Vs St. of Har. , (2007) 9 SCC 151

14. Suresh Vs St. of Har. , (2013) 16 SCC 553

15. Bhateri Devi Vs St. of Har. , 2011 Criminal Law Journal 463 (P&H)

(Delivered by Hon'ble Subash Chand, J.)

1. The instant Criminal Appeal has been preferred on behalf of the appellant-convict Yameen against the judgment dated 10.04.2019 passed by the Additional Sessions Judge/Fast Track Court-3, Bulandshahar in Sessions Trial No. 767 of 2015 (State of U.P Vs. Yamin and others) arising out of Case Crime No. 452 of 2015, under Section 304B, 498A, 316 I.P.C and Section 4 of D.P. Act, P.S. Kotwali Dehat, District Bulandshahar whereby the accused Yunus and Smt. Jubaida were acquitted from the charge levelled against them and held appellant Yameen guilty for the offence under Section 304B, 498A and 316 of I.P.C and Section 4 of D.P. Act and was punished for the offence under Section 304B of I.P.C with rigorous imprisonment of 10 years, for the offence under Section 498A was punished imprisonment of 2 years and fine of Rs. 5000/-, in default of payment of fine an additional imprisonment of 3 months was to be under gone, for the offence under Section 316 of I.P.C was punished with rigorous imprisonment of 10 years and fine of Rs. 7000/-, in default of

payment of fine an additional imprisonment of 6 months was to be under gone, for the offence under Section 4 of D.P Act was punished with imprisonment of 1 year and fine of Rs. 5000/-, in default payment of fine an additional imprisonment of 1 month to be under gone. All the sentence were directed to run concurrently.

2. The brief facts giving rise to this criminal appeal are that the informant Mohd. Javed moved a written information with the police station concerned with these allegations that his sister Razina was married with Yameen on 19.03.2011. The in-laws of his sister were not satisfied with the dowry given at the time of marriage and an additional demand of one Scorpio car and Rs. 1 lakhs in cash was made and for non fulfillment of the same, his sister was subjected to physical and mental cruelty. On 11.10.2013, on the ground of the additional demand of dowry his sister was bitterly beaten, F.I.R of the same was lodged with the police station concerned by his brother Mohd. Sazid which was register as case crime no. 92 of 2013. In that case a compromise was arrived at between both the parties and it was settled that his sister would be taken to in-laws house from the parental house and accused persons will not repeat their alleged demand of dowry. The sister of informant was residing at her parental house since 09.06.2015 and she was sent to her in-laws house on 11.06.2015. On 12.06.2015 at 5 'O' clock the sister of informant was dragged by the accused persons- husband Yameen, mother-in-law Smt. Jubaida, three sister-in-laws namely Nazma, Asma and Reshma, father-in-law Yunus, devar Yaseen and Faizan, after having poured kerosene oil over the body of his sister set her ablaze. His sister was burnt 80% and with the fear of her parents she was rushed to Adbulla hospital of Bulandshahar, from there she was referred to Green hospital in Meerut. His sister was also pregnant and 5 months child was in her womb that also died in the womb. The informant was busy in the treatment of his sister, therefore, could not lodge the F.I.R and the same was lodged on 18.06.2015 but no case was registered. Thereafter, an application was moved to the Senior Superintendent of Police, Bulandshahar on which by the order of S.S.P, Bulandshahar case crime no. 452 of 2015 was registered under Sections 498A, 307, 316 of I.P.C and 3/4 of D.P. Act against the accused Yameen, Smt. Jubaida, Yunus, Nazma, Asma, Reshma, Yaseen and Faizan. During treatment the sister of informant died on 15.07.2015 in Ram Manohar Lohiya hospital New Delhi where she had been referred earlier. An application in this regard was moved by informant Javed to the Station Officer of Kotwali Dehat.

3. The Investigating Officer after having concluded the investigation filed charge-sheet before the court of Magistrate concerned against the accused Yameen, Smt. Jubaida and Yunus under Section 498A, 316, 304B of I.P.C and 3/4 of D.P.Act and remaining accused were exonerated. The C.J.M, Bulandshahar took cognizance on the charge-sheet and committed the case to the court of Sessions for trial.

4. The trial court took cognizance on the charge-sheet and summoned the accused persons and the charge was framed against them under Sections 498A, 304B and 316 of I.P.C and Section 3/4 of D.P. Act and the alternate charge under Sections 302 read with 34 of I.P.C was also framed. All the accused persons denied the charge and claimed for trial.

5. On behalf of prosecution to prove the charge against the accused persons **in documentary evidence**, adduced the written information Exhibit Ka-1, application in regard to information of death of Razina during treatment, Exhibit Ka-2 and Exhibit Ka-3 death report issued by Executive Magistrate, Exhibit Ka-4, statement of brother of deceased Javed, Exhibit Ka-5, letter to the Head of Department of F.M.T.L.H.M college, New Delhi for postmortem of deceased, Exhibit Ka-6, death summary of Razina, Exhibit Ka-7, death report legal information to be added to death register, Exhibit Ka-8, chick F.I.R, Exhibit Ka-9, G.D entry in regard to registration of case crime no. 452 of 2015, Exhibit Ka-10, dying declaration of deceased Razina recorded by Nayab Tehsildar Dev Raj Singh, Exhibit Ka-11, charge-sheet, Exhibit Ka-12, postmortem report of deceased, Exhibit Ka-13, statement of Razina under Section 161 Cr.P.C recorded by female constable 767 Sheetal, Exhibit Ka-14, site plan of place of occurrence Exhibit Ka-15.

In oral evidence, examined **P.W.1-Javed, P.W.2-Smt. Raheesa, P.W.3-Mohd. Sazid, P.W.4-Executive Magistrate Manoj Kumar, P.W.5-Dr. Shyam Gupta, P.W.6-S.I Charan Singh, P.W.7-Naib Tehsildar Dev Raj Singh, P.W.8-Abhishek Yadav, S.S.P (I.O), P.W.9-Dr. Rishabh Kumar, P.W.10-Constable 767 Sheetal, P.W.11-S.I Sunil Kumar.**

6. The statement of accused persons under section 313 Cr.P.C., were recorded. All the accused persons denied the incriminating circumstances in the evidence against them and accused Yameen stated that death of Razina was accidental because the dibiya of kerosene oil had fell down on her whereby she caught fire and the efforts were made to extinguish the fire, she was also rushed to the hospital for immediate treatment. No demand of alleged dowry was ever made. Moreover accused Smt. Jubaida and Yunus in their statement stated that they resided separately from their son Yameen and no alleged demand of dowry was ever made by them.

7. On behalf of accused persons in defence evidence, examined **D.W.1-Rakesh and D.W.2-Naushad.**

8. The learned trial court after hearing the contentions of the learned counsel for the parties passed the impugned judgment dated 10.04.2019 whereby the accused Yunus and and Smt. Jubaida were acquitted from the charge levelled against them while the accused Yameen was convicted for the offence under Sections 304B, 498A, 316 of I.P.C and Section 4 of D.P. Act and was punished as stated above.

9. Aggrieved from the impugned judgment 10.04.2019, this criminal appeal has been preferred on behalf of the appellant Yameen on the grounds that the impugned judgment is based on perverse and illegal finding. There are material contradictions in the oral testimony of prosecution witnesses in contrast to the documentary evidence available on record. The F.IR of this case was lodged belated of which there is no explanation. Out of 11 witnesses examined on behalf of prosecution P.W.-1, Javed, P.W.-2, Smt. Raheesa, P.W-3, Sazid are the witnesses of the fact and they have not supported the prosecution version. P.W-7, Dev Raj Singh, Naib Tehsildar has not proved the dying declaration recorded by him likewise **P.W-10, constable 767 Sheetal** has not proved the statement of deceased under Section

161 Cr.P.C. That statement does not contain thumb impression or signature of the deceased as such the same can not be read as dying declaration of the deceased under Section 32 of the Evidence Act. The defence witness D.W-1, Rakesh and D.W-2, Naushad have proved that deceased died due to accidental burn injuries. The dying declaration recorded by P.W-7 and P.W-10 are contradictory to each other and does not inspire the confidence of the court.

10. I have heard submissions made by Shri Sunil Kumar, learned counsel for the appellant and also learned A.G.A. for the State, and perused the materials brought on record.

11. On behalf of prosecution to prove the charge against the accused persons in **ocular evidence examined P.W.1-Javed, P.W.2- Raheesa and P.W.3-Mohd. Sazid.**

12. **P.W.1-Javed** in his examination-in-chief supports the contents of the written information and it also verified that the written information was given by him with his signature and during treatment his sister died. He gave the information of the same Exhibit Ka-2 with the police station concerned.

In cross-examination by the defence this witness says that his sister was never subjected to physical or mental cruelty by her husband or any member of in-laws house for non fulfillment of additional demand of dowry. He got the information in regard to burning of his sister from some neighbour of his brother-in-law (bahnoi). Accordingly, he reached to Abdulla hospital, Bulandshahar to see his sister, she was admitted by the in-laws of his sister to the Green hospital, Meerut. His sister did not tell him that she was set ablaze by any inmate of in-laws house. **The occurrence took place in her in-laws house, he was not present there**. From Green hospital, Meerut his sister was also referred to Delhi hospital where she underwent treatment and during treatment his sister died. He lodged the F.I.R at the behest of his family and persons of the village.

During trial this witness was declared hostile. In cross-examination by prosecution, this witness had stated that the statement which he has given on 15.01.2016 in his examination-in-chief and the statement which he has given today on 09.02.2016 both are correct.

13. **P.W.-3, Smt. Raheesa, mother of the deceased** in her statement says that her daughter Razina never made complaint in regard to demand of the alleged dowry from her, she was never subjected to cruelty for the alleged demand of dowry and she caught fire as the kerosene oil dibiya fell upon the gas oven. Her daughter was not set ablaze by any persons of in-laws house after having poured kerosene oil on her. This witness was also declared hostile. In cross-examination, this witness denied the statement under Section 161 Cr.P.C which was given to the Investigating Officer.

14. **P.W.-3, Mohd. Sazid** in his examination-in-chief says that deceased was never subjected to cruelty by any members of in-laws for the alleged demand of dowry and she caught fire due to falling of the kerosene oil dibiya on the gas oven. This witness was also declared hostile as she had denied her own statement under Section 161 Cr.P.C.

15. On behalf of prosecution in regard to prove the cause of death of deceased has examined **P.W.4-Manoj Kumar,**

Executive Magistrate. This witness says that on 15.07.2015 he received a call from police outpost of Ram Manohar Lohiya hospital, Delhi to conduct the inquest and postmortem of a female who had died during treatment. Accordingly, he reached to the mortuary and in his presence the inquest report was prepared by S.I Devendra Kumar on his direction and same was also signed by him. He also recorded the statement at 12:15 p.m of P.W.-1, Javed, brother of the deceased. This witness had also signed over his own statement and verified his statement, which was marked as Exhibit Ka-5. From the perusal of the in this inquest report Exhibit Ka-3 and postmortem report Exhibit Ka-4 the cause of death is shown as burn injuries.

16. On behalf of prosecution **P.W-10, constable 767 Sheetal** in her statement says that on 02.07.2015 she was deployed as female constable with the Police Station Kotwali Dehat, Bulandshahar. She recorded the statement of injured Razina on that day.

17. P.W-11, S.I. Sunil Kumar, the first Investigating Officer in his statement says that on 02.07.2015 female constable 767 Sheetal interrogated injured Razina and videography of her statement was also made. The statement of injured under Section 161 Cr.P.C was perused by him and entry of the same was also made in the G.D.

This witness in his cross-examination also says that while the female constable recorded the statement of injured, he was very much present there, he also made queries in between, he has videography and voice recording of injured.

18. On behalf of prosecution in medical evidence examined **P.W-5, Dr. Shyam Gupta and P.W-9, Dr. Rishabh Kumar.**

P.W-5, Dr. Shyam Gupta in his statement says that he was Senior resident in Delhi hospital. Injured Razina was admitted on 15.06.2015 at 3 'O' clock of day time and it was told that she was set ablaze by her in-laws. During treatment of 15 days her condition was deteriorated and on 15.07.2015 at 7:30 a.m Razina died during treatment. Her death summary was prepared by him, her death report was also prepared by him which is Exhibit Ka-8, she was 70% burnt.

P.W-9, Dr. Rishabh Kumar proved the postmortem report of deceased Razina Exhibit Ka-13 and says that Razina was 80% superficial to deep thermal burn. Cause of death was due to septicemia shock and thermal burn infection.

19. Section 304B of I.P.C reads as under:-

"304B. Dowry death.-(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation.-For the purpose of this sub-section, "dowry' shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

20. The Hon'ble Apex Court in **Pawan Kumar Vs. State of Haryana (1998) 3 SCC 309 (para 6), Kansraj Vs. State of Punjab (2005) SCC 207 (para 9), Heera Lal Vs. State (Govt. of NCT of Delhi) (2003) 8 SCC 80 (para 8), Bakshish Ram Vs. State of Punjab (2013) 4 SCC 131 (para 14) had indicated the following ingredients of Section 304B of I.P.C:-**

(a) that the married women had died otherwise than under normal circumstances;

(b) such death was within seven years of marriage;

(c) the prosecution has established that there was cruelty or harassment by her husband or near relative of her husband in connection with demand of dowry soon before death.

21. The Hon'ble Apex Court in **Suresh Kumar Vs. State of Haryana (2013) 16 SCC 553** pargraph 27 held:

"In death occurrence otherwise 'than under normal circumstances', can be homicidal, suicidal or accidental."

The Hon'ble Apex Court in **State of Andhra Pradesh Vs. Raj Gopal Asawa, AIR 2004 SCW 1566** held:

" definition of dowry is not restricted to agreement or demand for payment of dowry before or at the time of marriage; but also includes demand subsequent to marriage."

The Hon'ble Apex Court in **Ashok Kumar Vs. State of Haryana, AIR 2010 2839 SC** held:

"husband or relative will be deemed to have committed offence under Section 304B of I.P.C if ingredients of the offence have been satisfied by deemed fiction of law."

The Hon'ble Apex Court in **Sher Singh @ Pratap Vs. State of Haryana, AIR 2015 SC 980** held:

"word soon before death is not to be interpreted in terms of days or months or years. But necessarily indicating domain of dowry should not be stale, it should be continuing cause of death under Section 304B of I.P.C or under Section 306 I.P.C."

The Hon'ble Apex Court in **Satbir Singh Vs. State of Punjab, AIR 2001 SC 2828** held:

"There should be nexus between the death of wife and dowry related harassment inflicted on her. If the interval elapsed is wide, court would guage the immediate cause of her death."

22. In the case in hand, so far as the date of marriage of Razina with Yameen is concerned, same is admittedly 19.03.2011. So far as the demand of the dowry and for non fulfillment of the same, harassment or cruelty is concerned **P.W-2, Raheesa, mother of deceased, P.W-3, Mohd. Sazid, brother of deceased both have turned hostile during trial and have not supported the prosecution version.**

23. So far as the testimony of **P.W-1, Javed** who is informant and brother of deceased is concerned, he in his examination-in-chief proved the written information Exhibit Ka-1 and also the application in regard to the death of his sister Exhibit Ka-2. This witness in examination-in-chief also proved the contents of prosecution story as narrated in the written information. This statement of P.W.1-Javed was recorded on 15.01.2016. On 09.02.2016, P.W.1-Javed was cross-examined. In cross-examination by defence P.W.1-Javed gave the statement against the prosecution and therefore, was declared hostile by the trial court. On the very day on behalf of prosecution, cross-examination of P.W.1-Javed was done and he admitted that the statement given by him on 15.01.2016 and today i.e on 09.02.2016, both are correct. Again this witness was cross-examined by prosecution on 03.11.2018 and this witness stated that the statement given by him on 09.02.2016 was true.

The testimony of P.W.1-Javed can not be discarded in toto. The testimony of this witness will be relied by the court because this witness has stated on 09.02.2016 that the statement given by him on 15.01.2016 and 09.02.2016 are correct. The whole prosecution case has been deposed by this witness in his examination-in-chief.

His testimony **becomes tainted, therefore, it requires corroboration.**

24. The statement of P.W.1-Javed was also recorded by **P.W-5, Manoj Kumar, Executive Magistrate** which is Exhibit Ka-5. This statement is signed by Javed and also by P.W-5, Manoj Kumar, Executive Magistrate. This statement has been proved by P.W-5, Manoj Kumar, Executive Magistrate and in this statement it is stated that demand of Rs. 1 lakh was made by brother-in-law (jija) and for non fulfillment of the same his sister was beaten. Earlier the settlement was also arrived at in presence of persons of the village and F.I.R was also lodged for the same at that time, and therefore, this act of burning the in-laws of his sister are responsible.

Although **P.W.1-Javed** has been examined on behalf of prosecution and during examination P.W-1, Javed was not examined in regard to this statement Exhibit Ka-5 since this statement was signed by P.W.1-Javed himself, which was marked as Exhibit Ka-5 and has been proved by P.W.5-Manoj Kumar, Executive Magistrate therefore, the testimony of P.W.5-Manoj Kumar, Executive Magistrate also corroborates this fact that the demand of Rs. 1 lakh in additional dowry was made by husband of the deceased and for non fulfillment of the same she was subject to cruelty. Earlier from the occurrence of burning one more incidence took place in regard to the same F.I.R was also lodged and a settlement was also arrived at between the parties in presence of persons of village.

25. On behalf of prosecution there is dying declaration of deceased. The **first dying declaration** is dated 13.06.2015 which is **Exhibit Ka-11**, this dying declaration has been proved by **P.W-7, Dev Raj Singh, Naib Tehsildar**. This witness recorded the dying declaration of injured Razina on the telephonic directiion of District Magistrate, Meerut.

26. The learned counsel of appellant contended that only the execution of the

dying declaration Exhibit Ka-11 was proved by this witness **P.W.7-Dev Raj Singh, Naib Tehsildar** but the contents of the same cannot be read in evidence because the same were not deposed by this witness.

This contention of learned counsel for the appellant is not sustainable because **P.W.7-Dev Raj Singh, Naib Tehsildar** has specifically deposed that the dying declaration of injured Razina was recorded by him while she was in fit state of mind. Dr. Mumtaz Ahmad also certified her mental fitness at 12:35 a.m on 13.06.2015, thereafter, at 12:40 a.m. he recorded the statement of injured Razina, whatever Razina told him same was recorded by him and this dying declaration is in his hand writing and signed by him and by Dr.Mumtaz Ahmad and R.T.I of the injured Razina was also verified by this witness. As such there was no need to depose the contents of dying declaration by **P.W.7-Dev Raj Singh, Naib Tehsildar**. It is also noteworthy here that **P.W.7-Dev Raj Singh Naib Tehsildar** was examined during trial, no cross-examination was made on behalf of the defence counsel in regard to the veracity of contents of the dying declaration.

The Hon'ble Apex Court in **Rajendra Prasad Vs. Darshan Devi Uchattam Nyaylaya Nirnaya Saar 2001 at 501** held:

"If the opposite party says that statement of any witness to be false, his duty is to cross-examine the witness on that point; otherwise the statement of witness shall be accepted."

27. From the perusal of this dying declaration, it is found that the injured Razina (now deceased) has assigned the role of pouring kerosene oil and litting fire to her husband Yameen and also stated that her husband made demand of Rs. 1 lakh in dowry from her, which could not be fulfilled by her father, consequently at 5 'O' clock of evening her husband poured kerosene oil over her body and lit fire.

28**. Second dying declaration** on which prosecution has relied is the statement of Razina recorded under Section 161 Cr.P.C on 02.07.2015 by **P.W.10-constable 767 Sheetal,** this witness says that she recorded the statement of Razina on the direction of Darogaji on 02.07.2015. In this statement injured Razina stated that mother-in-law and three sister-in-laws caught hold of her, father-in-law, brother-in-laws and husband poured kerosene oil over her body and her husband lit fire with a match and it is also stated that demand of Rs. 1 lakh was made from her, she was sent to her parental house and thereafter on 11.06.2015 she was brought to her in-laws house and on 12.06.2015 for non fulfillment of demand of Rs. 1 lakh and Scorpio car, she was burned. This statement has been proved by **P.W.10-female constable 767 Sheetal.** Certainly on this statement there is no signature or thumb impression of Smt. Razina.

This very statement was recorded by **P.W-10, constable 767 Sheetal** on direction of the Investigating Officer and contents of the same were entered in the G.D by the Investigating Officer. This fact has been proved on behalf of prosecution by the witness **P.W-11, S.I. Sunil Kumar, Investigating Officer**. This witness has deposed that on 02.07.2015 the statement of victim Razina was recorded by **P.W.10-constable 767 Sheetal** in his presence videography of the same was prepared.

After perusal of the contents of this statement under Section 161 Cr.P.C same was entered by him in the G.D. This witness also said that videography and voice recording of the victim were in his custody. **As such, getting no signature or thumb impression of the victim on this statement can not be said to be fatal as the statement of victim was recorded under Section 161 Cr.P.C and same need not be signed by the witness in view of the Section 162 Cr.P.C**.

The Hon'ble Apex Court in **Mukeshbhai Gopalbhai Barot Vs. State of Gujrat, A.I.R 2010 SC 3692** held:

"the statement of a persons recorded under Section 161 Cr.P.C would be treated as dying declaration after his death."

29. The learned counsel for the appellant also submitted that these two dying declarations are contradictory to each other and same cannot be relied upon. This contention of learned counsel for the appellant **is not sustainable because if there are two contradictory dying declarations the dying declaration which is corroborated by other evidence can be relied upon.**

The Hon'ble Apex Court in **Lakhan Vs. State of M.P (2010) 3 SCC Criminal 942** held:

"two contradictory dying declaration, the ascertainment of the reliable dying declaration can be made which one of the dying declaration is corroborated by other evidence to greater extent. Conviction can be confirmed on the same."

The Hon'ble Apex Court also in **Mohanlal and others Vs. State of Haryana (2007) 9 SCC 151** held:

"where there are more than one statement in nature of dying declaration, the one first in point must be preferred. Of course if there are several dying declaration the dying declaration which is trustworthy and reliable has to be accepted."

30. **Therefore, the first dying declaration which was recorded by P.W-7, Dev Raj Singh, Naib Tehsildar on 13.06.2015 on the very next day of occurrence is found to be more trustworthy and reliable and same is also corroborated with the second dying declaration, which is in the form of statement of injured Razina under Section 161 Cr.P.C and same was recorded by P.W-10, constable 767 Sheetal in presence of Investigating Officer P.W-11, Sunil Kumar and entry of the same was also made in the C.D, which corroborates with the first dying declaration**, same is not contradictory. There is no discrepancy on the material point so as to ascertain the role of committing dowry death by the husband of the victim.

31. Therefore, in view of the evidence on record, the ingredients of Section 304B of I.P.C are fulfilled as the death of deceased also took place within seven years of marriage and death of deceased was not in normal circumstances rather it was homicidal, thermal burn and there is also evidence in regard to demand of Rs. 1 lakh and Scorpio car by the husband of deceased and also the evidence that for non fulfillment of the same she was subjected to cruelty. This harassment and cruelty indicate that demand of dowry is found to be continuous soon before the death, as is evident from the evidence adduced by the prosecution. As such the offence under

Section 304B of I.P.C is proved beyond reasonable doubt by the prosecution.

32. **Now the burden of proof shifts upon the accused. Section 113B** of the **Evidence Act** reads as under:

*"**113B. Presumption as to dowry death**.- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death."*

33. The Hon'ble Apex Court in ***Suresh Vs. State of Haryana (2013) 16 SCC 553*** in paragraph 13 held:

"that the presumption under Section 113B of Evidence Act is the presumption of the law which is mandatory. Once the ingredients of Section 304B of I.P.C is made out the accused is deemed to have committed the dowry death of the women. The accused is entitled to rebutt the statutory presumption."

The Punjab and Haryana High Court in **Bhateri Devi Vs. State of Haryana, 2011 Criminal Law Journal 463 (P&H)** held:

"*husband is the beneficiary in case of dowry demand hence he is liable to dowry death and to give the explanation as to how the death has occurred."*

34. On behalf of accused to rebut this statutory presumption has been taken in statement under Section 313 Cr.P.C that the dibiya of kerosene oil fell upon Razina and as a result of that she caught fire and it was an accidental. Same kind of the suggestion were given by defence counsel to the prosecution witnesses. More-over, in defence evidence D.W-1, Rakesh and D.W-2, Naushad were examined. Both the witnesses have stated that the dibiya of kerosene oil fell on the gas oven as a result of which Razina caught fire. Both the witnesses in their cross-examination says that **when Razina caught fire they were not present at the place of occurrence, they did not see the occurrence from their own eyes**. Therefore, the testimony of these witnesses is not admissible in evidence, as such, accused has also failed to rebut this legal presumption.

35. In view of the over all assessment and re-appreciation of the evidence on record, it is established that the prosecution had proved its case beyond all reasonable doubts. The impugned judgment of conviction and sentence passed by the court below does not bear any infirmity and needs no interference. Accordingly, criminal appeal deserves to be dismissed.

36. Accordingly, Criminal Appeal is dismissed. Judgment dated 10.04.2019 passed by the Additional Sessions Judge/Fast Track Court-3, Bulandshahar in Sessions Trial No. 767 of 2015 (State of U.P Vs. Yameen and others) is hereby affirmed. The appellant is in jail. He is directed to serve out the remaining sentence as has been awarded by the trial court.

37. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

(2021)08ILR A526
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.08.2021

BEFORE

THE HON'BLE AJAY TYAGI, J.

Criminal Appeal No 4320 of 2009

Basant Lal Pal & Anr. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ajatshatru Pandey, Sri Akhilesh Kumar, Sri Anees Ahmad, Sri J.S.P. Singh, Sri R.K. Singh, Sri S.K. Pal, Sri Shiv Nath Singh

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

(A) Criminal Law - appeal against conviction - The Indian Penal Code, 1860 - Sections 147, 342/149, 394 & 395 - The Code of Criminal procedure, 1973 - Section 111,151, 107 , 116 & 197 - Prosecution of judges and public servants .

Appellant No.2 died and appeal abated against him - Complainant had Rs.2839/- as revenue-collection with him - amount snatched by police along with government record - constable and three other constables started beating him by fist, legs and rule - locked him up in lockup - facts not proved by the prosecution - government-peon was with complainant - material witness - not produced by the prosecution - court below concluded - a class-IV employee and could not dare to depose against police personnel - prosecution withheld best witnesses - no explanation why best witnesses were not produced - wrongful confinement not made out - Concerned SDM issued notice under Section 111 Cr.P.C. - after proceedings notice was dropped - if after judicial consideration notice was dropped by SDM then it cannot be said that police wrongfully confined the complainant and his son at police-chauki .

HELD:-Prosecution witnesses not at all reliable witnesses. Material witness Tehsildar and alleged eye-witness (peon) were withheld by the prosecution and they were not produced before the learned trial court. Trial court failed to appreciate the evidence on record correctly and judiciously and based its findings and conclusions only on the basis of assumptions and presumptions. Hence, findings are perverse.(Para - 27)

Criminal Appeal allowed. (E-6)

(Delivered by Hon'ble Ajai Tyagi, J.)

1. This appeal has been preferred against the judgment and order passed by Additional Sessions Judge/Special Judge (Dacoity Affected Area), Lalitpur in Sessions Trial No.03 of 1998 (State vs. Basant Lal and another) under Sections 147, 342/149, 395 IPC, by which accused appellants-Basantlal Pal and Ghanshyam were convicted under Sections 394 and 342 IPC and sentenced for 10 years RI and Rs.10,000/- fine under Section 394 IPC and one year RI under Section 342 IPC. During the pendency of this appeal, Ghanshyam-appellant No.2 died and appeal was abated against him.

2. In this case, initially First Information Report bearing Case Crime No.23/1993 was filed against five accused persons namely, Basantlal Pal, Ghanshyam, Ram Narain, Rajendra Singh and Rameshwar Dayal (all police personnel). Investigating Officer filed final report in court due to not finding any evidence. Final report was accepted by learned Magistrate against which a revision was preferred before learned Sessions Judge. Learned Sessions Judge, allowed the revision and directed the learned Chief Judicial Magistrate to decide the matter afresh. Learned CJM took cognizance. In the meantime, complainant also filed a

complaint before Special Judge (Dacoity Affected Area) and the court summoned the above named accused persons for trial.

3. The relevant brief facts of this case are that complainant-Hari Shankar stated in report that he is 'collection-amin' in Tehsil-Tal Behat, District-Lalitpur. Between 23.12.1992 and 25.12.1992, he was in his area for collection of land-revenue and on 25.12.1992, he was returning to his home after collecting Rs.2,839/- as revenue collection, at about 7:00 p.m., he reached before police-outpost Baansi with his peon Nathu Ram. Basantlal Pal, In-charge outpost, constable Ghanshyam and three other constables came out. They started beating him by fist, legs and rule. They robbed the amount of Rs.2,839/- of revenue collection and government record from him and locked him up in lockup. On hue and cry of complainant, one Badri Prasad and already locked up in police-chauki Brij Lal had seen the occurrence. It has also been stated in complaint that at 12:00 mid-night also above police-personnel beaten the complainant and his son Krishna Kant, who was already inside the lockup. Next day, accused persons challaned him under Section 151, 107 and 116 Cr.P.C. and produced before Sub Divisional Magistrate, Talbehat. At the time of challan, accused persons forcefully returned Rs.800/- to the complainant. By the order of S.D.M., medical examination of complainant and his son was conducted and SDM released them on bail.

4. Before making the charge, accused Rameshwar Dayal died and case was abated against him. Charge under Section 395 IPC was framed against rest of the accused persons and later on charge was amended by the learned trial court and it was framed under Sections 147, 342 read with Sections 149 and 395 IPC. After trial, learned court below acquitted the accused persons Rajendra Singh and Ram Narain of all the charges levelled against him and convicted the accused Basantlal Pal and Ghanshyam under Sections 394 and 342 IPC and sentenced them for 10 years RI under Section 394 with fine of Rs.10,000/- and for one year RI under Section 342 IPC.

5. Aggrieved by this judgment, appellants preferred this appeal, but during the pendency of the appeal, appellant No.2-Ghanshyam died and appeal was abated against him. Now sole appellant Basantlal Pal contested this appeal.

6. Heard learned counsel for the appellant, learned AGA for the State and perused the record.

7. Learned counsel for the appellant, first of all, argued that appellant was a public servant, but prosecution did not take prosecution sanction as provided under Section 197 Cr.P.C., which says that when any person who is or was a Judge or a Magistrate or a Public Servant not removable from his office saved by or with the sanction by the government is accused by any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction. Learned counsel for the appellant also referred the judgment in the case of Ayush Kumar and others vs. State of UP, 2019 LawSuit (All) 612, Anil Kumar Jha vs. State of Chattisgarh, 2016 LawSuit (SC)382 in support of his argument.

8. I am not convinced with the aforesaid argument because in this case, no doubt, all the accused persons were police-

personnel, but they were charged for the offences of alleged robbery and wrongful confinement, which do not come in discharge of their official duties. Previous sanction of government under Section 197 Cr.P.C. is required, in case when public servant was acting in discharge of his official duty, but making robbery or wrongful confinement does not come under the purview of discharging the official duty. Hence, prosecution sanction as provided under Section 197 Cr.P.C. was not at all required in this matter.

9. Learned counsel for the appellant next submitted that appellant along with other police-personnel was falsely implicated in this case. The real fact of the matter was that there were two real brothers, Raju and Kaushal Kishore, whose buffalo entered the field of complainant and his son Krishna Kant and destroyed some crop there. Complainant and his son got annoyed and complainant's son Krishna Kant got that buffalo admitted in kanji-house, which was situated near the police-chauki-Baansi at 7:00 pm on 25.12.1992. This was the bone of contention between the parties and there was altercation between both the sides at kanji-house. On hearing the noise, police reached the said kanji-house and arrested complainant, his son-Krishna Kant, Raju and Kaushal Kishore and locked them up in the police-chauki and next day they were challaned under Sections 107, 116 and 151 Cr.P.C. as complainant and his son-Krishna Kant one party and Raju and Kaushal Kishore as opposite party and they were produced before Sub Divisional Magistrate-Tal Behat, District-Lalitpur. Complainant-Hari Shankar got annoyed with this action of police and he cooked up the false story of beating him and snatching the amount of revenue collection and government record. He lodged complaint against all the police-personnel of police-outpost Baansi.

10. Learned counsel for the appellant submitted that five witnesses of fact were produced in this case and there are material contradictions in their statements.

11. Learned AGA argued that all the five witnesses of fact supported the prosecution version and Brij Lal (PW1) is an independent witness, he has also supported the prosecution story. Learned AGA further submitted that complainant and his son got injuries also, which are proved by the medical examination report. Hence, prosecution case was proved beyond any reasonable doubt and the learned court below rightly convicted and sentenced the appellant.

12. Learned counsel for the appellant argued that injuries were on the person of Raju and Kaushal Kishore also and prosecution has failed to explain their injuries. Their injuries were proved by Dr.C.P. Nagar (PW4). Learned trial court did not take care to appreciate the evidence correctly in legal frame work. Brijlal (PW1) cannot be said to be independent witness as he was already inside the lockup and he was brought by the police to the lockup after his altercation with some person and that person was not picked up by the police. Due to that reason, he gave false statements against the appellants. Another prosecution witness, namely Badri Prasad Gupta (PW5) is said to see the occurrence from outside the police-outpost while it was not possible to view the happenings of inside from standing outside the police-chauki.

13. First of all, it comes that prosecution case is completely silent on the

motive of appellant and other police personnel. It is not at all told by prosecution witnesses and even by complainant in his complaint as to why complainant's son Krishna Kant was already in lockup when police gave beating to complainant and locked him up also. Hari Shanker Goswami (PW2) in his examination-in-chief has stated as under:

"दरोगा जी ने मेरी जेब में रखे 2839 रूपये जेब से निकाल लिये थे तथा मेरा सरकारी रिकार्ड मुंशी घनश्याम ने छीन लिया था तथा मुझे लॉकअप में बंद कर दिया जिसमें मेरे पुत्र कौशल किशोर को पुलिस ने पहले से बन्द कर रखा था।"

14. Krishna Kant s/o Hari Shanker Goswami was examined as PW2. He has also admitted in his statement that when his father was locked up by the police, he was already in lockup, but prosecution is also silent on the point why police caught the complainant outside the police-chauki gave him beating, dragged him inside the chauki, snatched his government amount and government record and locked him up, the reason of this is not at all explained by any of the prosecution witnesses. It has also not been explained by any of the witnesses as to why Raju and Kaushal Kishore were brought to the police-chauki after half an hour of the occurrence with complainant. This is not at all explained anywhere by prosecution.

15. Krishna Kant (PW3), who is son of complainant, has stated in examination-in-chief the exact version of defence. He has admitted that on 25.12.1992 at about 4:30 p.m., he saw that buffalo of Raju destroyed his crop in his field. He caught the buffalo and took it to the kanji-house. On the way, Raju met him and threatened to leave the buffalo or he will get him locked up by asking Sub Inspector of police-chauki. It is also admitted by him that he caught the buffalo of Raju and admitted in kanji-house and took the receipt. It is the version of defence that both the parties were quarreling at kanji-house and for that reason, police arrested them and challaned them. This version of defence is matched with the statement of Krishna Kant (PW3). Statement of Krishna Kant reads as under:

"(3) मै कांजी हाउस से बाहर निकल रहा था करीब दो सवा दो बजे का समय था यह तीनों सिपाही जो हाजिर अदालत हैं चौकी इन्चार्ज S.I. बसन्त लाल पाल व का० रामेश्वर दयाल वहाँ आ गये थे और मुझे पकड़ कर बांसी की पुलिस चौकी के अंदर ले गये थे और मुझे वहाँ लात घूसों व लाठी की ठूसों से मार पीट कर चोट पहुचाई थी तथा कांजी हाउस की रसीद व साढ़े तीन रूपये निकाल लिये थे।"

16. Hence, with the above statement of PW3, it is admitted that police arrested Krishna Kant from the kanji-house.

17. Prosecution witnesses PW2 and PW3 set up the motive in their respective statements that Raju used to to supply milk in police-chauki so the police-personnel were under his influence and due to that reason they locked up them in police-chauki, but this motive, set up by complainant and his son fails miserably because police at that time locked up Raju also along with Kaushal Kishore and challaned under Sections 107, 116 and 151 Cr.P.C. If in any case, motive is set up by the prosecution, it is the burden of prosecution to prove the motive, but in this case, prosecution is completely failed to prove the motive due to arrest of Raju and Kaushal Kishore. Even the complainant-

Hari Shanker, concealed the fact that his son Krishna Kant caught the buffalo of Raju, admitted in kanji-house and there was altercation between Krishna Kant and Raju. Complainant did not disclose the above fact either in FIR or complaint, yet he has admitted this fact by saying that:

"भैंसे कांजी हाउस में बन्द करने के सम्बन्ध में कृष्णाकान्त व राजू के बीच विवाद होने वाली बात F.I.R. या परिवाद में या बयान में बताना जरूरी नहीं समझी थी।"

Hence, it is clear that this fact was concealed by the complainant.

18. Further, it was burden on prosecution to prove that complainant had Rs.2839/- as revenue-collection with him and this amount was snatched by police along with government record. But, these facts were also not proved by the prosecution. It is said by prosecution that the government record was snatched by police, therefore, it may be presumed that receipt took was also snatched by the police, but the complainant (PW2) has told the names of persons from whom he made recovery of revenue and provided them receipt. Those persons could be summoned by the prosecution for evidence, but they were not summoned and they were not produced in evidence, who could show that they paid the amount of revenue-collection to the complainant. It is also submitted by complainant that before the occurrence at about 5:30 p.m., Tehsildar-Talbehat met him and checked him, but Tehsildar was also not produced in evidence to corroborate the fact that complainant was having government revenue and record with him before one and a half hour of occurrence. It is also very much necessary to note that as per prosecution version government-peon was with the complainant and when police caught him, at that time also, he was with the complainant. Badri Prasad (PW5) has also stated in his statement that he was present at the place of occurrence and was seeing entire occurrence while standing outside the police-chauki and after the occurrence, he went from there. The peon was very material witness, but he was also not produced by the prosecution. In this regard, learned court below has concluded that he was a class-IV employee and could not dare to depose against police personnel. This conclusion drawn by the court below cannot be accepted. Hence, prosecution has withheld best witnesses and there is no explanation at all why these best witnesses were not produced. Therefore, adverse inference shall be drawn and it will be presumed that if they would have been produced in evidence, they would have deposed against prosecution version. Hence, prosecution failed to prove that at the time of occurrence, complainant was having Rs.2839/- as revenue-collection and government record was with the complainant. Contrary to this, record shows that the receipt took the complainant was lost somewhere and it was not snatched by police-personnel because paper No.303(kha) is a press release issued by Additional District Magistrate (Finance & Revenue) Lalitpur, wherein it is stated that the receipt-book, which was with collection-amin Hari Shanker (complainant) had lost somewhere. This press release has also mentioned the numbers of used and unused receipts and it is also directed in this release that if somebody finds it, it should be returned to him or *Tehsildar-Talbehat* and unused receipts were declared unauthorized. Although, this document is not exhibited, but it is from government record and

cannot be overlooked. Moreover, it was not contradicted by the prosecution.

19. It is admitted fact that on the next day of occurrence, police produced both the sides before concerned SDM and Rs.800/- were returned to the complainant by the police, which according to the police was recovered from his personal search at the place of occurrence. The complainant has stated that police forcefully returned the Rs.800/- and did not return full amount of Rs.2,839/-. Hence, learned trial court committed mistake by not accepting amount of Rs.800/- as amount of his personal search.

20. Prosecution version is also doubtful keeping in view the injuries of PW2 and PW3. Prosecution has set up the case that police gave very harsh beating to the complainant-Hari Shanker (PW2) outside the police-chauki and dragged him inside and locked him up and in the mid-night at 12 o'clock also, police gave beating to complainant and his son (PW3). Badri Prasad (PW5) also stated in his statement that police gave them beating with lathi. The relevant extracts from the statement of PW5 are quoted as under:

"दरोगा जी हरी शंकर को घसीटते हुये लात घूसे मारते हुये चौकी के अंदर ले गये थे। उन्होंने जूते पहने हुये पैर से पन्द्रह बीस ढोड़े हरी शंकर को मारी थी। घनश्याम मुंशी ने लाठी के दस पन्द्रह प्रहार हरी शंकर पर किये थे हरी शंकर जिससे जमीन पर गिर गये थे।"

21. Hence, as per the above statement of Badri Prasad, police gave beating to complainant and his son by lathi so harshly, therefore, he fell down on ground and complainant was hit by lathi by 10-15 times. With regard to above statement of PW2 and PW3 regarding beating, if injuries of PW2 and PW3 are considered, these injuries do not support the prosecution version as stated by PW2 and PW3. The injuries of the complainant-Hari Shanker were examined by Dr.Chandra Prakash Nagar (PW4) and he has mentioned only three injuries as under:

"(i) नीलगू निशान 2 cm x 1 cm जो कि वाये तरफ पीछे की ओर था जो 11 cm वायें पकावे के हड्डी के नीचे की तरफ था।

(ii) खरोंच का निशान 3 cm x 0.5 cm जो कि दाहिने घुटने के पिछले वाले भाग में था।

(iii) वायें कान के ऊपरी भाग पर चोट से उत्पन्न सूजन थी।"

22. These injuries were of simple in nature and it was just one contusion and one abrasion and one swelling injury likewise injuries of complainant's son Krishna Kant were as under:

"(i) दर्द युक्त सूचन वायें कन्धे के जोड़ से 4 cm नीचे।

(ii) नीलगू निशान 8.5 cm x 1.5 cm जो कि पीछे की ओर वाये घुटने के तीन से०मी० नीचे की तरफ"

23. Hence, there was only one swelling and one contusion to Krishna Kant. No other injury was found on the person of complainant and his son. So above injuries do not co-relate with the version of PW1, PW3 as well as PW2 and PW5, who say that police gave very harsh and immense beating to them at the time of their arrest and also at 12 o'clock in the mid-night by using fist, punch, shoes, lathi and danda. The complainant (PW2) has

also stated that he got bleeding also, but there was no sign of any bleeding in his medical report. Hence, injuries of complainant and his son are not at all co-related with the version of prosecution regarding beating. It also falsifies the story of prosecution.

24. Learned AGA has argued that Brij Lal (PW1) was independent witness and he has supported the prosecution case, but in my view, Brij Lal cannot be said to be independent witness as he has stated in his statement that on the date of the said occurrence, police has put him in the lockup at about 11-12 in the noon because he had marpeet with Bhai Khan and police locked him up only and left Bhai Khan, therefore, he cannot be accepted as independent witeness.

25. The entire findings of learned trial court seems to be based on assumption and not in consonance with the evidence on record. It transpires that on the same day of occurrence, there was some altercation and quarrel between the complainant-Hari Shanker, his son-Krishna Kant as one party and Raju, Kaushal Kishore as other party because Krishna Kant got the buffalo of Raju admitted in kanji-house. The certified copy of receipt of buffalo of admitting it in *kanji-house* (Ex.kha1) is produced as Ex.kha1 and it shows the time of admission of buffalo as 7:00 p.m. by Krishna Kant. Krishna Kant (PW3) has admitted in his examination-in-chief that police caught him at *kanji-house* and next day, police produced both the sides before Sub Divisional Magistrate-Talbehat for breaching the peace.

26. As far as the offence under Section 342 IPC for wrongful confinement is concerned, the same is not made out as it is admitted fact that on the very next day of the said occurrence, police produced both the parties before SDM by challaning them under Sections 107, 116 and 151 Cr.P.C. Concerned SDM also issued the notice under Section 111 Cr.P.C. and after proceedings notice was dropped, but it is clear that judicial consideration took place and if after judicial consideration notice was dropped by SDM then it cannot be said that police wrongfully confined the complainant and his son at police-chauki. If trial court was of the opinion that complainant and his son were wrongfully locked up by police even then it was on record before learned trial court that they were challaned under Sections 107, 116 and 151 Cr.P.C. and, accordingly, judicial proceedings took place against them and they cannot be said to be confined wrongfully by the police.

27. Hence, with the above discussion, this Court reaches the conclusion that prosecution witnesses were not at all reliable witnesses as discussed earlier. Material witness Tehsildar-Talbehat and alleged eye-witness Nathu Ram (peon) were withheld by the prosecution and they were not produced before the learned trial court. I am of the definite view that learned trial court failed to appreciate the evidence on record correctly and judiciously and based its findings and conclusions only on the basis of assumptions and presumptions. Hence, findings are perverse. Therefore, prosecution has miserably failed to prove its case beyond reasonable doubt and by incorrect appreciation of evidence. Learned trial court wrongly convicted and sentenced the appellant. Hence, the conviction and sentence of appellant cannot be sustained and the appeal is liable to be allowed.

28. Accordingly, this appeal is **allowed**.

29. The conviction and sentence of appellant-Basant Lal Pal under Sections 394 & 342 IPC is hereby set aside and appellant is acquitted with all the charges levelled against him.

30. Appellant is on bail. His personal bond is cancelled and sureties are discharged.

(2021)08ILR A533
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2021

BEFORE

THE HON'BLE SUBASH CHAND, J.

Criminal Appeal No 6794 of 2019

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

Counsel for the Appellant:
Sri Ajay Pandey, Sri Mukesh Joshi

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

(A) Criminal Law - The Narcotics Drugs and Psychotropic Substances Act, 1985 - Section 8/15,42,55 - Section 50 - appeal against conviction - compliance of section 50 of the Act is mandatory - mere information to the accused that he had option to be searched either in presence of gazetted officer or Magistrate is not enough - It is required that the accused is actually brought before the gazetted officer or the Magistrate and give option in order to impart authenticity - Section 50 of the Act applies only in case of personal search and does not extend to the search of vehicle container of bag or premises.(Para -13)

12 Kg., poppy straw recovered out of plastic gunny bag - in 12 polythene packets of one kg., each - gunny bag was in the hand of appellant/convict - sampling of the poppy straw was not taken as representative sampling - nothing on record to support the prosecution case that in the 11 remaining packets the narcotics drugs was also poppy straw.

HELD:- In the present case as the poppy straw was in a plastic gunny bag which was being carried by the appellant, the provision of section 50 of the Act would not attract . No malkhana register was produced on behalf of the prosecution in regard to compliance of section 55 of the Act. Certainly, provisions of section 55 of the Act are directory in nature; but the violation of the same also casts doubt on the prosecution story. In view of re-appreciation of the evidence on record it is found that the prosecution has failed miserably to prove its case beyond doubt. Conviction of the appellant bears infirmity and same deserves to be set-aside.(Para - 13,15,16)

Criminal Appeal allowed. (E-6)

List of Cases cited:-

1. Sukhdev Vs St. of Har. , 2013 Criminal Law Journal 841

2. Kishan Chand Vs St. of Har. , LAWS (SC) 2012-12-55

3. Rajendra Vs St. of U.P. , 2004 (48) SCC 304

4. U.O.I. Vs Bal Mukund & ors. , Criminal Appeal No. 1397 of 2007

5. St. of Raj. Vs Gurmail Singh , 2005 Criminal Law Journal 1749

(Delivered by Hon'ble Subash Chand, J.)

1. The instant Criminal Appeal is preferred on behalf of the appellant Mehbood against the state of U.P., against the judgment and order dated 13.9.2019 passed by the Additional Sessions Judge, Court No. 11, Moradabad in Special Sessions Trial No. 806 of 2018 (State of U.P. Vs. Mehbood) whereby the appellant

was convicted and sentenced with rigorous imprisonment for 5 years and fine of Rs. 5,000/- for the charge under section 8/15 of The Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and in default of payment of fine the appellant was directed to undergo for additional imprisonment for one year.

2. The brief of facts giving rise to this criminal appeal are that on 3.4.2018 Sub-Inspector Sanjeev Kumar along with police party while on patrolling received information from the informant (Mukhbir Khas) that one person along with 10-12 Kgs. poppy straw in a plastic gunny bag would come from the side of Umari by e-Rikshaw and would pass by the Newada Railway crossing. On this information Sub-Inspector Sanjeev Kumar along with police party reached to the Newada Railway crossing and after waiting for some time one person came by e-Rikshaw and alighted from e-Rikshaw and proceeded along with white colour plastic gunny bag in his hand towards Newada Railway crossing. The informant indicated to the police party that he was the very person who had poppy straw in the plastic gunny bag. That person was apprehended at 21:30 hours and he told his name Mehbood, son of Sattar, resident of tenanted house of Afzal Jabruddin Mohalla Daulatbagh, P.S. Nagfani, District Moradabad. This person told that he had poppy straw in the plastic gunny bags. The police party asked him for his personal search before the Magistrate or a gazetted officer. This person refused for the same and reposed his trust in the police party in taking search of him and a consent memo was prepared under section 50 of the Act. The thumb impression of this accused was taken on this consent memo. In the plastic gunny bag 12 polythene packets of one kg., each were kept. On being opened one packet it was found to be narcotic drugs I.e. poppy straw. The weighing machine brought by constable Basant Kumar and on being weighed it was found 11.800 Kg. poppy straw. Out of 12 packets 11 packets were sealed in the same plastic gunny bag and same was also made specimen and one packet of 970 gms., poppy straw was kept in one white colour cloth for forensic examination and same was sealed in cloth and made specimen. The accused Mehboob was made aware in regard to commission of offence by him under section 8/15 of the Act and his arrest memo was prepared keeping in view the safeguards. The recovery memo was prepared on the spot which was signed by the accused and all the police personnel present at that time and on the basis of this recovery memo case crime no. 0089 of 2018 was registered under section 8/15 of the NDPS Act against the accused Mehboob with the police station Kanth, District Moradabad. The Investigating Officer after having concluded the investigation filed charge sheet against the accused Mehboob before the court of Sessions Judge, Moradabad which was registered as SST No. 806 of 2018 and cognizance was taken thereon.

3. The trial court framed the charge against the accused Mehboob under section 8/15 of the Act and charge was read over and explained to the accused who denied the charge and claimed to be tried.

4. On behalf of prosecution to prove the charge against the accused in documentary evidence filed recovery memo, Exb. Ka-1, consent memo for personal search of police personnel Exb.Ka-2, consent memo of accused Mehboob under section 50 of the Act, Exb-Ka-3, arrest memo, Exb-Ka-4, site plan of place of occurrence Exb. Ka-5, FSL report,

Exb. Ka-6, charge sheet, Exb. Ka-7, check FIR, Exb. Ka-8, GD entry in regard to registering the case crime, Exb. Ka-9.

In oral evidence examined PW-1 Sub-Inspector Sanjeev Kumar, PW-2, Sub-Inspector, Lokesh Kumar Tomar, PW-3, Sub-Inspector Mukesh Singh.

5. The statement of the accused Mehboob was recorded under section 313 of Cr.P.C., who denied incriminating circumstances in evidence against him and stated that he is innocent and has been falsely implicated in this case.

6. The trial court after hearing learned counsel for the parties convicted the accused Mehboob vide judgment and order dated 13.9.2019 for the offence under section 8/15 of the Act and punished him with rigorous imprisonment for 5 years and fine of Rs. 5,000/-. In default of payment of fine additional imprisonment of one year was directed to be undergone by the convict.

7. Aggrieved from the impugned judgment of conviction and sentence dated 13.9.2019 this criminal appeal is preferred on behalf of the appellant/convict Mehboob on the ground that the impugned judgment and order dated 13.9.2019 is against the fact and law and the same is against the weight of evidence on record. The impugned judgment and order is based on conjectures and surmises. The trial court has not appreciated the evidence on record in proper perspective. There is no independent witness of the alleged recovery. No compliance of the provisions of sections 41,42,50 and 57 of the Act was made during search and seizure. Accordingly, prayed to allow this criminal appeal and to set aside the impugned judgment of conviction and sentence and to acquit the appellant from the charge levelled against him.

8. I have heard Sri Mukesh Joshi learned counsel for the appellant, learned AGA for the State and perused the materials brought on record.

9. Learned counsel for the appellant has submitted that as per prosecution version the police party had received the information from the informant (Mukhbir Khas) that one person along with 10-12 Kg., poppy straw in a plastic gunny bag was to come from the side of village Umari and would pass by the Newada Railway crossing. Accordingly, police party relying upon the information of Mukhbir Khas reached at the Railway crossing Newada. The police party also waited there for some time and as such that person alighted from e-Rikshaw and proceeded towards the Newada Railway crossing having a plastic gunny bag in his hand and on the indication of Mukhbir Khas that person was apprehended by the police party and from his possession 12 Kg., poppy straw was recovered in 12 polythene packets of one kg., each which was kept in a white colour plastic gunny bag. It is also further submitted that as per provisions of section 42 of the Act the head of the police party had to reduce the information received from the Mukhbir Khas in writing and did not inform to his superior officers in this regard before apprehending the accused. Therefore, the violation of mandatory provisions of NDPS Act is the ground of acquitting the accused.

10. In this regard, on behalf of prosecution **PW-2 Sub-Inspector Sanjeev Kumar** who is complainant in his statement says that on 3.4.2018 he was deployed as

Sub-Inspector with the Police Station Kanth and on that day he along with Sub-Inspector Lokesh Kumar Tomar, Constable 706 Rahul Kumar Yadav and Constable 966 Basant Kumar reached the police station making entry in Rapat No. 64 at 18:38 hours and were on patrolling and checking of the vehicles to maintain law and order within the limit of police station concerned. **The informant (Mukhbir Khas) had informed him that one person was to come from the side of village Umari by e-Rikshaw and would pass through Newada Railway crossing and that person was carrying 10-12 Kg., poppy straw in a plastic gunny bag** and relying on this information of Mukhbir Khas he along with police party reached to Newada Railway crossing and on the indication of the informant (Mukhbir Khas) that person was apprehended after a wait of 10-20 minutes at the Railway crossing.

This witness in his cross-examination says that **he did not give any information to his superior officers which he has received from the Mukhbir Khas**. Again this witness says; he informed the higher authorities in regard to the information received from Mukhbir Khas but no entries were made in this regard in the recovery memo.

PW-2 Sub-Inspector Lokesh Kumar Tomar in his examination-in-chief also supports the FIR case and says that the information was received from **the Mukhbir Khas that one person was to come carrying poppy straw with him.**

PW-3 Sub-Inspector Mukesh Singh also corroborated the statement of the complainant.

11. From the statement of three witness it is found that **the police party had received the information from the Mukhbir Khas that one person was to come from the side of village Umari carrying 10-12 kg., poppy straw in a plastic gunny bag and he would pass by the Newada Railway crossing.**

Admittedly, **this information received from the informant (Mukhbir Khas) was not taken down in writing in view of section 42 (1) of the Act and a copy of the information was not given to the immediate superior officer within 72 hours in view of section 42 (2) of the Act. Therefore, the mandatory provision of Section 42 of the Act was violated.**

The Hon'ble Apex Court held in ***Sukhdev Vs. State of Haryana 2013 Criminal Law Journal 841*** that the compliance of section 42 of the NDPS Act is mandatory. **The contravention of it vitiates the trial.**

The Hon'ble Apex Court in **Kishan Chand Vs. State of Haryana reported LAWS (SC) 2012-12-55** held in para 12 as under:-

"12. In our considered view, this controversy is no more res integra and stands answered by a Constitution Bench judgment of this Court in the case of Karnali Singh(supra). In that judgment, the court the very opening paragraph noticed that in the case of Abdul Rasid Ibrahim Mansuri Vs. State of Gujrat (2000) 2 SCC 513, a three Judge Bench of the Court had held ***that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused****. However, in the case of Sajan Abraham (supra), again a bench of three*

Judges, held that this provision is not mandatory and substantial compliance was sufficient. The Court noticed, if there is total non-compliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory. But, if there is delay, whether it was undue or whether the same was explained or not, will be a question of fact in each case."

12. Learned counsel for the appellant has submitted that the place of occurrence is public place and no independent witness of public was made party to the recovery memo which casts doubt on the recovery memo itself because all the witnesses of the recovery memo are police personnel.

From the perusal of the recovery memo Exb. Ka-1 it is found that the place of occurrence is Newada Railway crossing and time of occurrence is 21:30 hours on 3.4.2018. This recovery memo is Exb.Ka-1. PW-1 S.I. Sanjeev Kumar and PW-2 Lokesh Kumar Tomar both have stated that they asked the persons of public to be witness but none was ready for the same. Therefore, independent witness of the recovery memo was not made.

On the ground that **no witness of public was made party to the recovery memo, the whole of the prosecution case can not be discarded but it may be one of the grounds to cast doubt on the prosecution story.**

13. Learned counsel for the appellant has further submitted that before apprehending the appellant/convict Mehboob no compliance of section 50 of the Act was made. Non compliance of the mandatory provision of section 50 of the Act vitiates the whole of the trial.

On behalf of the prosecution witness PW-1 S.I. Sanjeev Kumar says that all the police personnel of the police party had taken search inter se and no narcotics drugs and psychotropic substance was recovered from any one of the police personnel. Accordingly, recovery memo of the same was prepared which was signed by S.I. Sanjeev Kumar, and Lokesh Kumar Tomar, Constable Rahul Yadav and Constable Basant Kumar. This memo in regard to search of police personnel has been proved by the prosecution witness PW-1 S.I. Sanjeev Kumar as Exb. Ka-2.

PW-1, S.I. Sanjeev Kumar and PW-2 Lokesh Kumar Tomar also in their statement say that before making search of the accused Mehboob they made the accused Mehboob aware in regard to his right to get search before the Magistrate or gazetted officer but this accused stated that he reposed his trust in the police party and he was not needed to be searched in presence of the Magistrate or gazetted officer. In regard to the same a consent memo was prepared which was signed by S.I. Sanjeev Kumar, S.I. Lokesh Kumar Tomar, Constable Basant Kumar and Constable Rahul Yadav and this consent memo was also read over to the accused Mehboob, who after having understood the contents of this **consent memo** affixed his thumb impression on this consent memo. This consent memo has been proved by PW-1 S.I. Sanjeev Kumar as **Exb. Ka-3**.

As per prosecution case the recovery of the alleged 12 Kg., poppy straw from the possession of the accused Mehboob was not a chance recovery rather police party apprehended him after having received information from the Mukhbir Khas.

As per prosecution case 12 Kg., poppy straw was recovered out of plastic gunny bag in 12 polythene packets of one kg., each and this gunny bag was in the hand of appellant/convict Mehboob.

It is settled law that the compliance of section 50 of the Act is mandatory. The mere information to the accused that he had option to be searched either in presence of gazetted officer or Magistrate is not enough. It is required that the accused is actually brought before the gazetted officer or the Magistrate and give option in order to impart authenticity.

In the present case as the poppy straw was in a plastic gunny bag which was being carried by the appellant, the provision of section 50 of the Act would not attract.

The Hon'ble Apex Court held in ***Rajendra Vs. State of U.P. 2004 (48) SCC 304*** Section 50 of the Act applies only in case of personal search and does not extend to the search of vehicle container of bag or premises.

14. Learned counsel for the appellant has also submitted that the sampling of the recovered poppy straw was not made as per provisions of the **Standing Order No. 1/89 dated 13.6.1989, Section II (General Procedure For Sampling Storage, etc.), which is quoted as below:-**

"2.1. All the drugs shall be properly classified carefully weighed and sampled on the spot of seizure.

2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotics drugs and psychotropic substance seized shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the punchanama drawn on the spot.

2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case is required for chemical test. The same quantity shall be taken for the duplicate sample also. The seized drugs in the packages/containers shall be well mixed to make ti homogeneous and representative before the sample (in duplicate) is drawn.

2.4. In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5. However, when the packages/containers seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may carefully bunched in lots of 10 packages/containers except in the case of ganja and hashish(charas), when it may be bunched in lots of 40 such packages/containers.For each such lot of packages/containers, one sample(in duplicate) may be drawn.

2.6. Where after making such lot, in the case of hashish and ganja, less than 20 packages/containers remain and, in the case of other drugs, less than five packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7. If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such reminder package/container.

*2.8. While drawing one sample (in duplicate) from a particular lot**, it must be ensured that representative samples in equal quantity are taken from each package/container of that lot and mix together to make composite whole from which the samples are drawn for that lot.***

2.9. The sample in duplicate should be kept in heat-sealed plastic bag as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "Secret- Drug sample/test memo", to be sent to the chemical laboratory concerned."

As per evidence available on record it is found that the sampling of the poppy straw was not taken as representative sampling. There were 12 packets of one kg., each bearing poppy straw in plastic gunny bag. Out of the 12 packets, 11 packets were sealed in a plastic gunny bag on the spot; **while one packet of poppy straw which was 12th one was sent for examination to Forensic Science Laboratory (in short FSL)** as such, out of 12 packets only one packet was sent for examination and no sampling **was taken in any quantity from the remaining 11 packets of poppy straw.**

The FSL report Exb. Ka-6 is on record. As per FSL report the result of poppy straw which was sent in a polythene bag having 950 gms was found to be poppy straw.

The **Hon'ble Apex Court** held in **Criminal Appeal No. 1397 of 2007 Union of India Vs. Bal Mukund and others** vide judgment dated **31st March 2009** held in paragraph 39 as under:-

" There is another aspect of the matter which can not also be lost sight of Standing Instruction No. 1/88, which had been issued under the Act, lays down the procedure for taking samples. The High Court has noticed that PW-7 had taken samples of 25 grams each from all the five bags and then mixed them and sent to the laboratory. There is nothing to show that adequate quantity from each bag had been taken. It was a requirement in law."

Therefore, in the case at hand **the violation of the Standing Order dated 1/89 dated 16.9.1989 Section II General Procedure for Sampling etc., has been made, because out of 12 packets of poppy straw which was found in as plastic gunny bag from the possession of the appellant only one packet was sent to**

the testing to the FSL and no representative sampling was taken from the remaining 11 packets. As such, there is nothing on record to support the prosecution case that in the 11 remaining packets the narcotics drugs was also poppy straw.

15. Learned counsel for the appellant has also submitted that there is no evidence adduced on behalf of the prosecution that the recovered poppy straw was kept in a sealed cover and specimen was made in a proper way in safe custody from the date of recovery upto the date of sending one packet for testing to the FSL. No malkhana register was produced and nor the same was proved on behalf of the prosecution. Therefore, there is violation of section 55 of the Act.

From the perusal of the record it is found that the police party apprehended the appellant Mehboob on 3.4.2018 and 12 Kg., poppy straw in 12 packets in polythene, one kg., each which was kept in a plastic gunny bag were recovered from his possession. Out of these 12 packets, 11 were sealed in a plastic gunny bag and one packet was sealed in a cloth for sampling and same was sent to the FSL on 16.4.2018.

PW-3 S.I. Mukesh Singh is the investigating officer of case crime no. 89 of 2018. This witness in his statement says that he sent a packet of sampling for examination to the FSL, Moradabad and receiving of the same was entered in the case diary. The FSL report Exb. Ka-6 was received and after conclusion of the investigation in view of the statement of the witnesses, documents on record, FSL report and charge sheet was filed against the accused Mehboob.

The recovered contraband was sealed by S.I. Sanjeev Kumar. During investigation same was taken by him in his possession and the memo of the same was not prepared by him. Today, he has not brought the case property before the Court. The malkhana register is not brought by him. The receiving of the sampling of FSL report was got on the malkhana register.

From the FSL report itself Exb. Ka-6 it is found that **the sampling of this case crime was sent on 16.4.2019 to FSL Moradabad; while in view of recovery memo Exb. Ka-1 the alleged 12 kg., poppy straw was recovered on 3.4.2018. From the date 3.4.2018 whether the seized poppy straw was kept in safe custody, is nothing on record to prove the same. No malkhana register was produced on behalf of the prosecution in regard to compliance of section 55 of the Act. Certainly, provisions of section 55 of the Act are directory in nature; but the violation of the same also casts doubt on the prosecution story.**

Hon'ble Apex Court in ***State of Rajasthan Vs. Gurmail Singh 2005 Criminal Law Journal 1749*** held that malkhana register was not produced in evidence to prove the seized article, but kept in malkhana. No sampling of the same was sent along with sample of laboratory for the purpose of comparing sealing in the sample bottle. No evidence that the seal was intact. Acquittal proper.

16. Therefore, in view of re-appreciation of the evidence on record it is found that the prosecution has failed miserably to prove its case beyond doubt. The conviction of the appellant bears infirmity and same deserves to be set-aside

and the appeal is **allowed**. The appellant is in jail. He be released forthwith, if he is not wanted in some other case provided the bail bonds are furnished on his behalf before the trial court in compliance of section 437-A of Cr.P.C., to the satisfaction of the court concerned.

17. Let the copy of the judgment/order be certified to the court concerned for necessary information and follow up action.

(2021)08ILR A541
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.08.2021

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.

Criminal Revision No. 300 of 2020

Smt. Poornima Asthana ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Rajerndra Prasad Sharma

Counsel for the Opposite Parties:
Govt. Advocate, Prem Shankar

(A) Criminal Law - Maintainability of recall application in a criminal revision - The Code of criminal procedure , 1973 - Section 64 - Service when persons summoned cannot be found - Chapter XVIII of Part III of The Allahabad High Court Rules , 1952 - Rule 9 - Issue of notice, Rule 12 - Service of notice by post or publication , Rule 22 - Notice - No party having knowledge of the case can force the Court to first pass an ex parte order and then claim right to recall the same even when its bona fide is not proved.(Para - 10)

Present criminal revision decided ex parte by the order dated 4.1.2021 - against the applicant-respondent No.2 - treating service of notice sufficient upon him - Application filed by the husband applicant-respondent No.2 - to recall the final order dated 4.1.2021.

HELD:- The notice was issued upon the applicant-respondent No.2 as per proforma prescribed under Chapter XVIII/Rules 9 and 22 of Rules of 1952. Service of notice is duly effected upon a family member of applicant-respondent No.2. This Court does not believe the conduct of the applicant-respondent No.2 to be bona fide in not appearing in the case and stating that the notice was not served upon him. The applicant-respondent No.2 had knowledge of the pendency of the present case and when ex parte order was passed, he claims his right to recall the order on ground of non-appearance, which in the given facts cannot be said to be bona fide. In view of the aforesaid, the application for recall deserves to be rejected with costs. (Para - 9,10)

Application for recall rejected. (E-6)

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

(Crl. Misc. Application No.66006 of 2021: Application for Recall of Order dated 4.1.2021)

1. This application is filed by the husband applicant-respondent No.2 to recall the final order dated 4.1.2021 passed in the present criminal revision.

2. By the order dated 4.1.2021, the present criminal revision was decided ex parte against the applicant-respondent No.2, treating service of notice sufficient upon him. By the said order, the maintenance amount granted by the Court below under Section 125 CrPC was enhanced from 1500/- to Rs.3000/- per month with effect from 8.10.2001 (from the date of institution of proceeding) till 14.1.2020 (date on which judgment was

passed by the Court below) and from Rs.4000/- to Rs.15,000/- per month from 14.1.2020 onwards, and any amount deposited/paid by the applicant-respondent No.2 in compliance of the order of Court below dated 14.1.2020, was to be adjusted in the said payment. Further, the maintenance from the date of institution of application till 31.1.2021 was directed to be paid in 15 equal monthly instalments starting from 1.3.2021 onwards till the entire amount is paid.

3. I have heard learned counsel for parties on this recall application. Without going into the issue, whether recall application is maintainable in a criminal revision or not, the recall application is decided on merit.

4. The recall application is filed by the applicant-respondent No.2 on 25.3.2021. In the recall application most of paragraphs are with regard to the merits of the case. With regard to grounds and facts for recall of the order learned counsel for applicant-respondent No.2 referred to para 2, para 17 to 19 and para 64 of the affidavit filed in support of the recall application. The said paragraphs state that the applicant-respondent No.2 is not residing on the address on which the notice was sent. In paragraph 17 to 19, the applicant-respondent No.2 has stated that he has not received notice of aforesaid case and thus, could not appear; the notice was deliberately sent to the address where applicant-respondent No.2 is not residing, only to deprive him from appearance in the case; the notice was served upon his nephew (Bhanja) who is not a family member and, therefore, the service is not sufficient as per Section 64 of the CrPC. The Court has wrongly noted, in paragraph 2 of the order dated 4.1.2021 of this Court, that service under Section 64 of the CrPC is sufficient. On the aforesaid grounds, the learned counsel for applicant-respondent No.2 submits that this is a fit case for recall of order as the same is passed without proper service of summons upon the applicant-respondent No.2 as per Section 64 of the CrPC.

5. Opposing the same, learned counsel for petitioner states that service is sufficient upon the Bhanja who is a family member of the applicant-respondent No.2. The applicant-respondent No.2 throughout was aware of the proceedings and he himself admits that there are around 20 different cases pending between him and the petitioner. In such a situation, it cannot be said that applicant-respondent No.2 was not aware of the present proceedings. The applicant-respondent No.2 has nowhere stated that he never resided on the said address. In all the paragraphs, he merely states that "he is" not residing on the said address. In fact, he was at the relevant time residing at the same address. It is further stated that on the notice which was sent to the applicant-respondent No.2, the server has also noted his mobile number and stated that applicant-respondent No.2 is also informed on the said mobile number. This fact is not disputed by the applicant-respondent No.2 or his affidavit or by his counsel during arguments.

6. Chapter XVIII of Part III of The Allahabad High Court Rules, 1952 (Rules of 1952) provides proceedings other than original trials. Rule 9 of Chapter XVIII of Part III of Rules of 1952 provides that if an appeal or revision is not dismissed summarily a day shall be fixed for its hearing and notices in the prescribed form shall be issued. For convenience, the said Chapter XVIII Rule 9 is quoted as under:-

*"**9. Issue of notice**.-- If an appeal is not dismissed summarily a day shall be fixed for its hearing and notices in the prescribed form shall be issued.*

If an application for revision or other application is not rejected and an order directing the issue of notice is made, a day shall be fixed for its hearing and notices in the prescribed form shall be issued.

After notices have been issued in an appeal or revision the record shall be sent for unless otherwise ordered.

In the case of an appeal under Section 341 of the Code of Criminal Procedure, 1973, the record of the case out of which the proceedings under appeal arose shall also be sent for unless otherwise ordered." (emphasis added).

7. The said fact is further clear from Chapter XVIII Rule 22 which provides that notices in different classes of cases shall, unless otherwise orders, be issued as indicated below which includes a revision also. Rule 22 is also quoted below:-

*"**22. Notice** :- Notice in different classes of cases shall, unless otherwise ordered, be issued as indicated below, namely—*

(1) Appeal :- Where an appeal has not been dismissed summarily notice of the time and place at which such appeal will be heard shall be given to—

(i) the appellant or his Advocate, or, where the State is the appellant, to the Government Advocate, and

(ii) where the State is not the appellant, to the Government Advocate, and, where the State is the appellant to the respondent as also to the Court appealed from.

(2) Revision :- Where notice has been directed to be issued, notice shall be given to the applicant, if any, or his Advocate and the Government Advocate as also to such opposite parties as may be arrayed in the application. Where the State is the applicant notice shall be given to the Government Advocate and such opposite parties as may be arrayed in the application.

Where the Court acting under Section 401 of the Code of Criminal Procedure, 1973 directs notice to be issued, notices shall be given to the Government Advocate and the accused or in a case in which there has been no conviction or acquittal, the parties affected by the order passed in the case.

(3) Reference :- Where notice has been directed to be issued on a reference 93[under Section 395 of the Code of Criminal Procedure, 1973], notice shall be given in accordance with the second paragraph of Clause (2).

In a reference under Section 366 of the Code of Criminal Procedure, 1973, notice shall be given to the Government Advocate and, if possible, to the accused or his guardian or Advocate.

In a reference under section 318 of the Code of Criminal Procedure, 1973, notice shall be given to the Government Advocate and, if possible, to the accused or his guardian or Advocate.

(4) Miscellaneous Application :- In a miscellaneous application notice shall

be given to the applicant, the Government Advocate and the opposite parties and where the application is on behalf of the State to the Government Advocate and the opposite parties Provided that no notice of an application under Section 378 (4) of the Code Criminal Procedure, 1973 need be issued to the accused opposite party." (emphasis added)

8. Chapter VIII Rule 12 of Rules of 1952 further deals with service of notice by post or publication. It reads as follows:-

*"**12. Service of notice by post or publication**.- A notice, in addition to the court notice, may also be served by the petitioner/appellant through his Advocate to the respondent(s) by registered post or speed post or by such courier service, as may be approved by the court, or any other electronic mode and file affidavit of service accompanied by proof thereof or with the permission of the court by substituted service, publishing the notice in a daily newspaper, having wide circulation in the districts, in which the defendant /respondent is last known to have actually or voluntarily resided/ carried on business or personally worked for gain;*

Provided that where an order for publication of notice has been passed by the Court or by the Registrar General, as the case may be, the party on whose behalf the notice is to be published shall, within seven days from the date of the order, obtain the tentative date from the office on the prescribed form of the notice duly filled in by the party or his counsel and shall get it published before the date fixed in a daily newspaper circulating in the locality in which the respondent or the opposite party, as the case may be, is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

Provided further that the party or his counsel getting the notice published as aforesaid shall so arrange that the notice is published at least ten days before the date fixed in the notice and shall file a copy of the newspaper containing the notice before the Registrar General a week before the date fixed.

Provided also that where the copy of the newspaper is not supplied within the time prescribed in the preceding proviso, the case or the application, as the case may be, on which the order for publication of notice had been passed, shall be listed before the Court for such orders as the Court deems fit.

Explanation I :- Where the party fails to file the copy of the newspaper he shall be deemed to have committed default in supplying the notice, and the provisions of Rule 4 of Chapter XII shall mutatis mutandis apply in such cases.

Explanation II :- A notice sent by registered post shall, unless it is received back from the post office as undelivered, be deemed to have been served at the time at which it would be delivered in the ordinary course of post."

9. The notice was issued upon the applicant-respondent No.2 as per proforma prescribed under Chapter XVIII/Rules 9 and 22 of Rules of 1952. Therefore, the summons were not issued in the present criminal revision under the provisions of CrPC. Thus there is no question of applicability of Section 64 CrPC. The notices were issued under the Rules of 1952 in the present proceedings. The said

notice was duly served upon the applicant-respondent No.2. There is no compulsion that notice be served upon the male family member of party. Service of notice is duly effected upon a family member of applicant-respondent No.2. It is nowhere disputed that notice is duly served upon the Bhanja of applicant-respondent No.2. It is nowhere disputed by the applicant-respondent No.2 that he was informed on phone with regard to notice of the present proceedings. Further, the applicant-respondent No.2 has also nowhere stated that he never lived on the address on which the notice was sent. The only repeated statement, made by the applicant-respondent No.2 in the affidavit and even in the Court is, that, he is not residing on the said address.

10. Looking into the entirety of above noted facts and circumstances of the case and also the long drawn litigation, as admitted by the applicant-respondent No.2 himself in his affidavit in support of recall application, this Court does not believe the conduct of the applicant-respondent No.2 to be bona fide in not appearing in the case and stating that the notice was not served upon him. The applicant-respondent No.2 cannot be permitted to unnecessarily prolong the proceedings, pending before this Court. It is the duty of parties to fully cooperate in the early disposal of case. No party having knowledge of the case can force the Court to first pass an ex parte order and then claim right to recall the same even when its bona fide is not proved. The present case falls in such a category. The applicant-respondent No.2 had knowledge of the pendency of the present case and when ex parte order was passed, he claims his right to recall the order on ground of non-appearance, which in the given facts cannot be said to be bona fide. In view of the aforesaid, the application for recall deserves to be rejected with costs.

11. The application for recall is rejected with costs which is quantified to Rs.1000/-. The costs shall be deposited in Registry by the applicant-respondent No.2 within three weeks from today.

(Crl. Misc. Application No.37728 of 2021: Application for Correction in the Order dated 4.1.2021)

This application is filed on behalf of the petitioner. The correction sought for, are clerical in nature.

The application is allowed. The order dated 4.1.2021 is corrected in the following manner:-

(1) In para 6 line 5 of the order, the word "petitioner" is replaced with word "opposite party No.2".

(2) In para 7 line 8 of the order, the word, "daughter" is replaced with word "son".

(2021)08ILR A545
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2021

BEFORE

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

Criminal Revision No. 510 of 2020

Smt. Sitara Devi ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Kanchan Chaudhary, Sri C.L. Chaudhary

Counsel for the Opposite Parties:
A.G.A., Sri Hakim Kumar Kushwaha, Sri Rajesh Kumar Srivastava

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 125 -Revision - order for maintenance of wives, children and parents - maintenance is to be awarded from the *date of application* made to the Family Court, bearing in mind the total in-hand monthly salary received by the husband on the one hand and his liabilities towards other dependent family members on the other. (Para - 13)

Revisionist's moved application before Principal Judge, Family Court for maintenance - partly allowed - directing the second opposite party to pay the revisionist maintenance in the sum of Rs.7000/- per month from the *date of order* - revisionist seeks enhancement of the maintenance awarded, payable from the *date of application* - Hence criminal revision.

HELD:- The impugned judgment and order passed by the Principal Judge, Family Court, is modified to the extent that the revisionist is held entitled to receive in maintenance a sum of Rs.9000/- per month, payable by the second opposite party from the *date of application*.(Para - 14)

Criminal Revision allowed. (E-6)

List of Cases cited:-

1. Rajnesh Vs Neha & anr., (2021) 2 SCC 324

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

1. This criminal revision is directed against an order of Mr. Dinesh Tiwari, Principal Judge, Family Court, Kaushambi dated 19.10.2019, partly allowing the revisionist's application for maintenance under Section 125 Cr.P.C. and directing the second opposite party to pay the revisionist maintenance in the sum of Rs.7000/- per month from the date of order. The revisionist seeks enhancement of the maintenance awarded, payable from the date of application.

2. Heard Mr. C.L. Chaudhary, learned Counsel for the revisionist and Mr. Hakim Kumar Kushwaha, learned Counsel appearing on behalf of opposite party No.2.

3. The revisionist, Smt. Sitara Devi and the second opposite party, Kamlesh Kumar, are an estranged couple. The parties were married, according to Hindu rites, on 17th April, 2009. There are allegations by the wife that she was subjected to cruelty, both mental and physical, in connection with demand of dowry. The details of those facts, that have been wholesomely set out in the Family Court's judgment, need not be recapitulated. The reason is that the Family Court, on the basis of evidence on record, has recorded a finding of fact that the wife is living apart from the husband for sufficient cause. It is the wife who has come up in revision, assailing the judgment and order passed by the Family Court, to the extent it denies the wife's claim to a maintenance in the sum of Rs. 15,000/- per month, from the date of application. The husband-opposite party no.2 has not challenged the order.

4. The learned Counsel for the revisionist-wife submits that the maintenance awarded is way below than that necessary to maintain the standard of living the wife has been accustomed to in her matrimonial home. Learned Counsel for the revisionist submitted, during the course of hearing, that the husband is employed as a Class-IV employee at the Indian Air Force Station, Bamhrauli, Prayagraj and earns a salary of Rs.50,000/- per month. The wife is not professionally trained or otherwise able to earn anything

for herself. She is entirely dependent for her sustenance on her husband. There is also a case about the second opposite party being possessed of ancestral agricultural land, which yields a handsome income. His total monthly earnings from the salary and land put together is claimed to be a sum of Rs. 90,000/-.

5. It is further argued by Mr. Chaudhary, learned Counsel appearing for the revisionist that maintenance, apart from being grossly inadequate, judged on the standard parameters, is also awarded in error from the date of order, instead of the date of application.

6. The claim about the agricultural land has been denied by the husband in paragraph no.11 of the counter affidavit, that he has filed in opposition to the affidavit filed in support of the revision. It has also been asserted in paragraph no.9 of the counter affidavit that the second opposite party's income, evident from his payslip for the month of February, 2020, is Rs. 24,931/- per month and not Rs. 50,000/- as alleged.

7. This Court has keenly considered the submissions advanced by the learned Counsel for parties and perused the record, which has been summoned from the Family Court.

8. The Family Court, while awarding maintenance, has proceeded entirely on the basis of parole evidence of the husband, that he receives a monthly salary of Rs.22,000/-. The Family Court has not called upon or required the husband to produce documentary evidence about his monthly emoluments, which is easy to require production of, and would clinchingly show the husband's monthly income at least from his Government employment. Before the Family Court or this Court, the wife has not produced any evidence to show that the husband has inherited any kind of agricultural land, that yields him periodical income, in addition to what he earns in salary, received from the Indian Air Force. The husband/second opposite party has placed before the Court, through his counter affidavit, a photostat copy of his payslip for the month of February, 2020, as an annexure. The payslip shows a monthly gross salary of Rs.41,075/- and gross deduction of Rs.16,144/-, with a net pay of Rs. 24,931/-. The payslip further indicates the breakup of the gross deduction. It shows provident fund subscription to the tune of Rs.15,000/- per month, besides contribution to the Central Government Employees Group Insurance Scheme (CGEGIS) in the sum of Rs.9/- per month. It also shows deduction towards CGEGIS Saving in the sum of Rs.21/- per month and a sum of Rs.250/- per month deducted towards Central Government Health Scheme (CGHS). There is then a miscellaneous monthly deduction of Rs.864/-, the nature whereof is not clear from the payslip. It is the aggregate of these various deductions that go to make a gross of Rs.16,144/-.

9. To the understanding of this Court, the trivial and small sums of money deducted might be statutory and compulsory, but the provident fund subscription of Rs.15,000/- per month is a handsome elective. The statutory deduction of provident fund ex facie from a basic pay of Rs.29,300/- cannot be a figure of Rs.15,000/-.

10. During the hearing, this Court required Mr. Kushwaha to indicate the current emoluments of the second opposite

party, including deductions. He has submitted to the Court a figure of Rs.42,272/- received in gross salary. The deduction of Rs.15,000/- towards provident fund, Rs.30/- towards Insurance, Rs.250/- towards CGHS, Rs.4832/- towards house rent and an LIC premium of Rs.3013/- per month has been verified. He has placed before Court an in-hand salary of Rs.23,125/- per month. Again, ex facie, the said figures cannot be accepted. The lavish contribution towards provident fund and the LIC premium cannot reckon towards compulsory deductions or not counted towards the second opposite party's income at all. Going by a rough and ready estimate, the second opposite party would have an easy in-hand salary of Rs.35,000/- per month.

11. In the opinion of this Court, the Family Court, therefore, has erred in proceeding to determine the second opposite party's income at a figure of Rs.22,000/- per month for his mere saying. Mr. Kushwaha has drawn the Court's attention to the fact that the second opposite party has to shoulder the responsibilities of his aged father, who is said to be aged 66 years and dependent on him, besides an unmarried sister. It was said about his unmarried sister that her marriage is scheduled on 26.04.2021. It is not known if that marriage has fructified. It is true that so far as the second opposite party's father is concerned, if he is unable to maintain himself, the second opposite party would have obligation under the law to maintain him. He would, on moral parameters, have to support his sister, until she is married or starts earning for herself. Thus, in working out the entitlement of the wife, the lawful liabilities of her husband towards other dependent family members have to be borne in mind vis-a-vis his monthly income. At the same time, it has to be ensured that the wife receives a maintenance a sum that is sufficient to maintain herself by the same standard that she would enjoy in her husband's household.

12. In **Rajnesh v. Neha and another, (2021) 2 SCC 324,** their Lordships of the Supreme Court have laid down the criteria for determining the quantum of maintenance. It has been said in Rajnesh thus:

III. Criteria for determining quantum of maintenance

77. The objective of granting interim/permanent alimony is to ensure that the dependent spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded.

78. The factors which would weigh with the court inter alia are the status of the parties; reasonable needs of the wife and dependent children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife. [Refer to Jasbir Kaur Sehgal

v. District Judge, Dehradun, (1997) 7 SCC 7; Refer to Vinny Parmvir Parmar v. Parmvir Parmar, (2011) 13 SCC 112 : (2012) 3 SCC (Civ) 290]

79. In Manish Jain v. Akanksha Jain [Manish Jain v. Akanksha Jain, (2017) 15 SCC 801 : (2018) 2 SCC (Civ) 712] this Court held that the financial position of the parents of the applicant wife, would not be material while determining the quantum of maintenance. An order of interim maintenance is conditional on the circumstance that the wife or husband who makes a claim has no independent income, sufficient for her or his support. It is no answer to a claim of maintenance that the wife is educated and could support herself. The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support. Maintenance is dependent upon factual situations; the court should mould the claim for maintenance based on various factors brought before it.

80. On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependent family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able-bodied and has educational qualifications. [Reema Salkan v. Sumer Singh Salkan, (2019) 12 SCC 303 : (2018) 5 SCC (Civ) 596 : (2019) 4 SCC (Cri) 339]

81. A careful and just balance must be drawn between all relevant factors. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home. [Chaturbhuj v. Sita Bai, (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356] The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

84. The Delhi High Court in Bharat Hegde v. Saroj Hegde [Bharat Hegde v. Saroj Hegde, 2007 SCC OnLine Del 622 : (2007) 140 DLT 16] laid down the following factors to be considered for determining maintenance : (SCC OnLine Del para 8)

"1. Status of the parties.

2. Reasonable wants of the claimant.

3. The independent income and property of the claimant.

4. The number of persons, the non-applicant has to maintain.

5. The amount should aid the applicant to live in a similar lifestyle as he/she enjoyed in the matrimonial home.

6. Non-applicant's liabilities, if any.

7. Provisions for food, clothing, shelter, education, medical attendance and treatment, etc. of the applicant.

8. Payment capacity of the non-applicant.

9. Some guesswork is not ruled out while estimating the income of the non-applicant when all the sources or correct sources are not disclosed.

10. The non-applicant to defray the cost of litigation.

11. The amount awarded under Section 125 CrPC is adjustable against the amount awarded under Section 24 of the Act.

13. In **Rajnesh**, it has been held that maintenance is to be awarded from the date of application made to the Family Court, bearing in mind the total in-hand monthly salary received by the husband on the one hand and his liabilities towards other dependent family members on the other. Going by the entitlement of the wife to maintain herself by the same standard of living that she would have enjoyed in her husband's household, it would meet the ends of justice to enhance the maintenance awarded from a sum of Rs.7000/- to Rs.9000/- per month, payable from the date of application.

14. In the result, this revision, succeeds and is **allowed in part**. The impugned judgment and order passed by the Principal Judge, Family Court, Kaushambi is **modified** to the extent that the revisionist is held entitled to receive in maintenance a sum of Rs.9000/- per month, payable by the second opposite party from the date of application.

15. Let this order be communicated to the Principal Judge, Family Court, Kaushambi by the Registrar (Compliance).

16. Let the lower court records be sent down at once.

(2021)08ILR A550
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.08.2021

BEFORE

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

Criminal Revision No. 756 of 2020

Rajan @ Raja Ram & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:
Sri Nirbhay Singh, Sri A.K.S. Bais

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 326/34 , 504 & 506 - The Code of Criminal Procedure, 1973 - Section 374 - Appeals from convictions - Duties of the Appellate Court - In an appeal from a judgment of conviction, the Appellate Court is required not only to review, but re-appreciate the entire evidence on record afresh, and determine for itself, whether the prosecution have succeeded in establishing the charge against the appellant beyond reasonable doubt - Contrary to what the Appellate Court has said - if two views of the evidence are possible, certainly the Appellate Court is duty bound to take the view that favours the accused. (Para - 6)

It is a case, where the two revisionists have been tried and convicted by the Magistrate - offence punishable under Section 326 read with Section 34 IPC - acquitted by the Magistrate of

offences punishable under Sections 504 and 506 IPC - Criminal Appeal before Additional District and Sessions Judge - dismissed - affirming a judgment and order of conviction - hence criminal revision.(Para -1,3)

HELD:- Appellate Court has not yet discharged its sacrosanct duties of doing a complete independent re-appraisal of evidence, it is not for this Court to put a *terminus* to the proceedings. Case must go back to the Appellate Court for determination of the appeal afresh, after setting aside the impugned judgment. Pending appeal, the revisionists were on bail and were taken into custody when their appeal was dismissed. Not admitted to bail by this Court, pending revision and are in jail. Entitled to remain on bail, pending a re-hearing of their appeal.(Para - 7,8)

Criminal Revision partly allowed. (E-6)

List of Cases cited:-

1. Lal Mandi Vs St. of W.B., (1995) 3 SCC 603.

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

1. This criminal revision is directed against the judgment and order of Mr. Vikas Goswami, the IVth Additional District and Sessions Judge, Kasganj dated 13.01.2020, dismissing Criminal Appeal no.12 of 2018 and affirming a judgment and order of conviction and sentence passed by the Magistrate against the revisionists for an offence punishable under Section 326/34 IPC.

2. Heard Mr. A.K.S. Bais, Advocate holding brief of Mr. Nirbhay Singh, learned Counsel for the revisionists and Mr. S.S. Tiwari, learned A.G.A. appearing on behalf of the State.

3. Looking to the short point involved in this revision, it would not be apposite to set out in detail the prosecution case or the evidence. It is a case, where the two revisionists have been tried and convicted by the Magistrate for an offence punishable under Section 326 read with Section 34 IPC and sentenced to suffer rigorous imprisonment for a term of three years each and a fine of Rs.3000/-. In default, each of the revisionists have been sentenced to undergo three months' rigorous imprisonment. They were acquitted by the Magistrate of offences punishable under Sections 504 and 506 IPC.

4. The submission of Mr. A.K.S. Bais, Advocate holding brief of Mr. Nirbhay Singh, learned Counsel for the revisionists is that the Appellate Court has not discharged its duties under the Code of Criminal Procedure (for short, 'the Code') to do a wholesome review of the evidence on record and has perfunctorily upheld the conviction. Mr. S.S. Tiwari, learned A.G.A., on the other hand, has said that the Appellate Court has done a complete survey of the evidence led at the trial and expressed his concurrence with the Trial Court. Mr. Tiwari submits that being a judgment of affirmation, the Appellate Court was not required to do a detailed re-analysis or an analysis of the entire evidence on record afresh. He, therefore, supports the impugned judgment and says that there is no scope for this Court to interfere in the present revision against the concurrent judgments of the two Courts of fact below. The only point that arises for determination in this revision is about the duties of the Appellate Court under Section 374 of the Code, while hearing and determining an appeal from a judgment of conviction.

5. This Court has carefully perused the impugned judgment and the record as well. It is true that the Appellate Court has not done any reassessment of evidence

afresh, but has merely surveyed it. That the Appellate has done by detailing the evidence in the judgment. There is hardly any appraisal done by the Appellate Court to find out for itself, whether the prosecution have successfully established the charge against the revisionists, of which they have been convicted by the Trial Court. Rather, the Appellate Court has expressed its agreement with the Magistrate with remarks to the effect that a criminal appeal can be accepted only if it is shown that the Trial Court has committed any error of fact or law that is manifest, or ignored evidence on record and passed a wrong and illegal order. The Appellate Court has further remarked that a criminal appeal cannot be allowed solely on the ground that a different view of the evidence is possible. The crux of the learned Sessions Judge's determination in appeal is expressed in the following words in the judgment impugned:

"यह विधि का सुस्थापित सिद्धान्त है कि किसी अपील में, अपील का निस्तारण करने के समय अपील तभी स्वीकार की जा सकती है जब विद्वान अवर न्यायालय के आदेश में ऐसी कोई गलती, विधि तथ्यों की स्पष्टतः दर्शित हो कि पत्रावली पर उपलब्ध साक्ष्य को अनदेखा करके गलत व अवैध रूप से आदेश पारित किया गया केवल इस आधार पर कि उपलब्ध साक्ष्य के आधार पर दूसरा दृष्टिकोण भी सम्भव है। इस आधार पर अपील स्वीकार नहीं की जा सकती।"

6. The way, the Appellate Court has opined about the law relating to the duties of the Appellate Court, while hearing an appeal from a judgment of conviction, it has gone utterly wrong. In an appeal from a judgment of conviction, the Appellate Court is required not only to review, but re-appreciate the entire evidence on record afresh, and determine for itself, whether the prosecution have succeeded in establishing the charge against the appellant beyond reasonable doubt. Contrary to what the Appellate Court has said, if two views of the evidence are possible, certainly the Appellate Court is duty bound to take the view that favours the accused. This is in keeping with the presumption of innocence of the accused and the jurisdiction that Court exercises in an appeal from conviction, where the entire case is at large for a plenary re-appraisal. The parameters, by which the Appellate Court has judged the revisionists' appeal, would be those applicable to a Court of revision or may be to the Appellate Court in some measure, if it were hearing an appeal from a judgment of acquittal; not of conviction. In this connection, reference may be made to the decision of the Supreme Court in **Lal Mandi v. State of W.B., (1995) 3 SCC 603. In Lal Mandi**, it has been held by their Lordships:

"5. To say the least, the approach of the High Court is totally fallacious. In an appeal against conviction, the appellate court has the duty to itself appreciate the evidence on the record and if two views are possible on the appraisal of the evidence, the benefit of reasonable doubt has to be given to an accused. It is not correct to suggest that the "Appellate Court cannot legally interfere with" the order of conviction where the trial court has found the evidence as reliable and that it cannot substitute the findings of the Sessions Judge by its own, if it arrives at a different conclusion on reassessment of the evidence. The observation made in Tota Singh case [(1987) 2 SCC 529 : 1987 SCC (Cri) 381 : AIR 1987 SC 1083] , which was an appeal against acquittal, have been

misunderstood and mechanically applied. Though, the powers of an appellate court, while dealing with an appeal against acquittal and an appeal against conviction are equally wide but the considerations which weigh with it while dealing with an appeal against an order of acquittal and in an appeal against conviction are distinct and separate. The presumption of innocence of an accused which gets strengthened on his acquittal is not available on his conviction. An appellate court may give every reasonable weight to the conclusions arrived at by the trial court but it must be remembered that an appellate court is duty-bound, in the same way as the trial court, to test the evidence extrinsically as well as intrinsically and to consider as thoroughly as the trial court, all the circumstances available on the record so as to arrive at an independent finding regarding guilt or innocence of the convict. An appellate court fails in the discharge of one of its essential duties, if it fails to itself appreciate the evidence on the record and arrive at an independent finding based on the appraisal of such evidence....."

7. In the opinion of this Court, the Appellate Court has gone utterly wrong about the standard, by which it had to judge the revisionists' appeal. The impugned judgment cannot, therefore, be sustained. However, since the Appellate Court has not yet discharged its sacrosanct duties of doing a complete independent re-appraisal of evidence, it is not for this Court to put a terminus to the proceedings. The case must go back to the Appellate Court for determination of the appeal afresh, after setting aside the impugned judgment. It must also be noticed that pending appeal, the revisionists were on bail and were taken into custody when their appeal was dismissed. They were not admitted to bail by this Court, pending revision and are in jail. They are entitled to remain on bail, pending a re-hearing of their appeal, upon furnishing such bail bonds and sureties as the Appellate Court may direct, and which the Appellate Court shall do forthwith.

8. In the result, this revision succeeds and is **allowed in part**. The impugned judgment and order dated 13.01.2020 passed by the learned IVth Additional District and Sessions Judge, Kasganj in Criminal Appeal no.12 of 2018 is hereby set **aside**. The appeal shall stand restored to the file of the Appellate Court with a direction to re-hear and determine the appeal within six months next, in accordance with law. Pending appeal, the revisionists shall be released on bail forthwith on furnishing such bail bonds and sureties as the Appellate Court may direct.

9. Let a copy of this judgment be certified to the Appellate Court by the office and also communicated by the Registrar (Compliance).

10. Let the lower court records be sent down at once.

(2021)08ILR A553
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.08.2021

BEFORE

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

Criminal Revision No. 864 of 2020

Hansraj Yadav ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
Sri Neeraj Kumar Srivastava, Sri Pankaj Kumar

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 489B, 489C - Revision - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 12,101 - exceptions to the rule of bail for a juvenile - apprehension about the juvenile coming into contact with known criminals - Postulates an amalgam of the many undesirable consequences that would ensue in case the juvenile, in a given situation were released on bail - include an offence of grave enormity, where release of the juvenile on bail might have adverse impact on the society.(Para -12)

Revisionist apprehended in connection with crime - joint operation by Anti Terrorism Squad and the Station House Officer - carrying blue-coloured bag - search of the bag - led to recovery of fake Indian currency - First Information Report - revisionist confessed - Revisionist moved the Board - Board declared juvenile - moved Board seeking bail - bail rejected - appeal before the Sessions Judge - dismiss the same and affirmed the Board - Aggrieved, this Revision has been instituted.(Para - 1,2,3,4)

HELD:-Social Investigation Report, shows that revisionist is a dropout from school and has discontinued his studies after Class VIII. No evidence or material indicating the revisionist's gainful or productive employment in life so far. His siblings appear to be better educated, but the typical circumstances in which the revisionist is placed could make him a possible victim of known criminals to hire at the dawn of youth. In these circumstances, if the revisionist were enlarged on bail, the possibility that he would come into contact or resume contact with known criminals cannot be ruled out. No inference with the orders made by the Courts below is required.(Para - 11,13,14)

Criminal Revision dismissed. (E-6)

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

This Revision is directed against an order of Mr. Gaurav Kumar Srivastava, the then Additional District and Sessions Judge, Chandauli dated 05.02.2020, passed in Criminal Appeal No. 5 of 2020, dismissing the appeal and affirming an order of the Juvenile Justice Board, Chandauli1 dated 21.01.2020, refusing bail pending trial to the revisionist in Case Crime No. 222 of 2018, under Sections 489B, 489C of the Indian Penal Code, 18602, Police Station - Chakia, District - Chandauli.

2. The revisionist was apprehended in connection with the aforesaid crime in a joint operation by the Anti Terrorism Squad and the Station House Officer, Police Station Chakia, District Chandauli, on 17.10.2018 at 03:00 p.m. in the afternoon, while he was proceeding on board a three-wheeler. He was apprehended at the Saidullahpur Trijunction, by the joint police party, acting on a tip off from an informer. He was carrying a blue-coloured bag. The search of the bag, going by prior information, led to recovery of fake Indian currency worth Rs. 3,40,000/-. The First Information Report3 details that the revisionist confessed that he had collected the currency from Farakka, Bihar, travel led to Patna, and thence to Mugalsarai.

3. The revisionist moved the Board for a declaration that he was a child in conflict with law. The Board, after necessary inquiry, declared the revisionist a juvenile vide order dated 14.01.2020, aged about 15 years, one month and eighteen days on the date of occurrence. The revisionist then moved the Board seeking bail. The Board rejected the bail plea vide order dated 21.01.2020. The revisionist appealed the Board's order to the learned Sessions Judge, Chandauli under Section

101 of the Juvenile Justice (Care and Protection of Children) Act, 20154. The appeal before the Sessions Judge was numbered as Criminal Appeal No. 5 of 2020. It came up for determination before the learned Sessions Judge, Chandauli, who proceeded to dismiss the same and affirmed the Board.

4. Aggrieved, this Revision has been instituted.

5. Heard Mr. Neeraj Kumar Srivastava, learned Counsel for the revisionist and Mr. Shashi Shekhar Tiwari, learned Additional Government Advocate for the State of Uttar Pradesh.

6. During the course of hearing, it was strenuously argued by Mr. Srivastava that the juvenile was made a scapegoat. He was apprehended while he was travelling on board train at the Mugalsarai Junction by the Police and was challaned in connection with the present crime. There appeared to be something intriguing about the revisionist's apprehension that was spelt out by the fact that the FIR was registered with a delay of five hours. There was no reason for the FIR to be delayed by five hours in a matter where the first informant was the Station House Officer of the Police Station where report was registered. There is seemingly no explanation for this delay. It is on this account that the revisionist was summoned by the Court. He stated before the Court that he was passing through Mugalsarai Junction on board a train, being a runaway from home. He had left home after being thrashed by his father. Mr. Srivastava insists that it is a case of patent false implication, where someone caught with fake currency has been allowed to go scot-free and instead, the revisionist, an innocent boy, has been framed by the Police.

7. Mr. Tiwari, the learned A.G.A., on the other hand, has stoutly opposed the bail plea. He submits that the revisionist has been apprehended carrying the currency, and there is no reason why the revisionist would be chosen as a target for false implication. Even otherwise, he submits that there is no reason to frame an innocent person in a case of recovery of fake currency.

8. This Court has perused the impugned orders, the material available on record and considered the submissions advanced by learned Counsel on both sides.

9. Generally speaking, the revisionist, being a child in conflict with law, who has been found by the Board to be aged 15 years and one month, the universal rule of bail postulated under Section 12 of the Act of 2015 would come to his infallible aid, unless the case fell in one or the other exceptions to the rule postulated under the proviso to Section 12 (1) of the Act. Section 12 (1) reads :

12. **Bail to a person who is apparently a child alleged to be in conflict with law.—**

(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, shall be released on bail with or without surety or

placed under the supervision of a probation officer or under the care of any fit person :

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

10. It has to be borne in mind that there is substantial recovery of fake currency from the revisionist's possession, which has to be believed at this stage. An offence relating to fake currency, where the revisionist has been challaned under Sections 489B and 489C of the Penal Code, is a very serious offence, affecting the country's economy and national security. It could be a very small tentacle of a hydra-headed monster, involving infiltration of the country's economy with fake currency. Offences relating to currency and coinage have always been regarded to be so serious that these are made punishable at the stage of preparation. In the current scenario, they have assumed alarming dimensions, because these could be connected to further more dreadful crimes of terrorism etc. This Court does not wish to suggest that the revisionist is indeed involved in some heinous offence or even the present crime. Whatever is said here is limited to judge the bail plea. These remarks have been made in the context that the crime of which the revisionist is accused, is far too serious to be passed off for another heinous offence. At the same time, the law relating to bails governing children in conflict with law does envisage bail as a rule.

11. It is strenuously urged on behalf of the revisionist that howsoever serious the gravity of the offence, it is quite irrelevant to judge a juvenile's bail plea. This Court does not think so. The reason is that one of the exceptions to the universal rule of bail for juveniles is the case where grant of bail would lead to ends of justice being defeated. Now, ends of justice being defeated is not a word of art. It postulates an amalgam of the many undesirable consequences that would ensue in case the juvenile, in a given situation were released on bail. It would also include an offence of grave enormity, where release of the juvenile on bail might have adverse impact on the society.

12. There are other exceptions to the rule of bail for a juvenile. One of them is apprehension about the juvenile coming into contact with known criminals. Here, the juvenile being charged with carrying counterfeit currency, it is but logical to assume at this stage that he is in contact with some known criminals. At his age, it is, by no means, possible to infer that he would have printed the currency himself or be the kingpin of a racket involving fake currency. There is every likelihood that he is part of a gang or in contact with some known criminals, who have employed him as a carrier. The fact that he has no criminal history would make him an ideal choice for a hardened criminal, involved in a racket of fake currency.

13. There is one more feature which must not escape mention. The Social Investigation Report, amongst other things, shows that the revisionist is a dropout from school and has discontinued his studies after Class VIII. There is no evidence or material indicating the revisionist's gainful or productive employment in life so far.

Though his siblings appear to be better educated, but the typical circumstances in which the revisionist is placed could make him a possible victim of known criminals to hire at the dawn of youth. In these circumstances, if the revisionist were enlarged on bail, the possibility that he would come into contact or resume contact with known criminals cannot be ruled out.

14. Considering the entirety of circumstances, this Court is of opinion that no inference with the orders made by the Courts below is required.

15. In the result, this Revision **fails** and stands **dismissed.**

(2021)08ILR A557
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.07.2021

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Criminal Revision No. 916 of 1988

S.P. Mathur ...Revisionist
Versus
Sri R.P. Sharma & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri R.P. Sharma, Sri Harish Chandra Mishra, Sri S.G. Vinod Sinha, Sri Samit Gopal, Sri V.Saran, Sri Vinod Sinha, Sri Virendra Saran, Sri G.S. Chaturvedi, Sri V.P. Srivastava

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

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 245 (2) – Revision - Prevention of Food Adulteration Act,1954 - Section 7/16, 17, 17(1) (a) and (b), 17(2) - for maintaining the Complaint under Section 7/16 of the Act, 1954, "Company" is necessary party and no Complaint is maintainable until "Company" is made party - pure question of law or legal issue based on undisputed or proven facts can be raised at any stage even before the Court of last resort.(Para - 23,28)

Complaint was filed against the revisionist - Company is manufacturer of rath vanaspati - revisionist was accused in the capacity of sales manager D.C.M. Chemicals Firm - " Company" is not arrayed as accused - order passed for framing charges against revisionist - revisionist filed discharge application - ground - provision of section 17 of the Act 1954 has not been complied with - as company was not made the accused - discharge application rejected by the court below - hence the present revision .

HELD:- Non compliance of Section 17(1)(b) of the Act, 1954 is pure legal issue going to the root of the case based on undisputed and proven facts and can be raised at any stage of legal proceeding. In light of Section 17(1)(b) of the Act, 1954, "Company" is necessary party and no Complaint under Section 7/16 of the Act, 1954 can be maintained or order can be passed against the revisionist without impleading the "Company" as accused. Therefore, Complaint dated 22.08.1984 filed under Section 7/16 of the Act, 1954 as well as impugned order dated 16.05.1988 is not sustainable. (Para - 28,31)

Discharge application & Criminal Revision allowed. (E-6)

List of Cases cited:-

1. B.K. Varma Vs Corp. of Madras, 1971 CRI. L.J. 60 (Vol. 77 C. N.15)

2. N.N. Mukerjee & ors. Vs The St. of U.P. & anr., Criminal Reference No. 645 of 1974

3. The St. Vs R. P. Mehta, 1982 CRI. L. J. NOC 159 (ALL.)

4. Sharad Kumar Sanghi Vs Sangita Rane, 2015 0 Supreme (SC) 177

5. Sushil Sethi & anr. Vs The St. of A.P. & ors., 2020 0 Supreme (SC) 100

6. Hindustan Unilever Ltd. Vs The St. of M. P., 2021 (218) AIC 246

7. Gurucharan Singh Vs Kamla Singh & ors., 1977 AIR, 5

8. G.M. Contractor Vs Gujarat Electricity Board, 1972 AIR (SC) 792

9. Rajendra Shankar Shukla & ors. Vs St. of Chhatisgarh & ors., (2015) 10 SCC 400

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

1. Heard Sri V.P. Srivastava, learned Senior Counsel, assisted by Sri Harish Chandra Mishra, learned counsel for the revisionist and Sri Sanjay Sharma and Ajay Kumar Pathak, learned A.G.A. for the State.

2. Present revision has been filed against the order dated 16.05.1988 passed by Munsif Magistrate (Economic Offences), Bijnor in Criminal Case No. 1578 of 1986 directing for framing of charges against revisionist under Section 7/16 of Prevention of Food Adulteration Act,1954 (hereinafter referred to as the Act, 1954).

3. Brief facts of the case is that revisionist was working as Deputy Sales Manager D.C.M. Chemical Works, Najafgarh Road, New Delhi-10005, (Later on known as Shri Ram Foods and Fertilizer Industries, Shivaji Marg, New Delhi), Branch Delhi Cloth Mills Ltd. (hereinafter referred to as the "Company"). A raid was conducted by Food Inspector at the shop of Babu Singh. He has purchased Rath vegetable oil weighing 1500 grams/1.5 kilograms after payment of Rs. 27/- by adopting due procedure of law. Rath Vegetable oil was manufactured by "Company". He has sent Rath vegetable oil to Public Analyst U.P., Lucknow for chemical examination and as per report no. 2588 dated 24.02.1984, same was found adulterated. Thereafter, he has lodged Complaint before the Special Judicial Magistrate (Crime), Bijnor under the provisions of the Act, 1954. Order dated 16.05.1988 was passed for framing charges against revisionist and revisionist filed discharge application under Section 245(2) Cr.P.C. dated 19.01.1988. Apart from many other grounds, he has also taken ground that provisions of Section 17 of the Act, 1954 has not been complied with as "Company" was not made the accused. The said discharge application was rejected by the Court below vide order dated 16.05.2018, hence the present revision.

4. Sri V.P. Srivastava, learned Senior Counsel for the revisionist submitted that present revision has been filed on many grounds, but he is pressing only ground no. 5 i.e. while filing the Complaint, Section 17 of the Act, 1954 has been violated as the "Company" has not been made an accused and mandatory provision under Section 17 (1) (b) of the Act, 1954 has been violated. Section 17(1)(a) of the Act, 1954 provides for nomination of a person and Section 17(1)(b) provides liability upon Company, therefore, Section 17(1) (a) and (b) of the Act, 1954 requires that the nominated person and the Company must be made an accused. It is further submitted that Section 17(1) (a) of the Act, 1954 provides that there should have been nomination of person for the conduct of the business of the Company and when no person is nominated, every person who at the time

the offence was committed was in charge of, be responsible for the conduct of business of the Company. Further Section 17(1)(b) provides that the Company responsible for offence and further made clear that in case of offence persons referred in Section 17(1) (a), they shall be liable to be guilty. It is next submitted that Section 17 (2) provides that any Company may, by order in writing, authorize any of its directors or managers (such manager being employed mainly in a managerial or supervisory capacity) to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission of offence by Company by this Act and may give notice to the Local (Health) Authority, in such form and in such manner as may be prescribed, that it has nominated such director or manager as the person responsible, alongwith the written consent of such director or manager for being so nominated.

5. In the present case, revisionist was never nominated in terms of Section 17(1) and (2) of the Act, 1954 and "Company" has also not been made accused, therefore, Complaint is bad and impugned order is liable to be set aside.

6. It is next submitted that while rejecting the discharge application dated 19.01.1988, learned Judge has not returned proper finding and stated that the said provision is directory, which according to Section 17 of the Act, 1954 is incorrect as it is mandatory. Therefore, it is necessarily required for the Complainant to make "Company" as accused and also mention this fact in the Complaint filed before the Special Judicial Magistrate (Crime), Bijnor, which is missing and not considered by the Court below.

7. In support of his contention, learned Senior Counsel for the revisionist has placed reliance upon the judgments of Apex Court and this Court in the cases of ***B.K. Varma Vs. Corporation of Madras, 1971 CRI. L.J. 60 (Vol. 77 C. N.15), N.N. Mukerjee and others Vs. The State of U.P. and another, passed in Criminal Reference No. 645 of 1974 decided on 16.2.1979, The State Vs. R. P. Mehta, 1982 CRI. L. J. NOC 159 (ALL.), Sharad Kumar Sanghi Vs. Sangita Rane, 2015 0 Supreme (SC) 177, Sushil Sethi and another Vs. The State of Arunachal Pradesh and others, 2020 0 Supreme (SC) 100 and Hindustan Unilever Limited Vs. The State of Madhya Pradesh, 2021 (218) AIC 246*** and submitted that once "Company" has not been made accused, impugned order is bad and liable to be set aside.

8. Sri Sanjay Sharma, learned A.G.A. opposed the submissions made by learned Senior Counsel for the revisionist and submitted that in discharge application revisionist has never taken this ground that revisionist is not the nominee as provided in Section 17(1) and (2) of the Act, 1954, but in the present revision, he accepted this fact that he is nominee of the "Company" and revision has been filed by him as S.P. Mathur, nominee, D.C.M. Chemical Works Nazaf Road, New Delhi, later on known as Shri Ram Food and Fertilizers Industry , Shiva Ji Marg, New Delhi. Not only this, even in the impugned order in the first line, he was shown as nominee of the "Company", which is not disputed by learned counsel for the revisionist even before this Court. It is further submitted that Section 17(1) of the Act, 1954 clearly provides that in case there is nominee, by making him accused, proceeding may be initiated and learned Judge, while rejecting

the discharge application, has given specific finding that as provided in Section 17 of the Act, 1954 for prosecution, "Company" or his nominee can be made accused. It is not required to implead "Company" also as accused. He further submitted that in case not impleading "Company" as accused of offence, there would be no effect upon trial of the prosecution case. So far as the word used directory is concerned, once the finding is given by the court that revisionist is nominee that would have no effect as the learned Judge has not ignored the provisions of Section 17 of the Act, 1954.

9. It is next submitted that new legal submissions made by learned Senior Counsel for the revisionist is not applicable in the case of the revisionist as first of all, he should dispute his nomination for "Company", but he never raised objection before the Court below or even before the High Court. In contrary to that, he accepted this fact that he is nominee of the "Company". It is also submitted that once the revisionist has accepted that he is nominee of the "Company", Section 17 of the Act, 1954 has been complied with. Further, he has never pressed or argued this ground that Section 17(1)(b) has not been complied with. Therefore, in the impugned order there is no illegality or perversity and the revision is liable to be dismissed.

10. Sri V.P. Srivastava, learned Senior Counsel in rejoinder argument submitted that though revisionist has not taken ground that he is not the nominee of the "Company", but he has taken specific ground in paragraph 3 of the discharge application dated 19.01.1988 moved under Section 245 (2) Cr.P.C. that Sri Ram Food and Fertilizer Industry is "Company" and provisions of Section 17 of the Act, 1954 is applicable in the present case. Perusal of Section 17(a)(b) of the Act would show that in case of prosecution, "Company" is pre-requisite condition and if "Company" is not arrayed as accused, prosecution of the "Company" is bad in law. He further submitted that in case it is admitted by the revisionist that he is nominee of the "Company", even though it is statutory requirement on the part of Complainant to make "Company" accused. Even in case, if this plea has not been taken in discharge application, its a legal plea can be taken at any stage of legal proceeding and there is no bar under the law.

11. In support of his contention, learned Senior Counsel for the revisionist has placed reliance upon the judgments of Apex Court in the cases of ***Gurucharan Singh Vs. Kamla Singh and others, 1977 AIR, 5, G.M. Contractor Vs. Gujarat Electricity Board, 1972 AIR (SC) 792 and Rajendra Shankar Shukla and others Vs. State of Chhatisgarh and others, (2015) 10 Supreme Court Cases 400.***

12. I have considered the rival submissions made by learned counsel for the parties and perused the paper book and other relevant documents as well as judgments relied upon by learned counsel for the parties.

13. From perusal of the record, there is no dispute that Complaint was filed against the revisionist under Section 7/16 of the Act, 1954 and also "Company" is manufacturer of Rath Vanaspati. Revisionist was made accused in the capacity of Sales Manager D.C.M. Chemicals Firm, Najafgarh Road, New Delhi. Once proceeding has been initiated under Section 7/16 and Section 17 of the Act, 1954 revisionist in the capacity of

Sales Manager of the "Company" has been made accused, there is no occasion for the Complainant to done away with other provisions of Section 17 of the Act, 1954 including accusation of "Company".

14. Section 17 of the Act, 1954 deals with the offence of the Company which is quoted below:-

"[17. Offences by companies.--(1) Where an offence under this Act has been committed by a company –

(a) (i) the person, if any, who has been nominated under sub-section (2) to be in charge of, and responsible to, the company for the conduct of the business of the company (hereafter in this section referred to as the person responsible), or

(ii) where no person has been so nominated, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company; and (b) the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of such offence.

(2) Any company may, by order in writing, authorise any of its directors or managers (such manager being employed mainly in a managerial or supervisory capacity) to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under this Act and may give notice to the Local (Health) Authority, in such form and in such manner as may be prescribed, that it has nominated such director or manager as the person responsible, along with the written consent of such director or manager for being so nominated. Explanation.--Where a company has different establishments or branches or different units in any establishment or branch, different persons may be nominated under this sub-section in relation to different establishments or branches or units and the person nominated in relation to any establishment, branch or unit shall be deemed to be the person responsible in respect of such establishment, branch or unit.

(3) The person nominated under sub-section (2) shall, until—

(i) further notice cancelling such nomination is received from the company by the Local (Health) Authority; or

(ii) he ceases to be a director or, as the case may be, manager of the company; or

(iii) he makes a request in writing to the Local (Health) Authority, under intimation to the company, to cancel the nomination [which request shall be complied with by the Local (Health) Authority], whichever is the earliest, continue to be the person responsible: Provided that where such person ceases to be a director or, as the case may be, manager of the company, he shall intimate the fact of such cesser to the Local (Health) Authority: Provided further that where such person makes a request under clause (iii), the Local (Health) Authority shall not cancel such nomination with effect from a

date earlier than the date on which the request is made.

(4) Notwithstanding anything contained in the foregoing sub-sections, where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company [not being a person nominated under sub-section (2)] such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.--For the purposes of this section—

(a) "Company" means any body corporate and includes a firm or other association of individuals;

(b) "director", in relation to a firm, means a partner in the firm; and

(c) "manager", in relation to a company engaged in hotel industry, includes the person in charge of the catering department of any hotel managed or run by it.]"

15. Section 17(1)(b) clearly provides that the "Company", shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Therefore, in case, it is admitted by revisionist that he is nominee of the "Company" under the provisions of Section 17(1)(a) of the Act, 1954, even though it is required on the part of the Complainant to make "Company" accused as provided under Section 17(1)(b) of the Act, 1954. Therefore in light of provisions of Section 17 (1)(b) of the Act, "Company" is necessary party and no Complaint can be maintained without impleading "Company" as accused.

16. This issue was considered by the Apex Court and this High Court in different cases.

17. In the matter of ***B.K. Varma (supra***), very similar matter came up before the Court and the Court has held that Complaint must have been filed against the "Company" and then against the person against whom they could proceed under Section 17 (1) and (2) of the Act, 1954. Finally Court allowed the revision in favour of the revisionist. Paragraph 4 of the said judgment is quoted below:-

"4. It is, therefore, clear from Sec. 17, that under clause (1) if the offence was committed by the Company, the Company as well as the person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the Company, and under clause (2) if the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other officer of the Company, such persons mentioned therein shall be liable to be proceeded against and punished. The prosecution, therefore, must have filed a complaint, against the Company first and then against the persons against whom they could proceed under Section 17(1) and (2) of the Act. It is, therefore, clear from the complaint itself that the revision petitioner has been prosecuted not in his individual capacity as a vendor but in the capacity of a person employed by the firm as the Plant Superintendent.

"There is nothing on record to show, as suggested by the learned counsel

for the petitioner, that the Plant Superintendent was a person responsible or in charge of or responsible to the manufacture or sale of Coca-Cola. In this statement under Section 342, Crl. P. C. the petitioner stated that he was only responsible for the bottling of the liquid and for nothing else. In this circumstance, it is doubtful whether the revision petitioner was in charge of the firm in respect of the manufacture or sale of Coca-Cola. He will however, be entitled to the benefit of doubt. Apart from this, I am of the view that this is a case where Section 95 I.P.C., can be applied, taking into consideration nature of the offence committed Sec. 95 I.P.C. reads thus:

"Nothing is an offence by reason that it cause or that it is intended to cause or that it is known to be likely to cause, any harm, if that harm, is so slight that no person of ordinary sense and temper would complain of such a harm."

18. In the case of ***N.N. Mukerjee (supra***), the Court has held that Company is required to be impleaded. Paragraph 3 of the said judgment is quoted below:-

"3. I have carefully perused the complaint, which was filed as for back as 8th November, 73. I do not find any allegation herein whether the accused apart from Shri Prem Chandra Jaiswal were persons, who were incharge of or responsible for the conduct of the business of the Company, or whether the offence in question was committed with the consent or connivance of these officers. I also find that the Company has not been impleaded as a party. The Sessions Judge, Allahabad has in fact recommended the removal of the infirmities in the complaint after quashing the order of the Magistrate issuing process. I do not think such an action would be justified in the interest of justice, particularly when a long period of six years has already elapsed, since the offence is alleged to have Been committed. The order passed by the Magistrate taking cognizance was an illegal order. The failure of the complainant to implead the company is the vital defect. The allegations against the other co-accused are wanting requisite particulars. In these circumstances, I consider that while the recommendation of the Sessions Judge for quashing the order of the Magistrate should be accepted, the entire proceedings under section 7/16 of the Prevention of Food Adulteration Act should be quashed."

19. Lucknow Bench of this Court in the case of ***The State Vs. R.P. Mehta (supra)*** has given clear cut finding that the prosecution of the Company is a pre-condition. The relevant paragraph of the said judgment is quoted below:-

"Where a sample of ice candy found to be adulterated by prohibited saccharin was taken for inspection from the manufacturing firm before it reached the sale-section the prosecution of the partner in charge before whom the sample was taken, without making the firm a party, was illegal. A partnership firm is included in the definition of a company as per explanation attached to Sec. 17 (4) of the Act. The prosecution of the company is a pre-condition before the partner also could be convicted irrespective of whether he is in charge of the company firm or not, especially where the produce, when the sample was taken, was not on sale thus ruling out the prosecution of the partner as its "vendor".

20. The Apex Court in the case of ***Sharad Kumar Sanghi (supra)*** after considering the matter given specific

finding that if the Company has not been arrayed as accused, no order could have been passed. Paragraphs 13 and 14 of the said judgment are quoted below:-

"13. When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant.

14. The appeal stands allowed accordingly."

21. The Apex Court in the case of ***Sushil Sethi and another (supra)*** was of the opinion that main allegation can be said to be against the Company, but Company has not been made party. In that case impugned criminal proceedings are required to be quashed. Paragraph 8.2 of the said judgment is quoted below:-

"8.2. It is also required to be noted that the main allegations can be said to be against the company. The company has not been made a party. The allegations are restricted to the Managing Director and the Director of the company respectively. There are no specific allegations against the Managing Director or even the Director. There are no allegations to constitute the vicarious liability. In the case of Maksun Saiyed v. State of Gujarat (2008) 5 SCC 668, it is observed and held by this Court that the penal code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the company when the accused is the company. It is further observed and held that the vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. It is further observed that statute indisputably must contain provision fixing such vicarious liabilities. It is further observed that even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability. In the present case, there are no such specific allegations against the appellants being Managing Director or the Director of the company respectively. Under the circumstances also, the impugned criminal proceedings are required to be quashed and set aside".

22. Similar issue again came up before the Apex Court in the case of ***Hindustan Unilever Limited (supra).*** Paragraph 22 of the said judgment is quoted below:-

"22. Clause (a) of Sub-Section (1) of Section 17 of the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of Sub-Section (1) of Section 17 of the Act. Therefore, there is no material distinction between Section 141 of the NI Act and Section 17 of the Act which makes the Company as well as the Nominated Person to be held guilty of the offences and/or liable to be proceeded and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint. Therefore, in the absence of the Company, the Nominated Person cannot be convicted or

vice versa. Since the Company was not convicted by the trial court, we find that the finding of the High Court to revisit the judgment will be unfair to the appellant/Nominated Person who has been facing trial for more than last 30 years. Therefore, the order of remand to the trial court to fill up the lacuna is not a fair option exercised by the High Court as the failure of the trial court to convict the Company renders the entire conviction of the Nominated Person as unsustainable".

23. From the perusal of the aforesaid judgments, it is crystal clear that for maintaining the Complaint under Section 7/16 of the Act, 1954, "Company" is necessary party and no Complaint is maintainable until "Company" is made party.

24. So far as second issue with regard to raising new legal plea at this stage is concerned, this issue has came up before the Apex Court in a catena of decisions.

25. Apex Court in the case of ***Gurucharan Singh (supra)*** has held that a pure question of law going to the root of the case and based on undisputed or proven facts could be raised even before the Court of last resort. Paragraphs 8 and 9 of the said judgment are quoted below:-

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

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

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

applicability of s.6 of the Act to the circumstances of the present case."

26. In the case of ***G.M. Contractor (supra),*** Apex Court has taken the same view. Paragraph 2 of the said judgment is quoted below:-

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

27. In the case of ***Rajendra Shankar Shukla and others (supra),*** this issue was again came before Apex Court and after considering the judgments of the Privy Council as well as Apex Court, the Court has taken the same view that legal plea can be raised at any stage of proceeding even before the Court of last resort. Paragraphs 28, 29, 30, and 31 of the said judgment are quoted below:-

"28. We are not able to agree with the contention of the respondent that a ground raised before this Court for the first time is not maintainable because it has been raised before us for the first time and has not been raised before the courts below. Though the said legal plea is raised for the first time in these proceedings, the learned senior counsel on behalf of the appellants placed reliance upon the judgment of the Privy Council In Connecticut Fire Insurance Co. v. Kavanagh wherein, Lord Watson has observed as under: (AC p.480)

"....when a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea."

The aforesaid views of the Court of Appeal have been relied upon by this Court in Gurcharan Singh v. Kamla Singh.

29. The above mentioned aspect of Article 243ZD, although is being raised before this Court for the first time, we are of the view that the same is based on admitted facts. The legal submission made on behalf of the appellants under Article 243ZD of the Constitution has to be accepted by this Court in view of the similar view that a new ground raising a pure question of law can be raised at any stage before this Court as laid down by this Court in V.L.S. Finance Limited v. Union of India & Ors. which reads thus :- (SCC p. 281 para 7)

"7. Mr Shankaranarayanan has taken an extreme stand before this Court and contends that the Company Law Board has no jurisdiction to compound an offence punishable under Section 211(7) of the Act as the punishment provided is imprisonment also. Mr Bhushan, however, submits that imprisonment is not a mandatory punishment under Section 211(7) of the Act and, hence, the Company Law Board has the authority to compound the same. He also points out that this submission was not at all advanced before the Company Law Board and, therefore, the appellant cannot be permitted to raise this question for the first time before this Court. We are not in agreement with Mr Bhushan in regard to his plea that this question cannot be gone into by this Court at the first instance. In our opinion, in a

case in which the facts pleaded give rise to a pure question of law going to the root of the matter, this Court possesses discretion to go into that. The position would have been different had the appellant for the first time prayed before this Court for adjudication on an issue of fact and then to apply the law and hold that the Company Law Board had no jurisdiction to compound the offence."

30 Further, this Court in Greater Mohali Area Development Authority & Ors. v. Manju Jain & Ors held as under :- (SCC pp. 164-65, paras 26-27)

"26. Respondent 1 raised the plea of non-receipt of the letter of allotment first time before the High Court. Even if it is assumed that it is correct, the question does arise as to whether such a new plea on facts could be agitated before the writ court. It is settled legal proposition that pure question of law can be raised at any time of the proceedings but a question of fact which requires investigation and inquiry, and for which no factual foundation has been laid by a party before the court or tribunal below, cannot be allowed to be agitated in the writ petition. If the writ court for some compelling circumstances desires to entertain a new factual plea the court must give due opportunity to the opposite party to controvert the same and adduce the evidence to substantiate its pleadings. Thus, it is not permissible for the High Court to consider a new case on facts or mixed question of fact and law which was not the case of the parties before the court or tribunal below. [Vide State of U.P. v. Dr. Anupam Gupta, Ram Kumar Agarwal v. Thawar Das, Vasantha Viswanathan v. V.K. Elayalwar, Anup Kumar Kundu v. Sudip Charan Chakraborty, Tirupati Jute Industris (P) Ltd. v. State of W.B. and Sanghvi Reconditioners (P) Ltd. v. Union of India.]

27. In the instant case, as the new plea on fact has been raised first time before the High Court it could not have been entertained, particularly in the manner the High Court has dealt with as no opportunity of controverting the same had been given to the appellants. More so, the High Court, instead of examining the case in the correct perspective, proceeded in haste, which itself amounts to arbitrariness. (Vide Fuljit Kaur v. State of Punjab.)"

31. In National Textile Corporation Ltd. v. Naresh Kumar Badrikumar Jugad, it was held as under:- (SCCp.706, para 19)

"19. There is no quarrel with the settled legal proposition that a new plea cannot be taken in respect of any factual controversy whatsoever, however, a new ground raising a pure legal issue for which no inquiry/proof is required can be permitted to be raised by the court at any stage of the proceedings. [See Sanghvi Reconditioners (P) Ltd. v. Union of India and Greater Mohali Area Development Authority v. Manju Jain.]"

28. In light of judgments of Apex Court discussed hereinabove, answer of the second issue is that non compliance of Section 17(1)(b) of the Act, 1954 is pure legal issue going to the root of the case based on undisputed and proven facts and can be raised at any stage of legal proceeding. It is further held that pure question of law or legal issue based on undisputed or proven facts can be raised at any stage even before the Court of last resort.

29. I have perused the Complaint dated 19.01.1988. In the Complaint revisionist has been made accused only for the reason that he was Sales Manager of the "Company" and there is no allegation against him which clearly shows that he was made party only following the provisions of Section 17(1) of the Act, 1954, therefore, it is also required for the Complainant to make "Company" accused following the provisions of Section 17(1)(b) of the Act, 1954. In paragraph 3 of the discharge application, revisionist had taken specific ground that prosecution of the "Company" is the prerequisite condition and if the "Company" is not arrayed as an accused, the prosecution would be bad in law and vitiates the entire trial. In discharge application, there is also reference of cases 1979 FACI 251 (All), 1971 Cr.L.J. 60 (Madras) and 1982 Cr.L.J. 159 (N.O.C.) supporting the case of revisionist.

30. In discharge application, undisputedly this ground as well as judgments were referred, but not considered by the Magistrate only for the reason that this ground has not been argued and no written submission has been filed, which is bad in practice as it goes to the root of the case. In fact, Magistrate was required to consider this ground taken i.e. compliance of Section 17(1)(b) of the Act, 1954 as well as judgments referred before deciding the discharge application, even if it has not been argued before him. It was very fundamental issue and Complaint may be rejected alone on the ground for non compliance of Section 17(1)(b) of the Act, 1954, but the learned Magistrate is done away with his duty and rejected the discharge application.

31. In light of the discussions made hereinabove as well as judgments relied upon, it is held that in light of Section 17(1)(b) of the Act, 1954, "Company" is necessary party and no Complaint under Section 7/16 of the Act, 1954 can be maintained or order can be passed against the revisionist without impleading the "Company" as accused. Therefore, Complaint dated 22.08.1984 filed under Section 7/16 of the Act, 1954 as well as impugned order dated 16.05.1988 is not sustainable.

32. In usual course after allowing the revision, it is required that matter be remanded for fresh decision, but in the present case Complaint was filed on 22.08.1984, discharge application was filed on 19.01.1988 and impugned order was passed on 16.05.1988. The revision was filed in the year 1988, now more than 33 years have been passed and at the time of filing of revision, age of the revisionist was 50 years (As per record his date of birth is 01.01.1934). Now as on date, age of the revisionist would be about 87 years.

33. Similar issue was also raised before the Supreme Court in the matter of ***Sushil Sethi and another (supra)*** and the Court has held as follows:-

"8.3. At this stage, it is required to be noted that though the FIR was filed in the year 2000 and the charge sheet was submitted/filed as far back as on 28.5.2004, the appellants were served with the summons only in the year 2017, i.e., after a period of approximately 13 years from the date of filing the charge sheet. Under the circumstances, the High Court has committed a grave error in not quashing and setting aside the impugned criminal proceedings and has erred in not exercising the jurisdiction vested in it under Section 482 Cr.P.C."

34. In present case too, it is required on the part of the Magistrate to allow the discharge application, but he has rejected the same without considering the provisions of law as well as judicial pronouncement by the Court resulting into inordinate delay of criminal proceeding. Therefore, in the larger interest of justice, it is required that discharge application be allowed and revisionist be discharged.

35. Therefore, under such facts and circumstances of the case as well as law discussed hereinabove, the impugned order dated 16.05.1988 passed by Munsif Magistrate (Economic Offences), Bijnor in Criminal Case No. 1578 of 1986 is quashed. Discharge application dated 19.01.1988 and revision are allowed. Revisionist be discharged from criminal proceedings.

36. No order as to costs.

37. Let a copy of this order alongwith lower court record be transmitted to the trial court forthwith for compliance.

(2021)08ILR A569
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.08.2021

BEFORE

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

Criminal Revision No. 2205 of 2020

Jagdish Yadav ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Abhishek Yadav, Tulsi Singh Yadav

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

(A) Criminal Law - Indian Penal Code, 1860 - Sections 363, 366, 376 - Code of Criminal Procedure, 1973 - Sections 110,161,164 - Section 319 - Revision - Power to proceed against other persons appearing to be guilty of offence - The Protection of Children from Sexual Offences Act, 2012 - Section 3/4 - a man with a criminal history is to be exposed to the depredations of another criminal, with the State being absolved of its responsibility to protect his life, merely because he has a criminal history to his credit - The State, in its obligation to protect human life, cannot discriminate on the ground of one facing the threat, carries behind him a history of crime - prosecutrix has to be protected in all events, so long as the trial continues or a real and potent threat perception persists.(Para 8)

Application seeking a direction to further investigate the case made before trial judge - rejected - reasoning - Police, after investigation, have submitted a charge-sheet in the case against one of the accused - opinion of the Trial Court - Investigating Officer exculpated the other co-accused opposite party no. 3, and co-accused, against whom, offence of gang rape, has been alleged by the prosecutrix - as would appear from her statement under Section 164 of the Code of Criminal Procedure, 19732 recorded by the Magistrate. (Para - 3)

HELD:- The Trial Judge shall proceed to record the testimony of the prosecutrix, the first informant and her father, if the evidence of these witnesses has already not been recorded. Trial Judge shall proceed to consider in the first instance and before proceeding with the trial further, whether a case to summon the third opposite party, in the exercise of powers under Section 319 of the Code is made out or not. Trial Judge shall proceed to consider framing of the appropriate charge(s) against the accused in accordance with law, before proceeding to trial. After the stage of reframing/further framing of charges, if any, is over, the Trial Court shall proceed with the trial expeditiously. (Para - 16)

Criminal Revision disposed of.(E-6)

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

Heard Mr. Abhishek Yadav, learned Counsel for the revisionist and Mr. Vinod Kant, the learned Additional Advocate General assisted by Mr. Shashi Shekhar Tiwari, learned Additional Government Advocate on behalf of the State of Uttar Pradesh.

2. This revision has been preferred, challenging an order dated 04.12.2020 passed by the Additional Sessions Judge (POCSO Act), Chandauli, in Misc. Case No. 287 of 2020 (arising out of Case Crime No. 73 of 2020) under Section 363 of the Indian Penal Code, 18601, Police Station - Balua, District - Chandauli.

3. It appears that the said case had arisen on an application made by the first informant, seeking a direction to the Superintendent of Police, Chandauli to undertake further investigation. This application has been made at a stage when Sessions Trial No. 73 of 2020, arising from the First Information Report giving rise to the crime, is pending on the basis of cognizance taken of a charge-sheet submitted by the Investigating Officer, charging opposite party no. 2 Sonu Kumar Gaud alone of offences punishable under Sections 363, 366, 376 of the Penal Code and Section 3/4 of the Protection of Children from Sexual Offences Act, 2012. However, the Investigating Officer exculpated the other co-accused opposite party no. 3, Satish Kumar Gaud and co-accused Sonu Kumar Gaud, against whom, offence of gang rape, punishable under Section 376-D of the Penal Code, has been alleged by the prosecutrix, as would appear from her statement under Section 164 of the Code of Criminal Procedure, 19732 recorded by the Magistrate. The Trial Judge, before whom the application seeking a direction to further investigate the case was made, has rejected it by means of the impugned order, on the reasoning that the Police, after investigation, have submitted a charge-sheet in the case against one of the accused. In the opinion of the Trial Court, the Investigating Officer has taken into consideration the statement of the prosecutrix under Section 161 of the Code, her additional statement also under Section 161, her statement under Section 164, statement of the informant under Section 161, besides the medico-legal report and the school-leaving certificate, both relating to the prosecutrix, while submitting a charge-sheet against opposite party no. 2 alone and exculpating opposite party no. 3.

4. Before this Court, much was contended on behalf of the revisionist to the effect that the prosecutrix's statement under Section 164, that clearly discloses a case of gang rape against opposite party nos. 2 and 3, acting in concert, has been ignored by the Police to extend undue favour to the accused, particularly opposite party no. 3, Satish Kumar Gaud. It was emphasized that Satish Kumar Gaud was a member of the Zila Panchayat and had political influence that he has brought upon the Police to exculpate him. It was also submitted on behalf of the revisionist during the course of hearing that the prosecutrix and her family members were threatened by opposite party no. 3 with dire consequences, in case they did not withdraw from the prosecution. It was also alleged during the course of hearing that the revisionist was being threatened to withdraw the present revision, else he would face injury to his life and/or limb.

The Police of Police Station - Balua, District - Chandauli were also alleged to be building up pressure upon the prosecutrix to withdraw from prosecution of the case.

5. This Court, taking note of all these facts, ordered impleadment of the Superintendent of Police, Chandauli, the Station House Officer, Police Station - Balua, District - Chandauli, Satyendra Yadav, and Investigating Officer, Sub-Inspector Lallan Ram, on the revisionist's application, to be impleaded as opposite party nos. 4, 5 and 6. Thereafter, this Court passed the following order on 20.01.2021 :

Impleadment application is allowed in part.

Let the Superintendent of Police, Chandauli, the Station House Officer, Police Station Balua, Satendra Yadav and the Investigating Officer, Sub Inspector, Lallan Ram Bind be impleaded as opposite party nos. 4,5 and 6 during the course of the day.

By the impugned order, the revisionist, who is the complainant of the crime and the father of the prosecutrix has made an application for further investigation which has been rejected vide order dated 04.12.2020. It is urged before the Court that opposite party Nos. 2 and 3, who are accused in the crime, are extending threats to the complainant and the prosecutrix to withdraw from the prosecution else they would be eliminated. On the other hand, it is pointed out that the impugned order, declining further investigation so as to bring home the complicity of Satish Kumar Gaud, opposite party no. 3 has been made ignoring from consideration the statement of the prosecutrix recorded under Section 164 Cr.P.C. and other material evidence in the case diary. The offence, according to the learned counsel for the revisionist, involves gang rape which has not been taken cognizance of. It is submitted further that the impugned order passed by the learned Special Judge, POCSO Act is bad because he has ignored from consideration material appearing against opposite party no. 3 on ground that cognizance has already been taken against the second opposite party for the offences charged and, therefore, no further investigation is possible.

A prima facie case is made out.

Admit.

Issue notice to respondent nos. 2 to 6 returnable on 28.01.2021.

Notice to the respondents shall be caused to be served by all means of communication which shall be caused to be served by the Chief Judicial Magistrate, Chandauli.

List in the additional cause list on 28.01.2021.

In the meanwhile, it shall be the responsibility of the Superintendent of Police, Chandauli to ensure that the revisionist or the prosecutrix are not harmed in life or limb or otherwise threatened in any manner.

Let this order be communicated to the Chief Judicial Magistrate, Chandauli and the Superintendent of Police, Chandauli by the Joint Registrar (compliance) today.

6. Notice was issued to opposite party nos. 2 and 3 vide order dated 05.01.2021.

The Superintendent of Police, Chandauli filed his personal affidavit dated 03.02.2021 in Court on 04.02.2021, which was very disillusioning. He did not show the required concern, which the case merited. The material part of the S.P.'s affidavit dated 03.02.2021 is extracted below :

5. That it is relevant to mention here that the above noted criminal revision against the impugned order is arising out of Case Crime No. 73 of 2020 Under Section 363 IPC, registered at Police Station Baluwa, District Chandauli in which after due investigation charge-sheet has been submitted on 13.08.2020 upon which the learned Court below has taken cognizance on 17.08.2020. It may be added here after cognizance taken by the Magistrate, the Protest Application no. 287 of 2020 in Case Crime No. 73 of 2020 has been filed by the revisionist before court below which was rejected by the learned Additional Session Judge by vide impugned order dated 04.12.2020.

6. That in compliance of order dated 20.01.2021 the deponent has made deep inquiry regarding life and liberty of revisionist or the prosecutrix during the course of inquiry it came in the light that the revisionist is working as IVth class employees in the police department and at present he is posted as E.O.W. (Economic Offences Wing), District Varanasi office of Superintendent of Police and prosecutrix is living with her parents at Village Matiyara Police Station Baluwa District Chandauli, during the course of inquiry it is also found that the father of victim is notified history sheeter. For kind perusal of this Hon'ble Court a copy of history sheet of father of prosecutrix is being filed herewith and marked as ***ANNEXURE NO.1*** to this affidavit.

7. That the from the perusal of order dated 28.01.2021 it appears that the revisionist under taken before this Hon'ble Court that he is threatened by Satish Kumar Gaud asking him to withdraw the present revision and prosecutrix by local police of Police Staton Baiuwa District Chandauli, which is without any basis and prove, the present criminal revision filed by the revisionist challenging the impugned order is pending before this Hon'ble Court for adjudication. on purely question of law, The charge-sheet has already been submitted in the present case and matter is sub-judice before Trial Court.

7. This Court proceeded to pass the following order on 04.02.2021 :

A personal affidavit of the Superintendent of Police, Chandauli has been filed. He has stated amongst other things in paragraph no. 8 of the affidavit that the revisionist is posted in the Economic Offences Wing in the police department and at present police personnel are deployed for the security of the prosecutrix and her father at their house. It is also said that this arrangement has been made so that they may not come to any harm.

This Court is not much impressed with the personal affidavit filed by the Superintendent of Police, Chandauli. It will be the duty of the Superintendent of Police to ensure that no harm comes to the victims of the crime or her family at the hands of respondents or anyone acting at their behest.

A personal affidavit has been filed on behalf of respondent no. 3. He has detailed the criminal history of the victim's father. The revisionist may file a rejoinder to the said affidavit, which is virtually a counter affidavit on behalf of respondent no. 3, within ten days.

State's counter affidavit and any further affidavit which respondent no.3 wishes to file shall be filed by the date next fixed.

List this matter in the additional cause list again on 22.02.2021.

8. A recall/modification application dated 22.02.2021, supported by an affidavit of one Prem Chandra, the Additional Superintendent of Police, Chandauli was filed, asking this Court to modify the interim order dated 20.01.2021, by which protection was provided to the prosecutrix and her father. It was alleged that the prosecutrix's father, Suresh Yadav, was misusing the liberty of Police security and was flaunting it in public to gain unfair advantage. Together with this affidavit, a criminal history of the prosecutrix's father was attached, which has a detail of eight cases. It must be recorded that three of these are challan in security proceedings under Section 110 of the Code. The others are also mostly trivial offences and span in time from the year 2001 to the year 2009. There is neither any heinous offence registered against the prosecutrix's father nor one that is within the period of ten years antedating the occurrence. Even if the prosecutrix's father were a hardened criminal, this Court fails to understand as to how that would be relevant to deny police protection to the prosecutrix or her father in connection with a heinous offence, where opposite party no. 2 is facing trial and opposite party no. 3 is sought to be arraigned. The prosecutrix and her father claim to be receiving threats from the accused to withdraw from the prosecution. The prosecutrix and her father have to be protected, irrespective of the fact whether the prosecutrix's father has a criminal history. It is, by no means, the law that a man with a criminal history is to be exposed to the depredations of another criminal, with the State being absolved of its responsibility to protect his life, merely because he has a criminal history to his credit. The State, in its obligation to protect human life, cannot discriminate on the ground of one facing the threat, carries behind him a history of crime. That apart, the prosecutrix has to be protected in all events, so long as the trial continues or a real and potent threat perception persists.

9. Later on, three counter affidavits were filed - one on behalf of Satyendra Yadav, the Station House Officer, Police Station - Balua, District - Chandauli dated 09.03.2021, another also dated 09.03.2021 on behalf of Lallan Ram Bind, the Investigating Officer of the case. Both these affidavits have done not much credit to explain the moot question why the statement of the prosecutrix under Section 164 of the Code was ignored. The affidavits were nothing more than affirmations of their action by the Station House Officer and the Investigating Officer concerned. Another affidavit that has to be taken note of is the counter affidavit filed on behalf of the State by Prem Chandra Bind, the Additional Superintendent of Police, Chandauli. Various parts of the Case Diary have been referred to and annexed to this affidavit, again to justify that the prosecutrix's statement under Section 164 of the Code is not of much consequence and that the C.D.R. details

relating to Satish Kumar Gaud, opposite party no. 3, were conclusive about the fact that his location close to the victim during the dates between 19.06.2020 to 05.07.2020 is not established.

10. This Court must also take note of a further personal affidavit filed by the Superintendent of Police, Chandauli in compliance with the order of this Court dated 04.03.2021 passed during the hearing of this revision. The following material averments find place there :

2. That, after studying the Statement of Prosecutrix recorded U/s 164 Cr.P.C, in the Case Diary, it is discernible that the name of two persons namely Sonu and Satish Kumar came in the light with allegation of committing offence of rape upon the Prosecutrix and after permission granted by the then competent supervisory Police Officer charge sheet was filed only against the person Sonu Gaud.

3. That, it appears that the investigating officer further proceeded investigation after statement of Prosecutrix recorded U/s 164 Cr.P.C, but without carefully evaluating the worth of statement of prosecutrix against Satish Kumar and accordingly the investigation was concluded. The Investigation Officer ought to have verified the correctness and genuineness of statement of Prosecutrix recorded U/s 164 Cr.P.C. against Satish Kumar with further corroborative, credible and material evidence, which renders possibility of some failure and slack-ness appearing in the investigation.

4. That in view of above facts and circumstances, show cause notice against the Investigating Otficer has been issued, calling for his explanation in writing. A correct copy of Show Cause Notice dated 13.3.2021 is hereby annexed as ANNEXURE NO. 1 for kind perusal of this Hon'ble Court

5. That, thereafter Investigating Officer has been placed under suspension contemplating enquiry proceeding in accordance with law for further course of action. A correct copy of Suspension order is hereby annexed and marked as ANNEXURE NO. 2 for kind perusal of this Hon'ble Court.

11. What this Court fails to understand is the fact that it might have been a strategy with the Police to collect the C.D.R. details, but, on that basis, to exculpate the accused during the investigation, contrary to the statement of the prosecutrix recorded before the Magistrate under Section 164 of the Code, virtually amounts to jumping fence from investigation into the arena of adjudication. During the hearing of this case, much was made on behalf of the State to say that if any material were to surface against opposite party no. 3, it would figure during the prosecutrix's testimony in the dock. If a case is disclosed against opposite party no. 3 and opposite party no. 2 involving gang rape, the Court can well exercise its power under Section 319 of the Code to summon the third opposite party. Learned Counsel for the revisionist has contended all through that flaws in investigation cannot be remedied later, during the hearing. The investigation here has been one-sided, unfair and biased, where material appearing against opposite party nos. 2 and 3, showing a case of gang rape, have been ignored by the Police, to put in a challan against opposite party no. 2 alone, exculpating opposite party no. 3.

12. This Court has keenly considered the matter and perused the record. There

are two facets of the case, as it now stands. One is about the merits of the investigation, where the revisionist says that opposite party no. 3 has been wrongly exculpated and opposite party no. 2 and 3 together have been wrongly not charge-sheeted for an offence of gang rape; the other is the issue about the security of life and limb of the prosecutrix, her father and the first informant, who is the prosecutrix's uncle. So far as the merits of the case are concerned, gleaning through the Case Diary and the stand taken by the Police before this Court, this Court is convinced that not much would come out of requiring the Police to investigate further. The statement of the prosecutrix is already a part of the Case Diary and it is material on which the Court can always act. More than that, it is the evidence of the prosecutrix during the trial that indeed is evidence alone in the case. Whatever the Police have collected during investigation is but material, that could be galvanised into evidence at the trial, depending the way that material is affirmed by the testimony of witnesses and other evidence led. After all, the Police are no more than parties. It is a criminal prosecution, and they cannot be compelled to say something which they do not wish to say. This, however, does not mean that the Police can be given a freehand to suppress material by doing an unfair investigation. But here, whatever material had to be collected, is there in the form of the prosecutrix's statement under Section 164 of the Code, recorded by a Judicial Magistrate.

13. What is, therefore, necessary is that the testimony of the prosecutrix, her father and the first informant are all recorded as promptly as possible by the Trial Judge. After the testimony of these three witnesses of fact has been recorded, the Trial Court shall examine whether a case to summon the third opposite party is made out or not, in the exercise of its powers under Section 319 of the Code. If the third opposite party is summoned by the Trial Court under Section 319 of the Code, the Trial Court shall further consider framing of appropriate charges against opposite party nos. 2 and 3, including a charge under Section 376D of the Penal Code.

14. This Court must hasten to add that it is not our adjudication that such a charge should be framed; or even that the third opposite party should be summoned. It is for the Trial Court to decide, both upon the matter of summoning the third opposite party to stand his trial, in exercise of its power under Section 319 of the Code and further to decide upon what charges ought to be framed, if the third opposite party is summoned. This would be done by the Trial Court without being influenced by anything said in this judgment.

15. So far as the security of the prosecutrix is concerned, this Court is of opinion that the Superintendent of Police, Chandauli would always remain responsible to ensure that the prosecutrix, her father or the first informant do not come to any harm during the trial or, in any case, on account of testifying in Court the way they do against anyone, including opposite party nos. 2 and 3. The precise manner in which the Superintendent of Police, Chandauli chooses to ensure the safety and security of life and limb of the prosecutrix, her father and the first informant is up to the Officer to decide. But, any lapse that occurs in ensuring the safety and security of the prosecutrix, the informant or her father, that leads to injury to the life or limb of any of them in

connection with the prosecution, would render the Superintendent of Police, Chandauli personally answerable to this Court.

16. In the result, this revision stands ***disposed of*** in terms of the following orders :

(i) The Trial Judge shall proceed to record the testimony of the prosecutrix, the first informant and her father, if he is a witness cited by the prosecution, within one month next, in Sessions Trial No. 73 of 2020, State v. Sonu Kumar Gaud, pending before the Additional Sessions Judge (POCSO Act) Chandauli, if the evidence of these witnesses has already not been recorded.

(ii) If the evidence of all these witnesses has already been recorded or comes to be recorded and concluded hereinafter, the learned Trial Judge shall proceed to consider in the first instance and before proceeding with the trial further, whether a case to summon the third opposite party, Satish Kumar Gaud, in the exercise of powers under Section 319 of the Code is made out or not.

(iii) If the third opposite party is summoned to stand his trial along with co-accused Sonu Kumar Gaud, the Trial Judge shall proceed to consider framing of the appropriate charge(s) against the accused in accordance with law, before proceeding to trial. After the stage of reframing/further framing of charges, if any, is over, the Trial Court shall proceed with the trial expeditiously, fixing one date every week and endeavour to conclude the same within three months of its commencement.

17. The Superintendent of Police, Chandauli shall act to ensure the safety of the prosecutrix, her father and the first informant in the manner ordered hereinabove.

18. Let this order be communicated to the learned Additional Sessions Judge (POCSO Act), Chandauli through the learned Sessions Judge, Chandauli and the Superintendent of Police, Chandauli by the Registrar (Compliance)

(2021)08ILR A576
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 3380 of 2019

Ranjeet (Juvenile) ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Alak Ranjan Mishra, Sri Amitabh Ranjan Mishra, Mrs. Amrita Mishra, Sri Surendra Kumar Tripathi

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

(A) Criminal Law - Constitution of India - Article 21 - Indian Penal Code, 1860 - Sections 302, 394 & 411 - Revision - The Code of criminal procedure, 1973 - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section12, 18(1)(g), Section 101 - appeal - *ipse dixit* - gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile - maximum period for which a juvenile can be incarcerated in whatever form of detention, is three years, going by

the provisions of Section 18(1)(g) of the Act.(Para - 10,17)

Revisionist is a juvenile declared by Juvenile Justice Board - age below 18 years on the date of occurrence - in jail since 17.04.2017 in connection with the present crime - completed more than four years of the sentence - applied for bail before the Juvenile Justice Board - bail application was rejected - revisionist preferred an appeal - dismissed -Hence the present criminal revision. (Para - 7,8)

HELD:- The juvenile is clearly below 18 years of age having no criminal history . The two courts below have held the juvenile disentitled to bail on account of his case falling under each of the three exceptions enumerated in the proviso to sub section (1) of Section 12, for which no reason has been indicated. Finding, in both the orders impugned, is based on an *ipse dixit*, in one case of the judge and in the other of the Board. Both the courts below have passed the impugned judgment and orders in cursory manner without placing due reliance on the report submitted by the District Probation Officer as well as facts and circumstances of the case. Impugned judgment and order hereby set aside and reversed. Bail application of the revisionist stands allowed.(Para - 14,16,19) .

Criminal Revision allowed. (E-6)

List of Cases cited:-

1. Kamal Vs St. of Har., 2004 (13) SCC 526

2. Takht Singh Vs St. of M.P., 2001 (10) SCC 463

3. Shiv Kumar & Sadhu Vs St. of U.P. 2010 (68) ACC 616(LB)

4. Dataram Singh Vs St. of U.P. & anr., (2018) 3 SCC 22

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

1. This revision is directed against the judgment and order dated 17.06.2019 passed by learned Additional Sessions Judge, Court No. 8, Agra dismissing Criminal Appeal No. 57 of 2019 (Ranjeet Vs. State of UP) filed under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the Act') and affirming the order dated 21.02.2019 passed by Juvenile Justice Board, Agra refusing the bail plea to the revisionist in Case Crime No. 85 of 2017, under Sections 302, 394 & 411 I.P.C., Police Station-Shamsabad, District Agra.

2. Heard learned counsel for the revisionist as well as learned A.G.A. for the State and perused the record.

3. The prosecution case, as per the version of the FIR, is that on 5.4.2017, when informant, Seemendra Singh Solanki who is a Sub-Inspector along with his team members namely Constable Gurmeet Singh, Constable Naresh Chand and Constable Vipin Kumar were patrolling, an information was received at about 7:25 on RT Set that firing was being done near Raja Kheda Road Bypass Tiraha and one person had got injured. Upon receiving the aforesaid information, the informant along with his team members reached the place of occurrence and found Constable Ajay Kumar of Police Station Shamsabad in a grievous injured condition lying aside road. The informant got knowledge from the people surrounded there that when the said Constable Ajay Kumar was trying to stop the three rogues who were coming from Rajkheda, they pumped many bullets to Constable Ajay Kumar by hurling abuses from their country made pistols. In reply, Constable Ajay Kumar has also open fired to them but they snatched his service pistol and flew away from the place of occurrence. Thereafter, the informant informed the higher officers about the said incident and bring Constable Ajay Kumar from the official jeep of police station to

the G.G. Nursing Home where the doctors declared Constable Ajay Kumar as dead. Thereafter, the dead body of Constable Ajay Kumar was sent to mortury at S.N. Medical College for post mortem examination.

4. Learned counsel for the revisionist submits that the revisionist has been falsely implicated in the present case. It is further submitted that the revisionist is in jail since 17.4.2017 and has completed more than four years of his incarceration.

5. Learned counsel for the revisionist further submits that co-accused Yogesh @ Khanna who is also a juvenile and having similar role already been granted bail by this Court vide order dated 30.9.2019 passed in Criminal Revision No. 3112 of 2019. It is argued that the revisionist being a minor, cannot be held in institutional incarceration any further once co-accused, who is also a juvenile and similarly circumstanced, has been admitted to bail. Further submission is that the case of the revisionist is not on worse footing than that of the co-accused, therefore on principles of parity also the revisionist be released on bail.

6. Learned counsel for the revisionist further submits that the revisionist is juvenile and there is no apprehension of reasoned ground for believing that the release of the revisionist is likely to bring him in association with any known criminals or expose him to mental, physical or psychological danger or his release would defeat the ends of justice. He further submits that except this the revisionist has no previous criminal history. The mother of the revisionist is giving her undertaking that after release of the revisionist on bail, she will keep him under his custody and look after him properly. Further, the revisionist undertakes that he will not tamper the evidence and he will always cooperate the trial proceedings. There was no report regarding any previous antecedents of family or background of the revisionist. There is no chance of revisionist's re-indulgence to bring him into association with known criminals.

7. Learned counsel for the revisionist further submits that it is not in dispute that the revisionist is a juvenile as he already been declared juvenile by Juvenile Justice Board vide order dated 24.01.2019. The revisionist was a juvenile, below the age of **18** years on the date of occurrence. He was, thus, clearly below 18 years of age. He is in jail since 17.04.2017 in connection with the present crime and has completed **more than four years** of the sentence out of the maximum three years institutional incarceration permissible for a juvenile, under Section 18(1)(g) of the Act.

8. Learned counsel for the revisionist further submits that thereafter the revisionist applied for bail before the Juvenile Justice Board, **Agra** upon which a report from the District Probation Officer was called for. The bail application was rejected vide order dated **21.02.2019**, being aggrieved, the revisionist preferred an appeal under Section 101 of the Act, which was also dismissed vide order dated **17.06.2019**. Hence the present criminal revision has been filed before this Hon'ble Court mainly on the following amongst other grounds:

(i) That the bail application of the revisionist was rejected by the court below in a *very cursory and arbitrary manner.*

(ii) That the revisionist, who is juvenile, is wholly innocent and has been

falsely implicated by the first informant in the present case.

(iii) That the courts below have not appreciated the report of the District Probation Officer in its right perspective.

(iv) That the impugned judgment and orders passed by the learned courts below are apparently illegal, contrary to law and based on erroneous assumption of facts and law.

(v) That there was absolutely no material on record to hold that the release of the Juvenile would likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or his release would defeat the ends of justice, yet the courts below have illegally, arbitrary and on surmises refused the bail of juvenile.

(vi) That the courts have erred in law in not considering the true import of Section 12 of the Act, 2015 and thus, the impugned orders passed by the courts below suffer from manifest error of law apparent on the face of record.

(vii) That the courts below have acted quite illegally and with material irregularity in not properly considering the case of juvenile in proper and correct perspective which makes the impugned orders passed by the courts below non est and bad in law.

(viii) That bare perusal of the impugned orders demonstrate that the same have been passed on flimsy grounds which have occasioned gross miscarriage of justice.

9. Several other submissions in order to demonstrate the falsity of the allegations made against the revisionist have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the revisionist that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

10. Learned counsel for the revisionist has pointed out that the revisionist has by now done **more than four years** of institutional incarceration. The maximum period for which a juvenile can be incarcerated in whatever form of detention, is three years, going by the provisions of Section 18(1)(g) of the Act. In support of his contention, learned counsel for the revisionist has placed reliance of Hon'ble Apex Court judgment in the case of **Kamal Vs. State of Haryana, 2004 (13) SCC 526** and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under :-

"2. This is a case in which the appellant has been convicted u/s 304-B of the India Penal Code and sentenced to imprisonment for 7 years. It appears that so far the appellant has undergone imprisonment for about 2 years and four months. The High Court declined to grant bail pending disposal of the appeal before it. We are of the view that the bail should have been granted by the High Court, especially having regard to the fact that the appellant has already served a substantial

period of the sentence. In the circumstances, we direct that the bail be granted to the appellant on conditions as may be imposed by the District and Sessions Judge, Faridabad."

11. Learned counsel for the revisionist has also placed reliance of Hon'ble Apex Court judgment in the case of **Takht Singh Vs. State of Madhya Pradesh, 2001 (10) SCC 463**, and submitted that the Hon'ble Apex Court was pleased to observe in paragraph no. 2 of the judgment as under:-

"2. The appellants have been convicted under Section 302/149, Indian Penal Code by the learned Sessions Judge and have been sentenced to imprisonment for life. Against the said conviction and sentence their appeal to the High Court is pending. Before the High Court application for suspension of sentence and bail was filed but the High Court rejected that prayer indicating therein that the applicants can renew their prayer for bail after one year. After the expiry of one year the second application was filed but the same has been rejected by the impugned order. It is submitted that the appellants are already in jail for over 3 years and 3 months. There is no possibility of early hearing of the appeal in the High Court. In the aforesaid circumstances the applicants be released on bail to the satisfaction of the learned Chief Judicial Magistrate, Sehore. The appeal is disposed of accordingly."

12. In spite of service of notice upon opposite party no.2, no one has appeared on behalf of opposite party no.2 nor any counter affidavit has been till date. It appears that opposite party no.2 is not interested to file counter affidavit.

13. Learned A.G.A. has opposed the revisionist's case with the submission that the release of the revisionist on bail would bring him into association of some known criminals, besides, exposing him to moral, physical and psychological danger. It is submitted that his release would defeat the ends of justice, considering that he is involved in a heinous offence.

14. This Court has carefully considered the rival submissions of the parties and perused the impugned orders. The juvenile is clearly **below 18 years** of age and does not fall into that special category of a juvenile between the age of 16 and 18 years whose case may be viewed differently, in case, they are found to be of a mature mind and persons well understanding the consequences of their actions. The provisions relating to bail for a juvenile are carried in Section 12 of the Act, which reads as under:

"(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice,

and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under subsection (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

15. A perusal of the said provision show that bail for a juvenile, particularly, one who is under the **age of 18 years**, is a matter of course and it is only in the event that his case falls under one or the other disentitling categories mentioned in the proviso to sub-Section (1) of Section 12 of the Act that bail may be refused. The merits of the case against a juvenile acquire some relevance under the last clause of the proviso to sub-section (1) of Section 12 that speaks about the ends of justice being defeated. The other two disentitling categories are quite independent and have to be evaluated with reference to the circumstances of the juvenile. Those circumstances are to be gathered from the Social Investigation Report, the police report and in whatever other manner relevant facts enter the record.

16. What is of prime importance in this case is that the juvenile, who is a young boy, has no criminal history. There is nothing said against the juvenile, appearing from the Social Investigation Report that may show him to be a desperado or misfit in the society. The two courts below have held the juvenile disentitled to bail on account of his case falling under each of the three exceptions enumerated in the proviso to sub section (1) of Section 12, for which no reason has been indicated. That finding, in both the orders impugned, is based on an ipse dixit, in one case of the judge and in the other of the Board. Even if it be assumed that the offence was committed in the manner alleged, it would be rather strained logic to hold that release of the juvenile on bail would lead to the ends of justice being defeated. Both the courts below have passed the impugned judgment and orders in cursory manner without placing due reliance on the report submitted by the District Probation Officer as well as facts and circumstances of the case.

17. This Court in the case of **Shiv Kumar alias Sadhu Vs. State of U.P. 2010 (68) ACC 616(LB)** was pleased to observe that the gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile.

18. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, the unlikelihood of

early conclusion of trial and also in the absence of any convincing material to indicate the possibility of tampering with the evidence and in view of the larger mandate of the Article 21 of the Constitution of India and the dictum of Apex Court in the case **of Dataram Singh vs. State of UP and another, (2018) 3 SCC 22** and the view taken by the Apex Court in the cases of **Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra) and Shiv Kumar alias Sadhu Vs. State of U.P. (supra).,** this Court is of the view that the present criminal revision may be allowed and the revisionist may be released on bail.

19. In the result, this revision **succeeds** and is **allowed**. The impugned judgment and order dated 17.06.2019 passed by learned Additional Sessions Judge, Court No. 8, Agra, are hereby set aside and reversed. The bail application of the revisionist stands allowed.

20. Let the revisionist, **Ranjeet (Juvenile)** through his natural guardian, his mother namely Smt. Kanta be released on bail in Case Crime No. 85 of 2017, under Sections 302, 394 & 411 I.P.C., Police Station-Shamsabad, District Agra upon his natural guardian furnishing a personal bond with two solvent sureties of his relatives each in the like amount to the satisfaction of the Juvenile Justice Board, Agra subject to the following conditions:

(i) That the natural guardian of the revisionist will furnish an undertaking that upon release on bail the juvenile will not be permitted to come into contact or association with any known criminal or allowed to be exposed to any moral, physical or psychological danger and further that the natural guardian will ensure that the juvenile will not repeat the offence.

(ii) The revisionist and his natural guardian will report to the District Probation Officer on the first Wednesday of every calendar month commencing with the first Wednesday of January, 2021 and if during any calendar month the first Wednesday falls on a holiday, then on the next following working day.

(iii) The District Probation Officer will keep strict vigil on the activities of the revisionist and regularly draw up his social investigation report that would be submitted to the Juvenile Justice Board concerned on such periodical basis as the Juvenile Justice Board may determine.

(iv) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or the certified copy issued by the Registry of the High Court, Allahabad.

(v) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vi) The concerned Court/Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

21. However, considering the peculiar facts and circumstances of the case, the court below is directed to make every possible endeavour to conclude the trial of the aforesaid case within a period of four months from today without granting unnecessary adjournments to either of the parties.

(2021)08ILR A583
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.07.2021

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Application U/S 378 Cr.P.C. No. 32 of 2021

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

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

Criminal Law - Code of Criminal Procedure, 1973- Section 378(3) – Appeal against Acquittal- Having considered the matter in its entirety and in view of the law laid down by the Hon'ble Supreme Court in *Krishnegowda's case (supra)* and Ramesh's case (supra), we find that the learned trial court's findings regarding acquittal of accused-Vijay Kumar, opposite party No.1 herein is based on proper appreciation and analysis of evidence available on record which does not in any manner appear to be improbable or perverse.

It is settled law that an order of acquittal further reinforces the presumption of innocence in favour of the accused, therefore the findings of the trial court can only be interfered by the High Court where there are strong and compelling reasons and the judgement of the trial court is perverse and erroneous. (Para 22)

Criminal Appeal rejected. (E-2)

Judgements/ Case law relied upon:-

1. Krishnegowda & ors. Vs St. of Kar. by Arkalgud Police, (2017) 13 SCC 98

2. Ramesh & ors. Vs St. of Har., (2017) 1 SCC 529

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. We have heard learned Additional Government Advocate for the State and gone through the record available before us.

2. By means of the present application under Section 378(3) of the Cr.P.C., the State has sought leave to appeal to assail the judgment and order dated 23.12.2020 passed by the learned Additional District & Sessions Judge/Special Judge POCSO Act, District Ambedkarnagar, whereby the learned trial court has acquitted the accused-Vijay Kumar, who is opposite party No.1 in the instant case, for the offence under Sections 363, 366, 376(1), 354 of the I.P.C and Sections 3A/4 of the Protection of Children from Sexual Offences Act, 2012.

3. The case of the prosecution as unfolded during trial is that the first informant-Vinod Kumar Sharma lodged the written report, Ex. Ka-1, at Police Station Ibrahimpur, District Ambedkarnagar on 19.11.2013 stating therein that his niece/victim is aged about 15 years. She is a student of class-10th. On 17.11.2013 at about 11.00 AM, she was abducted by Mangal, Vijay, Ram Sewak, Suraj and Vivek, who are residents of his colony, while the victim was going to attend her tuition. Thereafter, she could not be traced till evening, therefore, by submitting the written report, Ex. Ka-1, the first informant-Vinod Kumar Sharma prayed for taking appropriate action against the guilty persons.

4. On the basis of written report, Ex. Ka-1, lodged by the first informant-Vinod Kumar Sharma an F.I.R., Ex. Ka-11, was

lodged on 19.11.2013 at 10:30 AM at Police Station Imbrahimpur, District Ambedkarnagar, under Sections 363, 366 of the I.P.C. against the accused , namely, Mangal, Vijay, Ram Sewak, Suraj and Vivek.

5. During the course of investigation, the Investigating Officer inspected the place of occurrence and prepared the site plans Ex. Ka-5 and Ex. Ka-8 respectively. He also collected underwear, salvaar, transfer certificate and identity card of the victim and prepared recovery memos thereof as Ex. Ka-9, Ex. Ka-6 and Ex. Ka-7 respectively. The victim was medically examined on 26.11.2013 by Dr. Manisha Yadav, PW-4 at Primary Heath Centre, Tanda, District Ambedkarnagar. Details of medical examination are as follows:-

(A) External Examination:-

(i) The victim was fully normal.

(ii) Height - 145 Cm.

(iii) Weight - 37 Kg.

(iv) No mark of injury on external parts of body of the victim was found.

(B) Internal Examination:-

(i) Breasts were developed.

(ii) Hymen was torn with old healed margin.

6. According to X-ray report, Ex. Ka-15, prepared by Dr. P.N. Yadav, PW-6, the wrist joint, knee joint and iliac crest were found to be not fused.

7. On the completion of investigation, the Investigating Officer submitted chargesheet, Ex. Ka-10, dated 29.01.2014 against accused, namely, Mangal, Vijay Kumar, Ram Sewak, Suraj Gupta, Vivek and Aamir Khan. However, it appears that the case against accused, namely, Mangal, Suraj, Vivek and Aamir Khan was separated during the trial on account of the fact that they were juvenile.

8. After taking cognizance of the case, charges under Sections 354A, 363, 366, 376(1) of the I.P.C. and Section 4 of the Protection of Children from Sexual Offences Act, 2012 were framed against accused, namely, Vijay Kumar and Ram Sewak to which the accused pleaded not guilty and claimed trial.

9. The case against accused-Ram Sewak was abated during the trial due to his death vide order dated 11.11.2020 passed by learned trial court.

10. In order to bring home guilt of accused beyond reasonable doubt, the prosecution has examined as many as six prosecution witnesses. Vinod Kumar Sharma, PW-1 is the first informant, victim is the PW-2, Pankaj Sharma, PW-3 is an eye witness of the occurrence, Dr. Manisha Yadav, PW-4 is the Medical Officer who had medically examined the victim, Inspector R.P. Singh, PW-5 is the Investigating Officer whereas Dr. P.N. Yadav, PW-6 is the radiologist who had conducted X-ray of right elbow, right knee and iliac crest of the victim.

11. After the closure of prosecution evidence, statements of accused were recorded under Section 313 of the Cr.P.C. They denied the charges levelled against them and stated that they have falsely been

implicated in the case. They also stated that the prosecution witnesses are deposing falsely against them.

12. The learned trial court after hearing learned counsel for the parties and after scrutinizing and assessing the evidence available on record, has recorded the finding of acquittal as stated earlier. Hence this application for leave to appeal by the State.

13. Learned A.G.A. has vehemently argued that keeping in view the nature of offence, delay of about two days in lodging the first information report cannot be termed to be inordinate and unexplained delay in lodging the F.I.R. because sufficient explanation has also been offered by the first informant-Vinod Kumar Sharma, PW-1 for the delay caused in lodging the first information report.

14. In addition to the aforesaid submissions, he has also submitted that the findings of acquittal of accused-Vijay Kumar, opposite party No.1 herein, are against the weight of evidence and perverse because the prosecution has been fully successful in proving its case against opposite party No.1-Vijay Kumar beyond reasonable doubt on the basis of evidence available on record.

15. The learned trial court while acquitting the accused-Vijay Kumar has held that the victim is aged about 16 years. Learned trial court has held that the first information report has been lodged after consultation and after a delay of about two days which has not been explained by the prosecution. However, learned trial court has also recorded the findings to the effect that the first informant Vinod Kumar Sharma, PW-1 and Pankaj Sharma, PW-3 though projected to be eye witnesses of the incident, have not actually seen the incident. The victim herself has not attributed any role to the accused-Vijay Kumar, opposite party No.1 in the incident of her abduction, outraging her modesty or for the offence of committing rape on her, therefore, due to aforesaid reasons, the learned trial court has recorded findings of acquittal of accused-Vijay Kumar, opposite party No.1 herein.

16. We have carefully examined and scrutinized the testimony of the first informant, Vinod Kumar Sharma, PW-1, victim, PW-2 and Pankaj Sharma, PW-3 another eye witness of the incident. The first informant-Vinod Kumar Sharma, PW-1 has testified that he saw accused, namely, Mangal, Vijay Kumar, Ram Sewak, Suraj Gupta and Vivek abducting her niece, the victim and taking her away in a Xylo motorcar on 17.11.2013. He has also stated to have chased the accused by taking motorcycle from Satendra Verma, however, he returned from Bashkhari after the said Xylo motorcar disappeared. It is significant to notice that this witness, who is uncle of the victim, did not raise any alarm at the time when he saw her niece being abducted or being taken away by the accused. He has also not informed this fact to any other persons including Satendra Verma from whom he took motorcycle to chase the abductors.

17. On the issue of delay in lodging F.I.R. in such matter, the Hon'ble Supreme Court in ***Deepak vs. State of Haryana, (2015) 4 SCC 762*** in paragraph-15 has held as under:-

"15. The courts cannot overlook the fact that in sexual offences and, in particular, the offence of rape and that too

on a young illiterate girl, the delay in lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family. ***In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by the victim or by any member of her family.*** *Indeed, this has been the consistent view of this Court as has been held in State of Punjab v. Gurmit Singh [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] ."*

(Emphasis supplied by us)

18. The first informant-Vinod Kumar Sharma in his statement as PW-1 has stated that he lodged the first information report on 19.11.2019 after consultation with others including father of the victim, therefore, in view of the law laid down by the Hon'ble Supreme Court in ***Deepak's case (supra),*** the delay in lodging the F.I.R. appears to have been sufficiently explained and the same cannot be a ground to disbelieve the prosecution case.

19. However, the conduct of the first informant-Vinod Kumar Sharma, PW-1 in not raising alarm, when he saw her niece being abducted is quite unnatural. He has categorically stated that the victim was abducted on 17.11.2013 by accused, namely, Mangal, Vijay Kumar, Ram Sewak, Suraj Gupta and Vivek. Pankaj Sharma, PW-3 has also stated to have seen the incident and he has also named the accused-Vijay Kumar, opposite party No.1 herein. However, in his cross-examination, he has clearly stated that the statement of victim to the effect that she, for the first time, met Vijay Kumar while going to the police station and not before, is correct. Admittedly, Pankaj Sharma, PW-3 is victim's cousin, who is, therefore, a related witness. The victim, PW-2 in her statement has not named opposite party No.1-Vijay Kumar. Even in her statement recorded under Section 164 Cr.P.C., she has categorically stated that on 17.11.2013 at about 11:00 AM, she was abducted by Vivek and Mangal only. She has also stated that accused Ram Sewak and opposite party No.1-Vijay Kumar did not outrage her modesty, therefore, from the perusal of statement of the victim, PW-2, it is clear that on 17.11.2013, the victim was abducted by accused Vivek and Mangal only. The first informant-Vinod Kumar Sharma, PW-1 and Pankaj Sharma, PW-3, on the contrary, have stated to have seen all the accused including opposite party No.1-Vijay Kumar on 17.11.2013 when the victim was abducted. This itself, casts serious doubts on the presence of the first informant-Vinod Kumar Sharma, PW-1 and Pankaj Sharma, PW-3 on the spot. It, thus, leads to irresistible conclusion that in fact the first informant-Vinod Kumar Sharma, PW-1 and Pankaj Sharma, PW-3 had not seen the incident of abduction of victim on 17.11.2013. Therefore, the testimony of first informant-Vinod Kumar Sharma, PW-1 and Pankaj Sharma, PW-3, to the effect that Vijay Kumar, opposite party No.1 herein also participated in the commission of crime on 17.11.2013 does not appear to be truthful.

20. The Hon'ble Supreme Court in ***Krishnegowda and others vs. State of Karnataka by Arkalgud Police, (2017) 13 SCC 98*** in paragraphs-32 and 33 has held as under:-

"32. It is to be noted that all the eyewitnesses were relatives and the prosecution failed to adduce reliable evidence of independent witnesses for the

incident which took place on a public road in the broad daylight. Although there is no absolute rule that the evidence of related witnesses has to be corroborated by the evidence of independent witnesses, it would be trite in law to have independent witnesses when the evidence of related eyewitnesses is found to be incredible and not trustworthy. The minor variations and contradictions in the evidence of the eyewitnesses will not tilt the benefit of doubt in favour of the accused but when the contradictions in the evidence of the prosecution witnesses proves to be fatal to the prosecution case then those contradictions go to the root of the matter and in such cases the accused gets the benefit of doubt.

33. ***It is the duty of the Court to consider the trustworthiness of evidence on record. As said by Bentham, "witnesses are the eyes and ears of justice". In the facts on hand, we feel that the evidence of these witnesses is filled with discrepancies, contradictions and improbable versions which draws us to the irresistible conclusion that the evidence of these witnesses cannot be a basis to convict the accused."***

(Emphasis supplied by us)

21. The Hon'ble Supreme Court in ***Ramesh And Others vs. State of Haryana, (2017) 1 SCC 529*** in paragraphs 24, 25 and 26 has held as under:-

"24. We have duly appreciated the submissions advanced by the counsel for the parties on both sides. No doubt, the High Court was dealing with the appeal against the judgment of the trial court which had acquitted the appellants herein. The scope of interference in an appeal against acquittal is undoubtedly narrower than the scope of appeal against conviction. Section 378 of the Code of Criminal Procedure, 1973 confers upon the State a right to prefer an appeal to the High Court against the order of acquittal. At the same time, sub-section (3) thereof mandates that such an appeal is not to be entertained except with the leave of the High Court. ***Thus, before an appeal is entertained on merits, leave of the High Court is to be obtained which means that normally judgment of acquittal of the trial court is attached a definite value which is not to be ignored by the High Court. In other words, presumption of innocence in favour of an accused gets further fortified or reinforced by an order of acquittal. At the same time, while exercising its appellate power, the High Court is empowered to reappreciate, review and reconsider the evidence before it. However, this exercise is to be undertaken in order to come to an independent conclusion and unless there are substantial and compelling reasons or very strong reasons to differ from the findings of acquittal recorded by the trial court, the High Court, as an appellate court in an appeal against the acquittal, is not supposed to substitute its findings in case the findings recorded by the trial court are equally plausible.***

25. The scope of interference by the appellate court in an order of acquittal is beautifully summed up in Sanwat Singh v. State of Rajasthan [Sanwat Singh v. State of Rajasthan, (1961) 3 SCR 120 : AIR 1961 SC 715 : (1961) 1 Cri LJ 766] in the following words: (AIR pp. 719-20, para 9)

"9. The foregoing discussion yields the following results: (1) an appellate court has full power to review the

evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup case [Sheo Swarup v. King Emperor, 1934 SCC OnLine PC 42 : (1933-34) 61 IA 398] afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

26. This legal position is reiterated in Govindaraju v. State [Govindaraju v. State, (2012) 4 SCC 722 : (2012) 2 SCC (Cri) 533] and the following passage therefrom needs to be extracted: (SCC p. 732, paras 12-13)

"12. The legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 CrPC. This is an indication that appeal from acquittal is placed on a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 CrPC has been introduced as an additional stage between the order of acquittal and consideration of the judgment by the appellate court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 clearly provides that no appeal to the High Court under sub-section (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the courts.

13. Under the scheme of CrPC, acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the appellate court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law.""

(Emphasis supplied by us)

22. Thus, having considered the matter in its entirety and in view of the law laid down by the Hon'ble Supreme Court in ***Krishnegowda's case (supra)*** and Ramesh's case (supra), we find that the learned trial court's findings regarding acquittal of accused-Vijay Kumar, opposite party No.1 herein is based on proper appreciation and analysis of evidence available on record which does not in any manner appear to be improbable or perverse.

23. On the basis of forgoing discussion, we are of the considered view that the application for leave to appeal deserves to be rejected and the same is hereby **rejected**.

24. Since the application for leave to appeal has been rejected, the appeal also does not survive and the same stands **dismissed.**

(2021)08ILR A589
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.08.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Application U/S 482/378/407 No. 516 of 2021

Rishi Mohan Srivastava ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Naved Ali, Sandeep Yadav

Counsel for the Opposite Parties:
G.A., Pawan Bhaskar

A. Criminal Law-Code of Criminal Procedure, 1973-Section 482 - Negotiable Instrument Act, 1981-Section 138-quashing of criminal proceeding-cheque bounce-petitioner issued two cheques each of Rs. one lac in favour of complainant/opposite party-cheque bounced due to insufficient fund-petitioner convicted and he preferred an appeal-appeal dismissed and the revision too dismissed-after dismissal complainant and petitioner entered into settlement for compounding offence-N.I. Act primarily compensatory not punitive and moreover section 147 of the Act would have an overriding effect on section 320 Cr.P.C. irrespective of which stage the parties are compromising with the kind leave of the Court.(Para 1 to 31)

B. Offence made punishable u/s 138 of N.I. Act is not only an offence qua property but it is also of the nature of an economic offence, though not covered in the list of statutes enacted in reference to section 468 Cr.P.C. thus, the parties, in reference to offence u/s 138 N.I. Act r/w section 147 of the Act are at liberty to compound the matter at any stage even after the dismissal of the application.(Para 32)

The petition is allowed. (E-5)

List of Cases cited:

1. Damodar S. Prabhu Vs Sayed Babalal (2010) 2 SCC (Cri) 1328

2. M/s Meters and Instruments Pvt Ltd & anr. Vs Kanchan Mehta (2017) 7 Supreme 558

3. Kripal Singh Pratap Singh Ori Vs Salvinder Kaur Hardip Singh (2004) Crl. , L.J. 3786

4. Vinay Devanna Nayak Vs Ryot Seva Sahkari Bank Ltd. (2008) AIR SC 716

5. Tanveer Aquil Vs St. of M.P. & Anr (1999) Supp SCC 63

6. Narinder Singh Vs St. of Punj. (2014) 6 SCC 466

7. Rajinder Prasad Vs Bashir & ors. (2001) AIR SC 3524

8. Krishan Vs Krishnaveni (1997) 4 SCC 241

9. Municipal Corpn. Indore Vs Ratnaprabha (1977) AIR SC 308

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. The instant petition under section 482 Cr. P.C. has been filed with the prayer to compound the offence committed by the petitioner under section 138 of the Negotiable Instrument Act, 1981 in Complaint Case No.515 of 2016 (Abhay Singh vs. Jai Construction Co. and another) and further to quash the sentence of one year awarded to the petitioner.

2. The facts of the case, in brief, are that the petitioner and opposite party no.2 had a business relationship and during the course of business, the petitioner had issued two cheques each of Rs.1,00,000/- (One Lakh) in favour of opposite party no.2 and when he had deposited, the cheques were bounced due to insufficient fund. The opposite party no.2 filed a complaint case bearing no.515 of 2016 (Abhay Singh vs. Jai Construction Co. and another) under section 138 of the Negotiable Instrument Act (for short 'N.I. Act'). After the completion of the trial, the court has convicted the petitioner and sentenced him one year simple imprisonment and fine of Rs.3,00,000/- (Rupees three lakhs) vide judgment and order dated 27.11.2019. Being aggrieved the petitioner had preferred a Criminal Appeal No.01 of 2020 before the Additional Sessions Judge, Faizabad and at the time of hearing the appeal, the petitioner had deposited Rs.1,00,000/- (one lakh) before the Additional Sessions Judge, Faizabad, ultimately the appeal had been dismissed vide order dated 14.12.2020 against which the petitioner has preferred a Criminal Revision No.664 of 2020 before this Hon'ble Court which too had been dismissed at the admission stage vide order dated 18.12.2020. After the dismissal of the criminal revision, the complainant/opposite party no.2 and the petitioner have entered into settlement through his father and is ready to make payment of rest of Rs.2,00,000/- (Two Lakhs) by means of Demand Draft No.374901 of State Bank of India to opposite party no.2. On 22.01.2021 the petitioner and the opposite party no.2 have amicably entered into the agreement, which is placed on record as Annexure 4 to the instant petition. The accused/petitioner has moved this court under section 482 of Cr.P.C. for the following relief:-

"It is therefore prayed to this Hon'ble Court kindly may be pleased to compound the offence committed by the petitioner under section 138 of the Negotiable Instruments Act, 1981, in complaint case No. - 515 of 2016, District - Faizabad, titled as "Abhay Singh Vs. Jai Construction Co. and another" and further quash the sentence of 1 year awarded to the petitioner"

3. With this background, learned counsel for the petitioner has submitted that this petition has been filed on 01.02.2021 on the basis of changed circumstances with the prayer to compound the offence. Learned counsel further submits that this Hon'ble Court may invoke its inherent power under section 482 Cr.P.C. so that ends of justice could be secured as the object of 'N. I. Act' is primarily compensatory and not punitive and moreover section 147 of 'N.I. Act' would have an overriding effect on section 320 Cr.P.C. irrespective of which stage the parties are compromising with the kind leave of this Hon'ble Court. It has also been submitted that on 11.02.2021, the co-ordinate Bench of this Court passed an order and directed the parties to appear before the Senior Registrar Lucknow Bench on 23.02.2021, so the factum of compromise could be verified. In compliance of the order dated 11.02.2021, both the parties had appeared before the Senior Registrar of this Court and the compromise deed was verified by the Senior Registrar. Learned counsel submits that the petitioner is languishing in jail since 14.12.2020 and has already served half of the sentence.

4. In support of his arguments, learned counsel for the petitioner has submitted that in the case **of Damodar S.**

Prabhu vs. Sayed Babalal H report at 2010 (2) SCC (Cri) 1328, the Hon'ble Apex Court had formulated the guidelines for compounding the offence under section 138 N.I. Act wherein in para 21, the following has been held :

"With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:-

THE GUIDELINES

(i) In the circumstances, it is proposed as follows:

(a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount."

5. Learned counsel also submitted that in the case of M/**s Meters and Instruments Private Limited and another vs. Kanchan Mehta** reported at **2017 (7)** Supreme 558 Hon'ble the Apex Court in para 18, the following has been held :

i) Offence under Section 138 of the Act is primarily a civil wrong. Burden of proof is on accused in view presumption under Section 139 but the standard of such proof is "preponderance of probabilities". The same has to be normally tried summarily as per provisions of summary trial under the Cr.P.C. but with such variation as may be appropriate to proceedings under Chapter XVII of the Act. Thus read, principle of Section 258 Cr.P.C. will apply and the Court can close the proceedings and discharge the accused on satisfaction that the cheque amount with assessed costs and interest is paid and if

there is no reason to proceed with the punitive aspect.

(ii)The object of the provision being primarily compensatory, punitive element being mainly with the object of enforcing the compensatory element, compounding at the initial stage has to be encouraged but is not debarred at later stage subject to appropriate compensation as may be found acceptable to the parties or the Court.

(iii)Though compounding requires consent of both parties, even in absence of such consent, the Court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused.

(iv)Procedure for trial of cases under Chapter XVII of the Act has normally to be summary. The discretion of the Magistrate under second proviso to Section 143, to hold that it was undesirable to try the case summarily as sentence of more than one year may have to be passed, is to be exercised after considering the further fact that apart from the sentence of imprisonment, the Court has jurisdiction under Section 357(3) Cr.P.C. to award suitable compensation with default sentence under Section 64 IPC and with further powers of recovery under Section 431 Cr.P.C. With this approach, prison sentence of more than one year may not be required in all cases.

(v) Since evidence of the complaint can be given on affidavit, subject to the Court summoning the person giving affidavit and examining him and the bank's slip being prima facie evidence of the dishonor of cheque, it is unnecessary for the Magistrate to record any further preliminary evidence. Such affidavit evidence can be read as evidence at all stages of trial or other proceedings. The manner of examination of the person giving affidavit can be as per Section 264 Cr.P.C. The scheme is to follow summary procedure except where exercise of power under second proviso to Section 143 becomes necessary, where sentence of one year may have to be awarded and compensation under Section 357(3) is considered inadequate, having regard to the amount of the cheque, the financial capacity and the conduct of the accused or any other circumstances.

6. Learned counsel for the petitioner has further submitted that the petition under section 482 Cr.P.C. is maintainable after the dismissal of the revision on merit. To support of this arguments, he has relied upon the judgment of Gujarat High Court in the case of **Kripal Singh Pratap Singh Ori vs. Salvinder Kaur Hardip Singh** reported at **2004 Crl. L. J. 3786** wherein the following has been held :

"16.I have considered the decisions cited by the learned counsel for the respective party and some other decisions of the Apex Court and I do not think it necessary to enlist those decisions which are taken into consideration for the purpose of the present proceedings. But ultimately one balanced principle has emerged that the petitions invoking inherent powers under section 482 Cr.P.C. after dismissal/disposal or revision application under section 397 Cr.P.C. read with section 401 Cr.P.C., are not maintainable by the same party, more so when no special circumstances are made out. The gist of this ratio is reflected in the decision reported in AIR 2001 SC 3524 in

the case of Rajinder Prasad vs. Bashir and ors. It was contended before the Apex Court that as the earlier revision petition filed by the accused persons under section 397 of the Code has been rejected by the High Court vide order dated 13.7.1990, they had no right to file the petition under section 482 of the Code with prayer for QUASHING the same order. While dealing with the above contention the Apex Court observed that, "...We do not agree with the arguments of the learned counsel for the respondents that as the earlier application had been dismissed as not pressed, the accused had acquired a right to challenge the order adding the offence under section 395 of the Code ..." (i.e. IPC) It is further observed that, "We are of the opinion that no special circumstances were spelt out in the subsequent application for invoking the jurisdiction of the High Court under Section 482 of the Code and the impugned order is liable to be set aside on this ground alone.."

17. So can be legitimately argued and inferred and held that in all cases where the petitioners are able to satisfy this court that there are special circumstances which can be clearly spelt out , subsequent application invoking INHERENT powers under section 482 Cr.P.C. can be moved and cannot be thrown away on the technical argument as to its sustainability. The apex court in case of Rajendra Prasad (supra) was dealing with a case related to first part of section 482 Cr.P.C. but, when it comes to third part, the approach should remain more pragmatic and indirect relegation to Supreme Court, if legally possible, can be prevented.

31. In the circumstances, it is hereby declared that the compromise arrived between the parties to this litigation out of court is accepted as genuine and the order of conviction and sentence passed by the learned JMFC, Vadodara and confirmed in appeal by the learned Sessions Judge, Fast Track Court, Vadodara, therefore, on the given set of facts are hereby quashed and set aside as this court intends, otherwise to secure the ends of justice as provided under section 482 Cr.P.C. Obviously the order disposing Revision Application would not have any enforceable effect.

7. Learned counsel has also relied upon the judgment of Hon'ble the Apex Court in the case of ***Vinay Devanna Nayak vs. Ryot Seva Sahkari Bank Limited reported at AIR 2008 SC 716*** wherein the Hon'ble Apex Court has held as under :

"18. Taking into consideration even the said provision (Section 147) and the primary object underlying Section 138, in our judgment, there is no reason to refuse compromise between the parties. We, therefore, dispose of the appeal on the basis of the settlement arrived at between the appellant and the respondent.

19. For the foregoing reasons the appeal deserves to be allowed and is accordingly allowed by holding that since the matter has been compromised between the parties and the amount of Rs.45,000/- has been paid by the appellant towards full and final settlement to the respondent-bank towards its dues, the appellant is entitled to acquittal. The order of conviction and sentence recorded by all courts is set aside and he is acquitted of the charge levelled against him."

8. Learned counsel for the petitioner has argued that the law regarding compounding of offences under the N.I.

Act is very clear and is no more res integra and the offences under the N. I. Act can be compounded even at any stage of the proceedings. He submits that in terms of the aforesaid law laid down by the Hon'ble Supreme Court, the parties may be permitted to compound the offence and the conviction of the petitioner be set aside.

9. Per-contra, Sri Alok Saran learned AGA for the State has vehemently opposed the submissions made by the learned counsel for the petitioner and submitted that the instant petition under section 482 Cr.P.C. is not maintainable as the petitioner has already been convicted by the court below and the conviction order has been upheld by the appellate court and by this Hon'ble Court in the revision. Learned AGA has submitted that the present petition under section 482 Cr.P.C. is not maintainable as the High Court has dismissed the revision application on merits. It is further submitted that in view of the provisions of Sub-section (6) of Section 320 Cr.P.C. and the observations made by the Hon'ble Supreme Court in the case ***of Tanveer Aquil vs. State of M.P. and another (19990) Supp SCC 63***, the parties should be relegated to the Hon'ble Apex Court to initiate appropriate proceedings to get the actual affect of compromise arrived at between the parties. In the case of ***Tanveer Aquil (supra)*** the appellant was convicted under section 324 I.P.C. and was ordered to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/-. After the pronouncement of the judgment by the High Court the learned Counsel appeared and pleaded for an opportunity of hearing and at that stage the High Court again heard the matter and added a postscript in the judgment confirming the conviction and sentence. The petitioner thereafter had moved the High Court for a compromise to compound the offence. It was submitted to the High Court that the accused has paid a sum of Rs.3,500/- to the complainant and the learned Counsel for the complainant confirmed of having received the amount of Rs. 3,500/- in token of the compromise arrived between the parties. In Para 1 of the cited decision the Apex Court has observed that "..... *but the High Court did not and indeed could not take into consideration that application since it has deposed of the matter already."*

10. Learned AGA has also submitted that when this Court has already rejected the revision application on merits, whether the parties or any one of them can be permitted to place compromise and to get an order of acquittal from the very Court, is the question. Therefore, in more than one decisions, the Hon'ble Apex Court has observed that the petition invoking inherent powers under section 482 Cr.P.C. is not maintainable when the earlier revision application filed under Section 397 Cr.P.C. read with Section 401 Cr.P.C. seeking same or similar relief, when dismissed on merit, or has not pressed. However, in the same way the Hon'ble Apex Court has observed in more than one cases that such petitions, though otherwise, are not maintainable, can even be entertained when special circumstances are made out. These observations are in reference to third part of Section 482 of Cr. P.C. Learned AGA has submitted that the present petition is nothing but a gross misuse of the process of the law. There is no ground available to the petitioner for invoking the inherent power under section 482 Cr.P.C. for compounding the sentence on the basis of the compromise as filed by the petitioner. The present petition is devoid of any merit hence it is to be dismissed.

11. I have heard the learned counsel for the parties and carefully perused the compromise arrived at between the parties and other materials on record.

12. Considering the facts as narrated above, the following two questions arise for consideration –

Whether an order passed by the High Court in the criminal revision petition confirming the conviction can be nullified by the High Court in a petition filed under section 482 Cr.P.C. noticing subsequent compromise of the case by the contesting parties ?

13. Before answer the aforesaid questions as framed, I shall examine the relevant provisions of the Cr.P.C. as well the Negotiable Instrument Act. I may extract the Section 320 Cr.P.C., Section 147 of the Negotiable Instrument Act and Section 482 Cr.P.C.

Section 320 Cr.P.C. - Compounding of Offences –

1) The offences punishable under the sections of the Indian Penal Code (45 of 1860), specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table –

2) The offences punishable under the Sections of the Indian Penal Code (45 of 1860), specified in the first two columns of the Table next following may, with the permission of the Court before which any prosecution for such offence is pending be compounded by the persons mentioned in the third column of that Table –

3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

4) (a) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence.

(b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908 (5 of 1908) of such person may, with the consent of the Court, compound such offence

5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or as the case may be, before which the appeal is to be heard.

6) A High Court or Court of Session acting in the exercise of its powers of revision under Section 401 may allow any person to compound any offence which such person is competent to compound under this section.

7) No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such offence.

8) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

9) No offence shall be compounded except as provided by this section.

Section 147 of the Negotiable Instrument Act :

"Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."

Section 482 Cr.P.C. :

Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

14. I have to refer relevant portions of the compromise deed which is on the record for proper adjudication :-

7. That now the complainant - second party is ready for the settlement of the pecuniary dispute on an amount of Rs.- 3,00,000/- with the First Party through his father as the First Party is languishing in jail after the judgment and order of conviction. As agreed, the First Party will make a payment of Rs. 2 lakhs by means of a Demand draft no. 374901 of State Bank of India. The rest 1 Lakh which is already lying deposited with the Additional Court, Faizabad would be withdrawn by the Second Party. The First Party would carry out the documentation which is required for the withdrawal by the Second Party.

8. That now remains no grouse, complaintor grievance between both the parties. Both the parties are ready to get the matter settled/ quashed by a Court of Law as the dispute was personal in nature.

9. That thus the parties have amicably entered in this agreement and both parties in sound and disposing mind and under no Fear, Fraud, Influence, Coercion or under any force or compulsion or pressure have mutually agreed mentioned as under:

NOW THE DEED OF AGREEMENT / COMPROMISE WITNESSES AS UNDER

1. That the first party is ready to pay the amount i.e. Rs.- 3,00,000/- business debt to the second party..

2. That the second party also wants to settle the pecuniary dispute with the first party.

3. That the second party has not any grievance against the first party

4. That the dispute between the parties is private in nature.

5. That it is further agreed between the parties that neither of the parties shall file any complaint/ suit/ petition/ FIR and/or any other proceedings before any court of law/any authority for the same offence. Both the parties undertake that there is no other complaint/ petition/ suit/ FIR pending against each

other of the same dispute and if the same is found, the same compromised Agreement." shall in stand null and void and terms of this "Settlement

6. That the Second Party shall make no further complaint/ First Information Report against First Party or his family members regarding the said bounced cheques, this clause shall be an exception for any other fresh cause of action(s) or activity(s).

7. That both the Parties shall assist each other in prudently pursuing the petition to quash the judgment dated 27.11.2019 passed by Additional Court, Faizabad and subsequent judgment passed by Additional District Judge, Court 110. 10, Faizabad incriminal appeal no. 01/2020 and other subsequent proceeding (s) and shall appear in the concerned Court as and when necessary and required to record necessary statements/pleadings as per law. DIA

8. That both the parties shall have on satisfaction of aforementioned terms no further claims whatsoever against each other from this day onwards and terms of the aforementioned deed are binding on them. Any party who denies the above mentioned compromise/ agreement will be liable for legal action and claims.

9. That this compromise / agreement is being executed voluntarily and with mutual consent without any Fear, Pressure, Force, Fraud, Undue Influence, Coercion in the presence of members of the family / relative.

15. It is well settled that inherent powers under section 482 Cr.P.C. can be exercised only when no other remedy is available to the litigant and not where a specific remedy is provided by the statute. It is also well settled that if an effective alternative remedy is available, the High Court will not exercise its inherent power under this section, specially when the applicant may not have availed of that remedy.

16. Inherent powers under Section 482 of Cr.P.C. include powers to quash FIR, investigation or any criminal proceedings pending before the High Court or any Courts subordinate to it and are of wide magnitude and ramification. Such powers can be exercised to secure ends of justice, prevent abuse of the process of any court and to make such orders as may be necessary to give effect to any order under this Code, depending upon the facts of a given case. The court can always take note of any miscarriage of justice and prevent the same by exercising its powers u/s 482 of Cr.P.C. These powers are neither limited nor curtailed by any other provisions of the Code. However, such inherent powers are to be exercised sparingly and with caution.

17. The High Courts in deciding matters under Section 482 should be guided by following twin objectives, as laid down in the case of ***Narinder Singh vs. State of Punjab (2014) 6 SCC 466:***

i. Prevent abuse of the process of the court.

ii. Secure the ends of justice.

iii. To give effect to an order under the Code.

18. In the instant case, it is true that this Court had dismissed the criminal revision and upheld the conviction and sentence passed by the court below but it cannot be lost sight of the fact that this

Court has the power to intervene in exercise of the powers vested under section 482 Cr.P.C. only with a view to do the substantial justice or to avoid miscarriage and the spirit of the compromise arrived at between the parties. This is perfectly justified and legal too.

19. I have considered the judgments cited by the learned counsel for the petitioner as well as by the learned Counsel for the State and other decisions of the Hon'ble Apex Court and I do not think it necessary to enlist those decisions which are taken into consideration for the purpose of the present proceedings.

20. In the instant case, the petitioner is invoking the inherent power as vested under section 482 Cr.P.C. after the dismissal of the revision petition under section 397 Cr.P.C. read with section 401 Cr.P.C. In this circumstances, I have to examine the maintainability of the present petition under section 482 Cr.P.C. and also to examine as to whether for entertaining the aforesaid petition, any special circumstances are made out or not. The gist of the ratio is reflected in the decision of the Hon'ble Apex Court in the case of ***Rajinder Prasad vs. Bashir and Others; AIR 2001 SC 3524***. In that case, it was contended before the Apex Court that as per the earlier revision filed by the accused persons under section 397 of the Code has been rejected by the High Court vide order dated 13.05.1990, they had no right to file the petition under section 482 Cr.P.C. with the prayer for quashing the same order. While dealing with the above contention, the Apex Court observed that –

"We are of the opinion that no special circumstances were spelt out in the subsequent application for invoking the jurisdiction of the High Court under section 482 of the Code and the impugned order is liable to be set aside on this ground alone."

So it can be legitimately argued and inferred and held that in all cases where the petitioners are able to satisfy this court that there are special circumstances which can be clearly spelt out, subsequent application invoking inherent powers under section 482 Cr.P.C. can be moved and cannot be thrown away on the technical argument as to its sustainability.

21. In the case **of Krishan Vs. Krishnaveni, reported in (1997) 4 SCC 241**, Hon'ble the Apex Court has held that though the inherent power of the High Court is very wide, yet the same must be exercised sparingly and cautiously particularly in a case where the petitioner is shown to have already invoked the revisional jurisdiction under section 397 of the Code. Only in cases where the High Court finds that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order was not correct, the High Court may in its discretion prevent the abuse of process or miscarriage of justice by exercising jurisdiction under section 482 of the Code.

22. For adjudicating the instant petition, the facts as stated hereinabove are very relevant. Here, the petitioner has attempted to invoke the jurisdiction of this court vested under section 482 Cr.P.C. The embargo of sub section 6 of section 320 Cr.P.C. as pointed out by learned AGA would not come in the way so far as the relief prayed in this petition.

23. I am not in agreement that when the adjudication of a criminal offence has reached to the state of revisional level,

there cannot be any compromise without permission of the court in all case including the offence punishable under 'N.I. Act' or the offence mentioned in Table-1 (one) can be compounded only if High Court or Court of Sessions grants permission for such purpose. The Court presently, concerned with an offence punishable under 'N.I. Act'.

24. It is evident that the permissibility of the compounding of an offence is linked to the perceived seriousness of the offence and the nature of the remedy provided. On this point I can refer to the following extracts from an academic commentary [Cited from : K.N.C. Pillai, R.V. Kelkar's Criminal Procedure, 5th Edition :

"**17.2 - compounding of offences** - A crime is essentially a wrong against the society and the State. Therefore, any compromise between the accused person and the individual victim of the crime should not absolve the accused from criminal responsibility. However, where the offences are essentially of a private nature and relatively not quite serious, the Code considers it expedient to recognize some of them as compoundable offences and some others as compoundable only with the permission of the court..."

25. Section 147 of NI Act begins with a non obstante clause and such clause is being used in a provision to communicate that the provision shall prevail despite anything to the contrary in any other or different legal provisions. So, in light of the compass provided, a dispute in the nature of complaint under section 138 of N.I. Act, can be settled by way of compromise irrespective of any other legislation including Cr.P.C. in general and section 320 (1)(2) or (6) of the Cr.P.C. in particular. The scheme of section 320 Cr.P.C. deals mainly with procedural aspects; but it simultaneously crystallizes certain enforceable rights and obligation. Hence, this provision has an element of substantive legislation and therefore, it can be said that the scheme of section 320 does not lay down only procedure; but still, the status of the scheme remains under a general law of procedure and as per the accepted proposition of law, the special law would prevail over general law. For the sake of convenience, I would like to quote the observations of Hon'ble the Apex Court in the case of ***Municipal Corporation, Indore vs. Ratnaprabha reported in (AIR 1977 SC 308)*** which reads as under :

"As has been stated, clause (b) of section 138 of the Act provides that the annual value of any building shall "notwithstanding anything contained in any other law for the time being in force" be deemed to be the gross annual rent for which the building might "reasonably at the time of the assessment be expected to be let from year to year" While therefore, the requirement of the law is that the reasonable letting value should determine the annual value of the building, it has also been specifically provided that this would be so "notwithstanding anything contained in any other law for the time being in force". It appears to us that it would be a proper interpretation of the provisions of clause (b) of Section 138 of the Act to hold that in a case where the standard rent of a building has been fixed under Section 7 of the Madhya Pradesh Accommodation Control Act, and there is nothing to show that there has been fraud or collusion, that would be its reasonable letting value, but, where this is not so, and the building has never been let out and is being used in a manner where the question of fixing its

standard rent does not arise, it would be permissible to fix its reasonable rent without regard to the provisions of the Madhya Pradesh Accommodation Control Act, 1961. This view will, in our opinion, give proper effect to the non-obstante clause in clause (b) with due regard to its other provision that the letting value should be "reasonable"

26. The expression 'special law' means a provision of law, which is not applicable generally but which applies to a particular or specific subject or class of subjects. Section 41 of Indian Penal Code stands on the same footing and defines the phrase special law. In this connection I would like to quote the well accepted proposition of law emerging from various observations made by the Hon'ble Apex Court in different decisions as a gist of the principle and it can be summarised as under:

"When a special law or a statute is applicable to a particular subject, then the same would prevail over a general law with regard to the very subject, is the accepted principle in the field of interpretation of statute."

27. In reference to offence under section 138 of N.I. Act read with section 147 of the said Act, the parties are at liberty to compound the matter at any stage even after the dismissal of the revision application. Even a convict undergoing imprisonment with the liability to pay the amount of fine imposed by the court and/or under an obligation to pay the amount of compensation if awarded, as per the scheme of N.I. Act, can compound the matter. The complainant i.e. person or persons affected can pray to the court that the accused, on compounding of the offence may be released by invoking jurisdiction of this court under section 482 Cr.P.C. If the parties are asked to approach the Apex Court then, what will be situation, is a question which is required to be considered in the background of another accepted progressive and pragmatic principle accepted by our courts that if possible, the parties should be provided justice at the door step. The phrase "justice at the door step" has taken the court to think and reach to a conclusion that it can be considered and looked into as one of such special circumstances for the purpose of compounding the offence under section 147 of the N. I. Act.

28. It is also well settled that the operation or effect of a general Act may be curtailed by special Act even if a general Act contains a non obstante clause. But here is not a case where the language of section 320 Cr.P.C. would come in the way in recording the compromise or in compounding the offence punishable under section 138 of the N.I. Act. On the contrary provisions of section 147 of N.I. Act though starts with a non obstante clause, is an affirmative enactment and this is possible to infer from the scheme that has overriding effect on the intention of legislature reflected in section 320 Cr.P.C.

29. Merely because the litigation has reached to a revisional stage or that even beyond that stage, the nature and character of the offence would not change automatically and it would be wrong to hold that at revisional stage, the nature of offence punishable under Section 138 of the N.I. Act should be treated as if the same

is falling under table-II of Section 320 IPC. I would like to reproduce some part of the statement of objects and reasons of the Negotiable Instruments (Amendment & Miscellaneous Provisions) Act, 2002 :

"The Negotiable Instrument Act 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instrument Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instrument Act, 1981, namely Section 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the courts to deal with such matters has been found to be cumbersome. The Courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act.

2. A large number of cases are reported to be pending under Sections 138 and 142 of the Negotiable Instruments Act in various courts in the country. Keeping in view the large number of complaints under the said Act, pending in various courts, a Working Group was constituted to review Section 138 of the Negotiable Instruments Act, 181 and make recommendations as to what changes were needed to effectively achieve the purpose of that Section.

3. .....

4. Keeping in view the recommendations of the Standing Committee on finance and other R/SCR.A/2491/2018 ORDER representations, it has been decided to bring out, inter alia the following amendments in the Negotiable Instrument Act 1881, namely.

(i) xxxxxx

(ii) xxxxxx

(iii) xxxxxx

(iv) to prescribe procedure for dispensing with preliminary evidence of the complainant.

(v) xxxxxx

(vi) xxxxx

(vii) to make the offences under the Act compoundable. .....

5. xxxxxx

6. The Bill seeks to achieve the above objects."

30. In a commentary the following observations have been made with regard to offence punishable under section 138 of the N.I. Act. [Cited from : Arun Mohan, Some thoughts towards law reforms on the topic of Section 138 Negotiable Instrument Act -Tackling an avalanche of cases] :

"... ... Unlike that for other forms of crime, the punishment here (in so far as the complainant is concerned) is not a means of seeking retribution, but is more a

means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque.

If we were to examine the number of complaints filed which were 'compromised' or 'settled' before the final judgment on one side and the cases which proceeded to judgment and conviction on the other, we will find that the bulk was settled and only a miniscule number continued."

31. It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect

32. So the intention of the legislature and object of enacting "Banking", Public Financial Institutions and the Negotiable Instrument Laws (Amended Act) 1988 and subsequent enactment, 1.e., Negotiable Instruments (Amendment & Miscellaneous Provisions Act 2002 leads this Court to a conclusion that the offence made punishable under Section 138 of N.I. Act is not only an offence qua property but it is also of the nature of an economic offence, though not covered in the list of statutes enacted in reference to Section 468 of Cr.P.C. Thus, the parties, in reference to offence under Section 138 N.I. Act read with Section 147 of the said Act are at liberty to compound the matter at any stage even after the dismissal of the application.

33. In the instant case, the problem herein is with the tendency of litigants to belatedly choose compounding as a means to resolve their dispute, furthermore, the arguments on behalf of the opposite parties on the fact that unlike Section 320 Cr.P.C., Section 147 of the Negotiable Instruments Act provides no explicit guidance as to what stage compounding can or cannot be done and whether compounding can be done at the instance of the complainant or with the leave of the court.

34 . I am also conscious of the view that judicial endorsement of the above quoted guidelines as given in the case of **Damodar S. Prabhu (supra)** could be seen as an act of judicial law making and therefore an intrusion into the legislative domain. It must be kept in mind that Section 147 of the Act does not carry any guidance on how to proceed with the compounding of offences under the Act. I have already explained that the scheme contemplated under Section 320 of the Cr.P.C. cannot be followed in the strict sense.

35. In view of the aforesaid discussion, the parties, in reference to offence under Section 138 N.I. Act read with Section 147 of the said Act are at liberty to compound the matter at any stage. The complainant i.e. the person or persons affected can pray to the court that the accused, on compounding of the offence may be released by invoking jurisdiction of this Court under Section 482 Cr.P.C. read with Article 226 of the Constitution of India.

36. Generally, the powers available under Section 482 of the Code would not have been exercised when a statutory remedy under the law is available, however considering the peculiar set of facts and circumstances it would not be in the

interest of justice to relegate the parties to appellate court. Additionally when both the parties have invoked the jurisdiction of this Court and there is no bar on exercise of powers and the inherent powers of this court can always be invoked for imparting justice and bringing a quietus to the issue between the parties.

37. As discussed above, the court is inclined to hold accordingly only because there is no formal embargo in section 147 of the N.I. Act. This principle would not help any convict in any other law where other applicable independent provisions are existing as the offence punishable under section 138 of the N.I. Act is distinctly different from the normal offences made punishable under Chapter XVII of IPC (i.e. the offences qua property).

38. In view of the aforesaid discussions the answers of question referred in Paragraph 12 of the judgment is accordingly.

39. In view of the observations and in view of the guidelines as laid down in the case of **Damodar S. Prabhu (Supra)** and taking into account the fact that the parties have settled the dispute amicably, in view of this court the compounding of the offence is required to be permitted.

40. Accordingly, the present petition under section 482 Cr.P.C. is allowed in terms of the compromise arrived at between the parties to this litigation out of court. The conviction and sentence under Section 138 of the N.I. Act 1981 in Complaint Case No.515 of 2016 (Abhay Singh vs. Jai Construction Co. and another) stands annulled as this court intends, otherwise to secure the ends of justice as provided under section 482 Cr.P.C. The petitioner shall be treated as acquitted on account of compounding of the offence with the complainant/person affected. The petitioner shall pay costs of Rs.5000/- (Rs. Five thousand Only) to the respondent - State. Further, the amount of Rupees one lakh so deposited by the petitioner, as awarded, before the court below while filing the appeal shall be released in favour of opposite party no.2.

(2021)08ILR A603
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.08.2021

BEFORE

THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Application U/S 482/378/407 No. 1144 of 2010

Ram Chandra Verma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Mukul Rakesh

Counsel for the Opposite Parties:
G.A., L.P. Shukla

A. Criminal Law-Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code-Section 406-quashing of entire criminal proceeding-criminal breach of trust-an amount of Rs. 1.65,000/- was entrusted to the applicant by the informant for the fulfillment of his obligation to supply the bricks to the informant-he sold their bricks to others-despite repeated requests neither the bricks were supplied nor the money was returned-in this way money was misappropriated and converted to his own use by the applicant-complaint filed before the consumer forum was dismissed on the score that the same is not cognizable by the Forum-FIR, statement u/s 161 prima facie discloses an offence of

criminal breach of trust-Hence, no illegality has been committed by the Court below in either taking the cognizance or in summoning the applicant.(Para 1 to 24)

B. If after perusal of the Chargesheet and the case diary the magistrate has taken cognizance and there is sufficient grounds to proceed further and reasons for the same has even not been recorded by the magistrate the same will not vitiate the cognizance and summoning order. Such an order of issuing summons to the acccused is based on the subject to satisfaction of the Magistrate considering the police report and other documents.(Para 18 to 21)

The petition is dismissed. (E-5)

List of Cases cited:

1. Priti Saraf & anr. Vs St. of NCT of Delhi & anr. CRLA No. 296 of 2021

2. Pratibha Rani Vs Suraj Kumar & ors. MANU/SC/0090/1985

3. Chelloor Manaklal Naravan Ittiravi Nambudiri Vs St. of Travancore MANU/SC/0091/1952: AIR1953SC478

4. Jaswantrai Manilal Akhaney Vs St. of Bom. MANU/SC/0030/1956: 1956Cri LJ 116

5. Akharbhai Nazarali Vs Md. Hussain Bhai MANU/MP/0021/1961:AIR 1961MP37

6. Harihar Prasad Dubey Vs Tulsi Das Mundhra & ors. MANU/SC/0263/1980: 1980CriLJ1340

7. Basudeb Patra Vs Kanai Lal Haldar (1949) AIR Cal 207

8. Velji Raghavji Patel Vs St. of Mah. MANU/SC/0091/1964: 1965CriLJ431

9. St. of Guj.VS Jaswantlal Nathalal MANU/SC/S0091/1967: 1968CriLJ803

10. Sushil Kumar Gupta Vs Joy shanker Bhattacharjee MANU/SC/0201/1970: (1970)3SCR770

11. Superintendent & Remembrancer of Legal Affairs, W. B. Vs S.K. Roy MANU/SC/0229/1974: 1974 CriLJ678

12. St. of Guj. Vs Afroz Mohammed Hasanfatta MANU/SC/0139/2019

13. St. of Karn. Vs M. Devendrappa, MANU/SC/0027/2002, (2015)3 SCC 424

14. R.P Kapur Vs St. of Punj.MANU/SC/0086/1960: 1960 CriLJ 1239

15. St. of Har. & ors. Vs Bhajan Lal & ors, MANU/SC/0115/1992: (1992) CriLJ527

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

1. Heard Sri Kunwar Mukul Rakesh, learned Senior Advocate, assisted by Kunwar Sushant Prakash, learned counsel for applicant, Sri Yatindra Kumar Agnihotri, learned Additional Government Advocate for State and perused the record.

2. The instant petition has been filed for quashing the charge sheet dated 23.10.2009 and the summoning order dated 30.11.2009, passed by learned Judicial Magistrate 1st, Sitapur in State v. Ram Chandra Verma, Criminal Case No.2845 of 2009 arising out of Crime No.372 of 2009, under Section 406 I.P.C. P.S.Sidhauli, District Sitapur.

3. Though the service on opposite party no.2 was reported to be sufficient vide communication dated 6.7.2010 of Chief Judicial Magistrate, Sitapur and Sri L.P.Shukla, Advocate had filed his vakalatnama on his behalf but no-one is present for him today.

4. Necessary facts required for disposal of this application is that opposite party no.2 filed an FIR against the

applicant on 7.5.**20Priti Saraf & Anr. Vs. State of NCT of Delhi & Anr. in Criminal Appeal No(s). 296 of 2021 dated 10th March, 202109** at 21.30 hours at P.S.Kotwali Sidhauli, Sitapur stating therein that the opposite party no.2 had contacted to buy one lac bricks at the rate of 1650/- per thousand bricks from the applicant and had paid Rs.1,50,000/- through account payee cheque and Rs.15,000/- as cash, however the bricks were not supplied and the applicant had also sold his brick kiln to some other persons and, therefore, has misappropriated the money of opposite party no.2. After thorough investigation a charge sheet was submitted by the Investigating Officer under Section 406 I.P.C. and the Magistrate has also taken the cognizance of the offence and vide summoning order dated 30.11.2009 summoned the applicant to face trial for the offence under Section 406 I.P.C., aggrieved by the same the instant petition has been filed by the applicant praying to quash the summoning order dated 30.11.2009, passed by learned Judicial Magistrate 1st, Sitapur in State v. Ram Chandra Verma, Criminal Case No.2845 of 2009 arising out of Crime No.372 of 2009, under Section 406 I.P.C.

5. Sri Mukul Rakesh, learned Senior Counsel vehemently submits that the instant case is of such a nature where by any stretch of imagination criminal proceedings could not be initiated as the dispute is purely of civil nature and even if the allegation of the FIR is taken on its face value, the same appears to be a case of breach of promise or contract on the basis of which only civil case could have been filed.

It is further submitted that there were no sufficient ground before the Magistrate to summon the applicant to face trial and the Magistrate has materially erred in summoning the applicant to face trial.

It is further submitted that the cognizance has been taken by the Magistrate without application of judicial mind and the order of taking cognizance and summoning the accused has been passed on proforma simply by filling up the blanks which reveals that the Magistrate has not applied his judicial mind.

It is further submitted that the proceedings before the courts below are nothing but the abuse of the process of law and, therefore, the same be quashed.

Learned Senior Counsel relied on a judgment of this Court dated 15.12.2017, passed in Petition (482 Cr.P.C.) No.3551 of 2009 (Desh Bandhu Srivastava v. State of U.P.).

6. Learned Additional Government Advocate for State while controverting the arguments of the learned counsel for applicant submits that the arguments of learned counsel for applicant is with regard to the factual aspects of the case which cannot be gone into by this Court while exercising jurisdiction under Section 482 Cr.P.C.

7. Having heard learned counsel for the parties and having perused the record, it is now, no more res integra and this Court, in the exercise of its jurisdiction under Section 482 of the Code of Criminal Procedure, is required to examine whether the averments in the F.I.R./complaint constitute the ingredients necessary for an offence alleged under the Penal Code. If the averments taken on their face do not constitute the ingredients necessary for the

offence, the criminal proceedings may be quashed under Section 482. A criminal proceeding can be quashed where the allegations made in the F.I.R./complaint do not disclose the commission of an offence under the Penal Code. The F.I.R./complaint must be examined as a whole, without evaluating the merits of the allegations. Though the law does not require that the F.I.R./complaint reproduce the legal ingredients of the offence in verbatim but the complaint must contain the basic facts necessary for making out an offence under the Penal Code.

8. The opposite party no.2 has alleged in the F.I.R./complaint that the applicant has committed offence under Section 406 of the Penal Code. It would thus be necessary to examine the ingredients of the Section 406 IPC and to see whether the allegations made in the complaint, taken on their face, attract the offence of section 406 of the Penal Code.

9. Hon'ble Supreme Court Of India in **Pratibha Rani Vs. Suraj Kumar and Ors.,MANU/SC/0090/1985,** while discussing the ingredient of " Entrustment" held as under :-

"Section 405 of the Penal Code reads thus:

"Section 405.- Criminal breach of trust.- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

A careful reading of Section 405 shows that the ingredients of a criminal breach of trust are as follows:

i) A person should have been entrusted with property, or entrusted with dominion over property;

ii) That person should dishonestly misappropriate or convert to their own use that property, or dishonestly use or dispose of that property or willfully suffer any other person to do so; and

iii) That such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust.

Entrustment is an essential ingredient of the offence. A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code .The jurisdiction under Section 482 of the Code of Criminal Procedure has to be exercised with care. In the exercise of its jurisdiction, a High Court can examine whether a matter which is essentially of a civil nature has been given a cloak of a criminal offence. Where the ingredients required to constitute a criminal offence are not made out from a bare reading of the complaint, the continuation of the criminal proceeding will constitute an abuse of the process of the court.

"39. The Supreme Court in a large number of cases has held that the fundamental core of the offence of criminal breach of trust is that a property must be entrusted and the dominion of the property should be given to the trustee. In the present case, all these conditions, even according to the findings of the Court Though not its conclusion are clearly established. That the view of the High Court is absolutely wrong would be clear from a number of authorities, some of which we would like to discuss here.

40. ***In Chelloor Manaklal Naravan Ittiravi aNambudiri v. State of Travancore MANU/SC/0091/1952 : AIR1953SC478*** *this Court made the following observations:*

As laid down in Section 385, Cochin Penal Code (corresponding to Section 405, Indian Penal Code) to constitute an offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or Power over it.... It follows almost axiomatically from this definition that the ownership or beneficial interest in the property in respect of which criminal breach of trust is alleged to have been committed, must be in some person other than the accused and the latter must hold it on account of some person or in some way for his benefit.

41. In ***Jaswantrai Manilal Akhaney v. State of Bombay MANU/SC/0030/1956 : 1956CriLJ1116*** *Sinha, J. (as he then was) observed thus:*

For an offence under Section 409, Indian Penal Code the first essential ingredient to be proved is that the property was entrusted.... But when Section 405 which defines "criminal breach of trust speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain events.

42. In ***Akharbhai Nazarali v. Md. Hussain Bhai MANU/MP/0021/1961 :AIR1961MP37*** *the Madhya Pradesh High Court made the following observations :*

It may be that the deduction and retention of the employees' contribution is a trust created by virtue of that very fact, or by virtue of a provision in statute or statutory rule. But even apart from the latter, the mere fact of telling the employees that it is their contribution to the provident fund scheme and then making a deduction or recovery and retaining it, constitutes the offence of criminal breach of trust. This is so obvious that nothing more need be said about it.

43. These observations were fully endorsed and approved by this Court in ***Harihar Prasad Dubey v. Tulsi Das Mundhra and Ors. MANU/SC/0263/1980 : 1980CriLJ1340*** *where the following observations were made:*

This, in our opinion, is a correct statement of the position and we also agree with the learned Judge of the Madhya Pradesh High Court that "this so obvious that nothing more need be said about it". We, therefore, think that the impugned order quashing the charge against the respondents is obviously wrong.

*44. **In Basudeb Patra v. Kanai Lal Haldar AIR 1949 Cal 207** the Calcutta High Court observed thus:*

Whereas the illustration to Section 405 show equally clearly that the property comes into the possession of the accused either by an express entrustment or by some process placing the accused in a position of trust.... On the facts of the present case, which, as I have said, are not open to question at this stage, it is quite clear that the ornaments were handed over to the petitioner by the beneficial owner in the confidence that they would be returned to the beneficial owner in due time after having been used for the purpose for which they were handed over. If this is not an entrustment, it is impossible to conceive what can be an entrustment.

(Emphasis ours)

*45. This ratio was fully approved by this Court **in Velji Raghavji Patel v. State of Maharasatra MANU/SC/0091/1964 : 1965CriLJ43**1 where the following observation were made:*

In order to establish " entrustment of dominion" over property to an accused person the mere existence of that person's dominion over property is not enough. It must be further shown that his dominion was the result of entrustment. Therefore, as rightly pointed out by Harris, C.J. the prosecution must establish that dominion over the assets or a particular asset of the partnership was by a special agreement between the parties, entrusted to the accused person.

*46. In the case of **State of Gujarat v. Jaswantlal Nathalal MANU/SC/0091/1967** : 1968CriLJ803 Hegde, J., speaking for the Court observed thus:*

The expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner. Further the person handing over the property must have confidence in the person taking the property so as to create a fiduciary relationship between them.

*47. In **Sushil Kumar Gupta v. Joy Shanker Bhattacharjee MANU/SC/0201/1970 : [1970]3SCR770** this Court observed thus :*

The offence of criminal breach of trust is committed when a person who is entrusted in any manner with property or with dominion over it, dishonestly misappropriates it or converts it to his own use.... The appellant's manner of dealing with the money entrusted to his custody clearly constitutes criminal breach of trust.

*48. In the case of **Superintendent & Remembrancer of Legal Affairs, West Bengal v. S.K. Roy MANU/SC/0229/1974 : 1974CriLJ678** this Court held that for 'entrustment' two things are necessary, viz, (1) the entrustment may arise in "any manner" whether or not it is fraudulent, and (2) the accused must have acquisition or dominion over the property."*

10. Thus condition necessary for an act to constitute an offence under Section 405 of the Penal Code is that the accused was entrusted with some property or has dominion over the property and dishonestly misappropriates it or converts it to his own use .

11. Perusal of record would also reveal that in the FIR filed by the opposite party no.2 against the applicant it has been specifically stated that opposite party no.2 had contracted to buy one lac bricks at the rate of Rs.1650/- per thousand bricks from applicant and he had paid Rs.1,50,000/- to the owner of the brick kiln/applicant through account payee cheque and Rs.15,000/- as cash to him, who in turn promised to supply the bricks to opposite party no.2. On 2.6.2007 he at about 12.00 noon stated to have arrived at the brick kiln of the applicant to get his bricks but the applicant informed him that at that time bricks of good quality were not available and, therefore, he will deliver the same afterwards. It is further stated in the FIR that after waiting for some days, he again went to the applicant with tractor and trolley to get the bricks but the same were not delivered to him and when after waiting for long he came to the brick kiln again he was informed that applicant and his wife had sold the brick kiln to one Asha Gupta. Despite efforts by opposite party no.2 neither the money was returned nor the bricks were given to the complainant by the applicant.

12. It is also apparent that during the course of investigation the statement of the complainant/informant was recorded under Section 161 Cr.P.C. wherein he has corroborated the version of the FIR and it is also stated that the cheque of Rs.1,50,000/- and Rs.15,000/- cash was given to the applicant/accused in the presence of witnesses Banwari and Arvind Kumar Jain. He has also provided copy of the receipt given by the applicant to the Investigating Officer.

13. Opposite Party No.2 also appears to have filed a complaint before the Consumer Forum, Sitapur, which was dismissed by the Forum on the score that the same is not cognizable by the Forum as the issue involves complex factual determination which could only be adjudicated by full fledged trial and also that the proceedings for recovery of money are not cognizable by the Consumer Forum.

14. I now come to the question as to whether or not a clear allegation of entrustment and misappropriation of the money was made by the informant in the FIR and, if so, was the Court below was justified in summoning the applicant to face trial under section 406 of the Penal Code. It is well settled that for the purpose of exercising its power under Section 482 Cr.P.C. to quash a FIR or a complaint the High Court would have to proceed entirely on the basis of the allegations made in the complaint/FIR or the documents accompanying the same. It has no jurisdiction to examine the correctness or otherwise of the allegations. In case no offence is coming out on the allegations and the ingredients of Section 405 & 406, I.P.C. are not made out, this Court would be justified in quashing the proceedings. In the present case perusal of the F.I.R./complaint and the statement of the informant recorded under section 161 of the Crpc would show that the allegations with regard to the commission of offence under section 406 IPC by the applicant are clear, specific and unambiguous and, therefore, the complainant should be given a chance to prove his case in the trial. It is, of course, open to the accused at the trial to take whatever defence that is open to him but that stage had not come yet.

15. The important portions of the F.I.R./complaint and the statement of the informant recorded under Section 161 Cr.P.C. may be spelt out as under :

(1) that the informant had agreed to buy one lac bricks from accused applicant who was the manager of the brick kiln, at the rate of 1650/- per thosand bricks and had paid Rs. 1,50,000/- to the accused-applicant through account payee cheque and Rs. 15000/- in cash as advance,

(2) that applicant had assured the informant that he will supply the bricks as agreed between them,

(3) that informant had gone to the brick kiln of the applicant on 02.06.2007 at about 12.00 p.m. to recieve the bricks but he did not deliver the bricks on the pretext that bricks are not of good quality,

(4) that thereafter the informant had stated to have gone to the brick kiln of the applicant many times with tractor trolly, but he did not deliver the bricks ,

(5) that applicant and his wife had sold their brick kiln to others and despite repeated requests neither the bricks were supplied nor the money of the informant was returned.

16. Taking all the allegations placed above, by no stretch of imagination can it be said that the aforesaid allegations do not prima facie amount to an offence of criminal breach of trust against the applicant punishable under Section 406 of the Penal Code as the amount of Rs 1,65,000/- was allegedly entrusted to the applicant by informant for the fulfillment of his obligation to supply the bricks to the informant and contrary to the terms of the obligation, neither the bricks were supplied nor the money was returned to the informant/opposite party no.2 and in this way the money was misappropriated and converted to his own use by the applicant. Thus, there can be no room for doubt that all the facts stated in the F.I.R. and statement of informant recorded under Section 161 Cr.P.C. constitute an offence under Section 406 IPC and the informant cannot be denied the right to prove his case at the trial.

17. Next submission of learned Senior counsel is with regard to the fact that the order of magistrate whereby the cognizance has been taken and summons has been issued is a proforma order and the same shows non application of mind by the magistrate. To butress his point he relied upon a case decided by a single Judge of this Court in 482 No. 3551 of 2009 dated 15.12.2017 whereby the proforma summoning order of the magistrate was quashed on the ground that the same has been passed by filling blanks in proforma order. Perusal of the order of the magistrate whereby the applicant has been summoned would show that the same is a proforma order, however the magistrate on the same day has endorsed on the Charge Sheet as " Cognizance taken , register", which shows that the after perusing the charge sheet and the case diary he has endorsed this on the Charge Sheet. However no reason has been assigned by the magistrate for taking cognizance and issuance of summons.

18. Hon'ble Supreme Court in **State of Gujrat Vs Afroz Mohammed Hasanfatta reported in MANU/SC/0139/2019** while considering the need of the magistrate to record reasons for taking of cognizance and issuance of summons in cases based on police report (Charge Sheet) framed a point mentioned below and answered it as under :-

"While directing issuance of process to the Accused in case of taking

cognizance of an offence based upon a police report Under Section 190(1)(b) Code of Criminal Procedure, whether it is mandatory for the court to record reasons for its satisfaction that there are sufficient grounds for proceeding against the Accused?

"20. In para (21) of Mehmood Ali Rehman, this Court has made a fine distinction between taking cognizance based upon charge sheet filed by the police Under Section 190(1)(b) Code of Criminal Procedure and a private complaint Under Section 190(1)(a) Code of Criminal Procedure and held as under:

21. Under Section 190(1)(b) Code of Criminal Procedure, the Magistrate has the advantage of a police report and Under Section 190(1)(c) Code of Criminal Procedure, he has the information or knowledge of commission of an offence. But Under Section 190(1)(a) Code of Criminal Procedure, he has only a complaint before him. The Code hence specifies that "a complaint of facts which constitute such offence". Therefore, if the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance Under Section 190(1)(a) Code of Criminal Procedure. The complaint is simply to be rejected.

21. In summoning the Accused, it is not necessary for the Magistrate to examine the merits and demerits of the case and whether the materials collected is adequate for supporting the conviction. The court is not required to evaluate the evidence and its merits. The standard to be adopted for summoning the Accused Under Section 204 Code of Criminal Procedure is not the same at the time of framing the charge. For issuance of summons Under Section 204 Code of Criminal Procedure, the expression used is "there is sufficient ground for proceeding....."; whereas for framing the charges, the expression used in Sections 240 and 246 Indian Penal Code is "there is ground for presuming that the Accused has committed an offence.....". At the stage of taking cognizance of the offence based upon a police report and for issuance of summons Under Section 204 Code of Criminal Procedure, detailed enquiry regarding the merits and demerits of the case is not required. The fact that after investigation of the case, the police has filed charge sheet along with the materials thereon may be considered as sufficient ground for proceeding for issuance of summons Under Section 204 Code of Criminal Procedure.

22. In so far as taking cognizance based on the police report, the Magistrate has the advantage of the charge sheet, statement of witnesses and other evidence collected by the police during the investigation. Investigating Officer/SHO collects the necessary evidence during the investigation conducted in compliance with the provisions of the Code of Criminal Procedure and in accordance with the Rules of investigation. Evidence and materials so collected are sifted at the level of the Investigating Officer and thereafter, charge sheet was filed. In appropriate cases, opinion of the Public Prosecutor is also obtained before fling the charge sheet. The court thus has the advantage of the police report along with the materials placed before it by the police. Under Section 190 (1)(b) Code of Criminal Procedure, where the Magistrate has taken cognizance of an offence upon a police report and the Magistrate is satisfied that there is sufficient ground for proceeding,

the Magistrate directs issuance of process. In case of taking cognizance of an offence based upon the police report, the Magistrate is not required to record reasons for issuing the process. In cases instituted on a police report, the Magistrate is only required to pass an order issuing summons to the Accused. Such an order of issuing summons to the Accused is based upon subject to satisfaction of the Magistrate considering the police report and other documents and satisfying himself that there is sufficient ground for proceeding against the Accused. In a case based upon the police report, at the stage of issuing the summons to the Accused, the Magistrate is not required to record any reason. In case, if the charge sheet is barred by law or where there is lack of jurisdiction or when the charge sheet is rejected or not taken on file, then the Magistrate is required to record his reasons for rejection of the charge sheet and for not taking on file. In the present case, cognizance of the offence has been taken by taking into consideration the charge sheet filed by the police for the offence Under Sections 420, 465, 467, 468, 471, 477A and 120B Indian Penal Code, the order for issuance of process without explicitly recording reasons for its satisfaction for issue of process does not suffer from any illegality."[Emphasis Mine]"

19. Thus if after perusal of the Charge Sheet and the case diary the magistrate has taken cognizance and there is sufficient grounds to proceed further and reasons for the same has even not been recorded by the magistrate the same will not vitiate the cognizance and summoning order. However the situation may be different where there is no material at all in the case diary and the prosecution case even if taken on its face do not disclose commission of any offence.

20. The Apex Court in **State of Karnataka v. M. Devendrappa, MANU/SC/0027/2002, 2015 (3) SCC 424** while considering the R P Kapoor and Bhajan Lal (see below) has opined as under:-

"In R.P. Kapur v. State of Punjab MANU/SC/0086/1960 : 1960 CriLJ 1239, this Court summarized some categories of cases where inherent power can and should be exercised to quash proceedings.

(i) Where it manifestly appears that there is a legal bar against the institution or continuance, e.g. want of sanction;

(ii) Where the allegation in the first information report or complaint taken at its face value and accepted in their entirely do not constitute the offence alleged;

(iii) Where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

8. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not

or whether on a reasonable appreciation of it accusation would not be sustained. That is function of the trial judge. Judicial process should not be an instrument of oppression, or needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of private complainant as unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any Court or otherwise to secure the ends of justice were set out in some detail by this Court in ***State of Haryana and Ors. v. Bhajan Lal and Ors., MANU/SC/0115/1992 : 1992CriLJ527*** *. A note of caution was, however, added that the power should be exercised sparingly and that too in rarest of rare cases. The illustrative categories indicated by this Court are as follows:-*

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the F.I.R. do not constitute a cognizable offence but constituted only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

21. Hon'ble Supreme Court in its recent decision, in the case of Priti Saraf & Anr. Vs. State of NCT of Delhi & Anr. in Criminal Appeal No(s). 296 of 2021 dated 10th March, 2021 has held as under :-

"32. In the instant case, on a careful reading of the complaint/FIR/charge-sheet, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 406 and 420 IPC cannot be said to be absent on the basis of the allegations in the complaint/FIR/charge-sheet. We would like to add that whether the allegations in the complaint are otherwise correct or not, has to be decided on the basis of the evidence to be led during the course of trial.

Simply because there is a remedy provided for breach of contract or arbitral proceedings initiated at the instance of the appellants, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy, and the initiation of criminal proceedings, in any manner, will be an abuse of the process of the court for exercising inherent powers of the High Court under Section 482 CrPC for quashing such proceedings."

22. Thus it is manifestly evident from the law aforesaid that even if any case has been filed by the complainant/ informant before the consumer forum and the same has been dismissed on the ground of alternate remedy, the same could not clothe this case as a civil dispute.

23. In view of above, I am satisfied that the F.I.R. and statement of the complainant recorded under section 161 of the Cr.P.C. prima facie discloses an offence of criminal breach of trust, as defined in Section 405 and punishable under Section 406 of the Indian Penal Code and no illegality has been committed by the Court below in either taking the cognizance or in summoning the applicant-accused to face trial under aforesaid penal section. Keeping in view the over all facts, circumstances and the aforesaid case laws no case has made out for the quashing of the proceedings, charge sheet or the summoning order passed by the trial Court.

24. For the reasons given above, I do not find any substance in the application of the applicant and the same is therefore liable to be dismissed. The application filed by the applicant is, thus dismissed. The trial Court is directed to conclude the trial at the earliest without granting soft adjournments to the either party, in accordance with law.

25. Interim order, if any, is hereby vacated.

26. A copy of this order be immediately sent to the trial Court.

27. It is clarified that observations of this court made herein before are only for the purpose of disposing this application and the same shall never be construed as the opinion of this Court on merits and the trial Court shall independently appreciate the evidence which would be produced by the parties and will come to its own conclusion without being guided by any observation made in this order.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.09.2021

BEFORE
THE HON'BLE MOHD. FAIZ ALAM KHAN, J.

Application U/S 482/378/407 No. 1144 of 2010

Ram Chandra Verma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Mukul Rakesh

Counsel for the Opposite Parties:
G.A., L.P. Shukla

(Delivered by Hon'ble Mohd. Faiz Alam Khan, J.)

1. None is present for applicant when the case is taken up for hearing, however Sri Rajesh Kumar, learned Additional Government Advocate for State is present.

2. This case has been listed today for the reason that on perusal of judgment, after the same has been uploaded, it is noticed that in para-4 of page-1, one sentence has been crept which is not relevant for the disposal of dispute between the parties and the same appears to have crept up due to malfunctioning of the computer and thus is not having any bearing either on the facts or on the merits of the case and the same is required to be rectified.

3. Thus the phrase **"Priti Saraf & Anr. Vs.State of NCT of Delhi & Anr. in Criminal Appeal No(s).296 of 2021 dated 10th March, 2021"** appearing at page-1, para-4 of the judgment dated 09.08.2021, passed in Application U/S 482/378/407 No. - 1144 of 2010 is struck of and the above judgment dated 9.8.2021 is corrected to that extent.

4. This order shall remain part and parcel of the judgment dated 09.08.2021, passed in Application U/S 482/378/407 No. - 1144 of 2010

(2021)08ILR A615
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2021
BEFORE

THE HON'BLE VIVEK AGARWAL, J.

Application U/S 482. No. 5421 of 2021

Dharmendra Nishad ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Aqeel Ahmad, Sri Sanjeev Kumar Shukla

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 482 - Negotiable Instrument Act, 1981-Section 138-quashing of entire criminal proceeding-accused seeking quashing of entire proceeding on the sole ground that the complainant had not appeared before the court and had not given his evidence u/s 200-202 Cr.P.C.-The magistrate was required to observe the provisions contained in sections 200-202 Cr.P.C. does not appear to have any substance especially when section 145(1) of N.I. Act contemplates taking of the complainant evidence on affidavit not only in the trial but also in any inquiry or other proceeding-Section 145 of the Act has excluded the provisions of Code of Criminal procedure with regard to the manner in which evidence of the complainant is to be taken- plea taken by the applicant, is not made out.(Para 1 to 8)

The petition is dismissed. (E-5)

List of Cases cited:

1. Mandvi Co-operative Bank Ltd Vs Nimesh B. Thakore(2010) 3 SCC 83,

2. Sachin Agarwal Vs St. of U.P. (2011) 75 ACC 482

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

1. Heard Sri Sanjeev Kumar Shukla, learned counsel for the applicant and Sri Janardan Prakash, learned AGA for the State.

2. This application under Section 482 Cr.P.C. has been filed on behalf of the accused seeking quashing of the entire proceedings of Complaint Case No. 417 of 2019 (Nasreen vs. Dharmendra) under Section 138 of the Negotiable Instruments Act, 1881, Police Station-Kotwali, District-Jaunpur as well as summoning order dated 07.08.2019, pending in the Court of Judicial Magistrate-Ist, Jaunpur and non-bailable warrants issued on 08.01.2021, on a singular ground that the impugned order dated 07.08.2019 does not disclose that complainant had appeared before the court concerned and had given his evidence under Sections 200-202 Cr.P.C

3. Sri Janardan Prakash opposes the prayer made by learned counsel for applicant.

4. After hearing learned counsel for the parties and going through the record, it will be just and proper to refer to the provisions contained in Section 145 of the Negotiable Instruments Act, 1881, which reads as under:-

"Evidence on affidavit.?

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."

5. *In case of* ***Radhey Shyam Garg vs. Naresh Kumar Gupta; (2009) 13 SCC 201,*** *it is held that "if affidavit in terms of the provisions of Section 145of the Act is to be considered to be an evidence, it is difficult to comprehend as to why the court will ask the deponent of the said affidavit to examine himself with regard to the contents thereof once over again. He may be cross-examined and upon completion of his evidence, he may be re-examined."*

6. Similarly, in case of ***Mandvi Co-operative Bank Ltd. vs. Nimesh B. Thakore; (2010) 3 SCC 83,*** *the Supreme Court has held that "once it is realized that Sections 143 to 147 were designed especially to lay down a much simplified procedure for the trial of dishonoured cheque cases with the sole object that the trial of those cases should follow a course even swifter than a summary trial and once it is seen that even the special procedure failed to effectively and expeditiously handle the vast multitude of cases coming to the court, the claim of the accused that on being summoned under Section 145(2), the complainant or any of his witnesses whose evidence is given on affidavit must be made to depose in examination-in- chief all over again plainly appears to be a demand for meaningless duplication, apparently aimed at delaying the trial.*

Section 145 of the Act has excluded the provisions of Code of Criminal Procedure with regard to the manner in which evidence of the complainant is to be taken. Section 145(1) of the Act provides that notwithstanding any contained in the Code of Criminal

Procedure, 1973, the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any inquiry, trial or other proceedings under the said Act. However, the court has power in certain circumstances to examine the person giving evidence on affidavit either on the application of the prosecution or the accused and this provision is contained in sub-section (2) of section 145 of the Act, the Magistrate was not legally required to examine the complainant and his witnesses as provided in Section 200 of the Criminal of PC. The expression "inquiry" and "other proceeding" used in section 145(1) of the Act very well includes the proceedings of the complaint held at the pre-summoning stage, therefore, the affidavit could be filed and relied upon by the Magistrate in passing the summoning order."

7. In case of ***Sachin Agarwal vs. State of U.P.; (2011) 75 ACC 482,*** *it has been held that "the Magistrate was required to observe the provisions contained in sections 200 and 202 Cr.P.C. does not appear to have any substance especially when section 145(1) of the Negotiable Instruments Act contemplates taking of the complainant evidence on affidavit not only in the trial but also in any inquiry or other proceeding. The term inquiry and also the term other proceedings very well includes the proceedings held by the Magistrate before summoning the accused."*

8. In view of aforesaid legal position, it is evident that the plea taken by the applicant's counsel that since Magistrate has not observed that provisions contained in Sections 200 and 202 Cr.P.C., have not been followed, then applicant is entitled to quashing, is not made out, therefore, petition fails and is ***dismissed.***

(2021)08ILR A617
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2021

BEFORE

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

Application U/S 482. No. 6701 of 2021

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

Counsel for the Applicants:
Sri Ronak Chaturvedi

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Sections 498-A, 323,342, 504, 506, & SC/ST Act, 1989-section 3(2) (v-a)-quashing of-plea taken by the applicants that they be denied opportunity to move a discharge application-applicants duly appeared before the court and order was passed for framing of charges-trial judge recorded a prima facie satisfaction with regard to the material being sufficient for the purpose of framing of charge after perusing the case diary, FIR and evidence collected-order read and explained to the accused by fixing date for evidence and issued summons to the witnesses-order-sheet of the case indicates several dates have been fixed and applications seeking exemptions for appearance several times also-plea taken by the applicants that their valuable right to plead discharge has been taken away, seems as an afterthought.(Para 1 to 34)

B. The ambit and scope of exercise of power under Secitons 227 and 228 of the code, are fairly well settled. the test to be

applied at this stage would be whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. if the judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge, if not, he will discharge the accused.(Para 21)

The petition is dismissed. (E-5)

List of Cases cited:

1. Sanjay Kumar Rai Vs St. of U.P. & anr. (2021) SCC Online SC 367

2. Satish Chandra Ratan Lal Shah Vs St. of Guj. & anr. (2019) 9 SCC 148

3. St. of Bih. Vs Ramesh Singh(1977) 4 SCC 39

4. UOI Vs Prafulla Kumar Samal & anr. (1979) 3 SCC 4

5. Niranjan Singh Karam Singh Punjabi Vs Jitendra Bhimraj Bijjaya & ors. (1990) 4 SCC 76

6. Soma Chakravarty Vs St.thru CBI(2007) 5SCC 403

7. P. Vijayan Vs St. of Ker. & anr. (2010) 2 SCC 398

8. Sajjan Kumar Vs C.B.I. (2010) 9 SCC 368

9. Amit Kapoor Vs Ramesh Chander & anr. (2012) 9 SCC 460

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

11. Omkar Nath Mishra Vs St. of U.P.(2008) 2 SCC 561

12. Sheoraj Singh Alld Vs St. of U.P.(2013) 11 SCC 476

13. St. Vs S. Selvi & anr.(2018) 13 SCC 455

14. Asim Shariff Vs NIA (2019) 7 SCC 148

15. Vikram Johar Vs St. of U.P.(2019) 14 SCC 207

16. M.E Shivalingamurthy Vs CBI,Bengaluru (2020) 2 SCC 768

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

1. Heard Sri Ronak Chaturvedi, learned counsel for the applicants and Sri Pankaj Saxena, learned Additional Government Advocate-I appearing for the State-opposite party.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the proceedings of Special Session Trial No. 75 of 2019 (State Vs. Kamlendra Bahadur Mishra and others) arising out of Case Crime No. 62 of 2019, under Sections 323, 342, 504, 506 I.P.C. read with 3 (2) (v-a) of S.C./S.T. Act, Police Station Bijpur, District Sonbhadra pending in the court of Special Judge S.C./S.T. Act, Sonbhadra and also the order dated 20.02.2020 framing charges.

3. The only ground which has been sought to be canvassed to challenge the order dated 20.02.2020 and also the proceedings is that the learned Special Judge before proceeding to frame charges against the applicants did not provide opportunity to move a discharge application and accordingly the applicants have been denied their valuable right to claim discharge granted to an accused under Section 227 of the Code of Criminal Procedure.

4. Counsel for the applicants has contended that the court below has proceeded to frame charges without permitting the applicants to move a discharge application and the applicants having thus been denied their valuable right

to plead discharge have been seriously prejudiced.

5. Reliance has been placed upon the judgments in **Sanjay Kumar Rai Vs. State of Uttar Pradesh and another1 and Satish Chandra Ratan Lal Shah Vs. State of Gujarat and another**2 for the proposition that discharge is a valuable right provided to an accused.

6. Per contra, learned A.G.A. appearing for the State opposite party has drawn attention of the Court to the fact that prior to passing of the order dated 20.02.2020, framing charges, the applicants were put to notice by the previous order dated 03.01.2020 in terms of which the subsequent date i.e. 20.02.2020 was fixed for framing of charges. It has also been pointed out that the applicants had approached this Court in proceedings under Section 482 Cr.P.C. (Application U/S 482 No. 42060 of 2019) and also filed a writ petition (Criminal Misc. Writ Petition No. 17716 of 2019) seeking quashing of the first information report dated 12.06.2019 lodged against them. It is submitted that the necessary documents were therefore available with the accused applicants during the earlier proceedings and also the present proceedings which is evident from the documents which have been appended along with the affidavit in support of the present application. It is contended that in addition the applicants were granted sufficient time by the court below by fixing 20.2.2020 as the date for framing of charges and in the event the applicants desired, they could have moved an appropriate discharge application in the interregnum. It is pointed out that subsequent to framing of charges on 20.02.2020, several dates have been fixed and the trial is at the stage of evidence and as such the claim sought to be raised by the accused applicants with regard to discharge cannot be entertained at this stage.

7. In order to appreciate rival contentions, the relevant statutory provisions may be adverted to.

8. The procedure for trial before a court of session is provided under Chapter XVIII of the Cr.P.C. and Sections 227 and 228 which relate to discharge and framing of charges are extracted below.

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

228. Framing of charge.--(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which—

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, [or any other Judicial Magistrate of the first

class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial

Magistrate of the first class, on such date as he deems fit,and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial

of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b)of sub-section (1),the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

9. The tests and considerations to be applied by the Court while exercising the powers under Sections 227 and 228 of the Code, fell for consideration in the case of **State of Bihar vs. Ramesh Singh3,** and it was held that the standard of test and judgement which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or 228, and at that stage, the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. While considering the tests to be applied by the Court for the purposes of discharge, it was held that reading Sections 227 and 228 together in juxtaposition, it would be clear that at the initial stage of the trial, the truth, veracity and effect of evidence, which the prosecutor proposes to adduce are not to be meticulously judged and the standard of test and judgement which is to be finally applied before recording a finding regarding guilt or otherwise of the accused is not required to be applied at this stage; the test would be whether there is sufficient ground for proceeding and/or whether there is sufficient ground for conviction. It was stated thus :-

"4. Under section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge consider that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming. that the accused has committed an offence which-

. . . . . (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At

that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the, initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. if the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the, trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227.

5. In Nirmaljit Singh Hoon v. The State of West Bengal - Shelat, J. delivering the judgment on behalf of the majority of the Court referred at page 79 of the report to the earlier decisions of this Court in Chandra Deo Singh v. Prokash Chandra Bose - where this Court was held to have laid down with reference to the similar provisions contained in Sections 202 and 203 of the Code of Criminal Procedure, 1898 "that the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction, and observed that where there was prima facie evidence, even though the person charged of an offence in the complaint might have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue of a process could not be refused." Illustratively, Shelat J, further added "Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case".

10. The ambit and scope of the exercise of powers while passing an order of discharge under Section 227 of the Code was subject matter of consideration in **Union of India vs. Prafulla Kumar Samal And Another4,** and it was held that the Court while exercising such powers is not to act as a trial judge but should weigh evidence and form opinion only on the limited question of whether a prima facie case is made out. The principles to be applied for the purpose were stated as follows :-

"7. Section 227 of the Code runs thus :

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the

submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

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

8. The scope of Section 227 of the Code was considered by a recent decision of this Court in the case of State of Bihar v. Ramesh Singh (1977) 4 SCC 39 where Untwalia, J. speaking for the Court observed as follows:-

Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence; if any, cannot show that the accused committed the offence then there will be no sufficient ground for proceeding with the trial.

This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of ths Sessions Judge in order to frame a charge against the accused. Even under the Code of 1898 this Court has held that a committing Magistrate had ample powers to weigh the evidence for the limited purpose of finding out whether or not a case of commitment to the Sessions Judge has been made out.

9. In the case of K. P. Raghavan v. M. H. Abbas AIR 1967 SC 740, this Court observed as follows :

No doubt a Magistrate enquiring into a case under Section 209, Cr. P.C. is not to act as a mere Post Office, and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session.

To the same effect is the later decision of this Court in the case of Almohan Das v. State of West Bengal (1969) 2 SCR 520, where Shah, J. speaking for the Court observed as follows :

"A Magistrate holding an enquiry is not intended to act merely as a recording machine. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is his duty to discharge the accused : if there is some evidence on which a conviction may reasonably be based, he must commit the case.

In the aforesaid case this Court was considering the scope and ambit of Section 209 of the Code of 1898.

10. Thus, on a consideration of the authorities mentioned above, the following principles emerge :

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

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

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

11. In **Niranjan Singh Karam Singh Punjabi, Vs. Jitendra Bhimraj Bijjaya and others5**, it was held that at the stage of Sections 227-228, 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 disclose the existence of all the ingredients constituting the alleged offence and for this limited purpose, the court may sift the evidence. The observations made in the judgment in this regard are as follows :-

"4. ...The procedure for trial before a Court of Sessions is set out in Chapter XVIII of the Code. Section 225 places the public prosecutor in charge of the conduct of the prosecution. Section 226 requires him to open the prosecution case by describing the charge against the

accused and stating by what evidence he proposes to bring home the guilt against the accused. Once that is done the Judge has to consider whether or not to frame a charge. Section 227 of the Code reads as under:

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

Under this section a duty is cast on the judge to apply his mind to the material on record and if on examination of the record he does not find sufficient ground for proceeding against the accused, he must discharge him. On the other hand if after such consideration and hearing he is satisfied that a prima facie case is made out against the accused, he must proceed to frame a charge as required by Section 228 of the Code. Once the charge is framed the trial must ordinarily end in the conviction or acquittal of the accused. This is in brief the scheme of Sections 225 to 235 of the Code.

5. Section 227, introduced for the first time in the New Code, confers a special power on the Judge to discharge an accused at the threshold if 'upon consideration' of the record and documents he considers 'that there is not sufficient ground' for proceeding against the accused. In other words his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there exists sufficient grounds for proceeding with the trial against the accused. If he comes to the conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not he will discharge the accused. It must be remembered that this section was introduced in the Code to avoid waste of public time over cases which did not disclose a prima facie case and to save the accused from avoidable harassment and expenditure.

6. The next question is what is the scope and ambit of the 'consideration' by the trial court at that stage. Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In the State of Bihar v. Ramesh Singh 1977 CriLJ 1606 this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion-evidence which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused,

even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In Union of India v. Prafulla Kumar Samal and Anr. 1979 CriLJ 154 , this Court after considering the scope of Section 227 observed that the words 'no sufficient ground for proceeding against the accused' clearly show that the Judge is not merely a post-office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging therefrom taken at their face-value establish the ingredients constituting the said offence. After considering the case law on the subject, this Court deduced as under:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

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

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence adduced before him while giving rise to some suspicion but not grave suspicion against the accused he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code of Judge which (sic) under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

7. Again in Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors. 1979 CriLJ 1390 this Court observed in paragraph 18 of the Judgment as under:

The standard of test, proof and judgment which is to be applied finally before finding, the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the CrPC, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged, may justify the framing of discharge against the accused in respect of the commission of that offence.

From the above discussion it seems well-settled that at the Sections 227-228 stage the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there-from taken at their face-value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case."

12. The prerequisites for framing of charge were subject matter of consideration in Soma Chakravarty vs. State through CBI6, and it was held that the court can frame the charge if on the basis of material on record it can form an opinion that the commission of offence by the accused was possible. The question as to whether the accused committed the offence can only be decided in the trial, and at the stage of framing of charge the probative value of the material on record cannot be gone into and the said material has to be accepted as true. The observations made in the judgment in this regard are as follows :-

"9. Learned Counsel for the appellant relied on the decisions of this Court in Union of India v. Major J.S. Khanna, (1972) 3 SCC 873, State of Maharashtra v. Som Nath Thapa, (1996) 4 SCC 659 and L. Chandraiah v. State of A.P., (2003) 12 SCC 670 and contended that before framing the charges the court must have some material on the basis of which it can come to the conclusion that there is a prima facie case against the accused. In our opinion there was such material before the court while framing the charge.

10. It may be mentioned that the settled legal position, as mentioned in the above decisions, is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial."

13. The question as to when discharge of an accused would be warranted in exercise of powers under Section 227 of the Code in the light of its scope and object was considered in **P. Vijayan vs. State of Kerala and another7**, and it was held that at the stage of Section 227, the Court has merely to sift the elements in order to find out whether or not there is sufficient ground for proceeding against the accused and if the judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not, he will discharge the accused. The position of law in this regard was stated as follows :-

"10. Before considering the merits of the claim of both the parties, it is useful to refer to Section 227 of the Code of Criminal Procedure, 1973, which reads as under :

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

If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

.....

.....

14. The scope and ambit of Section 227 was again considered in Niranjan Singh Karam Singh Punjabi vs. Jitendra Bhimraj Bijjaya, (1990) 4 SCC 76, in para 6, this Court held that: (SCC pp. 83-84)

"6. .... Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In State of Bihar v. Ramesh Singh this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion evidence which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there

will be no sufficient ground for proceeding with the trial. In Union of India v. Prafulla Kumar Samal this Court after considering the scope of Section 227 observed that the words 'not sufficient ground for proceeding against the accused' clearly show that the Judge is not merely a post office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but it may evaluate the material to find out if the facts emerging therefrom taken at their face value establish the ingredients constituting the said offence."

14. The scope of exercise of powers under Sections 227 and 228 with regard to framing of charge/discharge again fell for consideration in **Sajjan Kumar Vs. Central Bureau of Investigation8,** and it was held that at the stage of framing of charge under Section 228 or while considering discharge petition filed under Section 227, it is not for the Magistrate or a Judge concerned to analyse all the materials including pros and cons, reliability or acceptability thereof, and it is at the trial that the Judge concerned has to appreciate evidentiary value, credibility or otherwise of the material and veracity of various documents. The observations made in the judgment in this regard are as follows :-

"20. A Magistrate enquiring into a case under Section 209 of the Cr.P.C. is not to act as a mere Post Office and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is the duty of the Magistrate to discharge the accused, on the other hand, if there is some evidence on which the conviction may reasonably be based, he must commit the case. It is also clear that in exercising jurisdiction under Section 227 of Cr.P.C., the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

Exercise of jurisdiction under Sections 227 & 228 of Cr.P.C.

21. On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:

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

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

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the

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

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

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

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

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

15. T he relative scope and distinction between Sections 227 and 228 with regard to discharge of accused and framing of charge was discussed and explained in detail in **Amit Kapoor vs. Ramesh Chander and another9** and it was held that at the stage of Section 228, the Court is not concerned with proof, but with a strong suspicion that the accused has committed an offence and the final test of guilt is not to be applied at the stage of framing of charge. It was stated thus :-

"17.Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the "record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the section exists, then the court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court

should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

.....

19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage."

16. In State of **Tamil Nadu vs. N. Suresh Rajan and others10**, while considering the scope of exercise of jurisdiction and power by Court at the stage of framing of charges or discharge of accused under Sections 227 and 228, it was restated that no mini trial is contemplated at the stage of considering the discharge application and only probative value of materials has to be gone into to see if there is a prima facie case for proceeding against the accused without any requirement of going deep into the matter. Referring to the earlier judgements in the case of **Omkar Nath Mishra11 and Sheoraj Singh Allahabad vs. State of U.P.12 ,** it was stated as follows :-

"30. Reference in this connection can be made to a recent *decision of this Court in Sheoraj Singh Ahlawat v. State of U.P., AIR 2013 SC 52,* in which, after analyzing various decisions on the point, this Court endorsed the following view taken in *Onkar Nath Mishra v. State (NCT of Delhi), (2008) 2 SCC 561:*

"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.' (Onkar Nath case (2008) 2 SCC 561, SCC p. 565, para 11)" (emphasis in original)*

31. Now reverting to the decisions of this Court in Sajjan Kumar v. CBI (2010) 9 SCC 368 and Dilawar Balu Kurane v. State of Maharashtra (2002) 2 SCC 135, relied on by the respondents, we are of the opinion that they do not advance their case. The aforesaid decisions consider the provision of Section 227 of the Code and make it clear that at the stage of discharge the Court can not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if it was conducting a trial. It is worth mentioning that the Code contemplates discharge of the accused by the Court of Session under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted

otherwise than on a police report are dealt with in Section 245. From a reading of the aforesaid sections it is evident that they contain somewhat different provisions with regard to discharge of an accused.

31.1. Under Section 227 of the Code, the trial court is required to discharge the accused if it "considers that there is not sufficient ground for proceeding against the accused". However, discharge under Section 239 can be ordered when "the Magistrate considers the charge against the accused to be groundless". The power to discharge is exercisable under Section 245(1) when, "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".

31.2. Section 227 and 239 provide for discharge before the recording of evidence on the basis of the police report, the documents sent along with it and examination of the accused after giving an opportunity to the parties to be heard. However, the stage of discharge under Section 245, on the other hand, is reached only after the evidence referred in Section 244 has been taken.

31.3. Thus, there is difference in the language employed in these provisions. But, in our opinion, notwithstanding these differences, and whichever provision may be applicable, the court is required at this stage to see that there is a prima facie case for proceeding against the accused. Reference in this connection can be made to a judgment of this Court in the case of R.S. Nayak v. A.R. Antulay, (1986) 2 SCC 716. The same reads as follows: (SCC pp. 755-56, para 43)

"43. ... Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of 'prima facie' case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial court is satisfied that a prima facie case is made out, charge has to be framed."

17 The scope of exercise of power by trial court at the stage of framing of charge was again considered in **State Vs. S. Selvi and another13**, and it was stated thus :-

"6. It is well settled by this Court in catena of judgments including the cases of Union of India v. Prafulla Samal, (1979) 3 SCC 4, Dilawar Babu v. State of Maharashtra (2002) 2 SCC 135; Sajjan Kumar v. CBI (2010) 9 SCC 368; State v. A. Arun Kumar (2015) 2 SCC 417; Sonu Gupta v. Deepak Gupta (2015) 3 SCC 424; State of Orissa v. Debendra Nath Padhi (2003) 2 SCC 711; Niranjan Singh Karam Singh Punjabi etc. v. Jitendra Bhimraj Bijjayya (1990) 4 SCC 76 and Superintendent & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja (1979) 4 SCC 274 that the Judge while considering the question of framing charge Under Section 227 of the Code in sessions cases (which is akin to Section 239 Code of Criminal Procedure pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the Accused has been made out; where the material placed before the Court disclose grave suspicion against the Accused which has not been properly explained, the Court will be fully

justified in framing the charge; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the Accused, he will be fully within his rights to discharge the Accused. The Judge cannot act merely as a Post Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the statements and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the materials as if he was conducting a trial."

18. The exercise of powers under Section 227 of the Code and the matters to be considered and the extent of inquiry permissible on part of Court was subject matter of consideration in **Asim Shariff vs. National Investigation Agency14**, and it was reiterated that the judge while considering the question of framing of charge under Section 227 is to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and the Court, at this stage, is not supposed to hold a mini trial by marshalling the evidence on record. Referring to the judgements in the case of **Sajjan Kumar vs. CBI8, State vs. S. Selvi11 and Vikram Johar vs. State of U.P.15** it was stated as follows :-

"18. Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases (which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the court discloses grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not supposed to hold a mini trial by marshalling the evidence on record."

19. The relevant considerations to be made by the Court at the stage of Section 227 of the Code were discussed in **M.E. Shivalingamurthy vs. Central Bureau of Investigation, Bengaluru16** and it was reiterated that the Court at this stage, without making a roving inquiry into the pros and cons, is only required to consider the broad probabilities and the probative value of material on record is not to be gone into.

20. The legal principles to be applied in this regard were stated as follows :-

"17. This is an area covered by a large body of case law. We refer to a recent judgment which has referred to the earlier decisions, viz., P. Vijayan v. State of Kerala (2010) 2 SCC 398 and discern the following principles:

17.1. If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the trial Judge would be empowered to discharge the accused.

17.2. The trial Judge is not a mere post office to frame the charge at the instance of the prosecution.

17.3. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the police or the documents produced before the Court.

17.4. If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, "cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial".

17.5. It is open to the accused to explain away the materials giving rise to the grave suspicion.

17.6. The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

17.7. At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

17.8. There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

18. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 Cr.PC (See State of J & K v. Sudershan Chakkar (1995) 4 SCC 181). The expression, "the record of the case", used in Section 227 Cr.PC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the police (see State of Orissa v. Debendra Nath Padhi (2005) 1 SCC 568)."

21. The ambit and scope of exercise of power under Sections 227 and 228 of the Code, are fairly well settled. It has been consistently held that the standard of test and judgment which is to be finally applied before recording of finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of framing of charge. The test to be applied at this stage would be whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. The Court has clearly to sift the elements in order to find out whether or not there is sufficient ground for proceeding against the accused and if the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228 of the Code, if not, he will discharge the accused. At the stage of framing of charge or considering discharge

of the accused, no mini trial is contemplated and only probative value of material has to be gone into, to see if there is a prima facie case for proceeding against the accused.

22. In the facts of the present case the applicants had duly appeared before the court on 03.01.2020 whereupon an order was passed fixing 20.02.2020 as the date for framing of charges. It is, therefore, not disputed that the applicants were put to notice with regard to framing of charges.

23. Learned counsel for the applicants has not disputed the fact that the applicants had earlier approached this Court in proceedings under Section 482 Cr.P.C. and also by filing an earlier writ petition seeking quashing of the FIR and that the relevant documents were available with the accused applicants during earlier proceedings and the said documents have also been made part of record having been appended alongwith the affidavit in the present application. It is, therefore not open to the applicants to raise a plea that the relevant documents were not available with them during the course of the pending proceedings. This together with the fact that the applicants had duly appeared before the court below on 03.01.2020 and had due notice of the fact that the next date i.e. 20.02.2020 was fixed for framing of charges, it was open to the applicants to have filed an application for discharge, if they so desired.

24. The order dated 20.02.2020 passed by the trial Judge indicates that the applicants alongwith their counsel were duly present before the Court on the date and the prosecution as well as the defence counsel were heard on the question of charges. The trial Judge upon hearing the contentions of the parties and perusing the case diary, FIR and the evidence collected during the course of investigation, recorded a prima facie satisfaction with regard to the material being sufficient for the purpose of framing of charge.

25. The order further indicates that the charge was framed, read and explained to the accused whereupon the accused did not plead guilty and claimed to be tried; thereupon the court fixed 07.04.2020 as the date for evidence and directed issuance of summons to the prosecution witness for the purpose.

26. The order-sheet of the case pending before the court below further indicates that thereafter several dates have been fixed and the proceedings are at the stage of evidence. It is further reflected from the order-sheet that the applications seeking exemption for appearance have been moved on behalf of the applicants on a number of dates.

27. In the aforesaid circumstances, the plea sought to be raised by the applicants that they were not provided opportunity to move a discharge application and that their valuable right to plead discharge has been taken away, seems to have been raised as an afterthought.

28. The relevant documents being available with the applicants and that they being aware of the date fixed for framing of charges, having duly participated in the proceedings, it was open to the applicants to have moved an appropriate application seeking discharge before the court below.

29. The order dated 20.02.2020 was passed in the presence of the applicants and their counsel were duly heard on the

question of framing of charge. The order does not in any manner indicate that any plea for discharge was raised on behalf of the applicants. It was after hearing the counsel for the accused-applicants that charge was framed in their presence and the same was read and explained to the accused applicants whereupon they claimed to be tried. The judgment sought to be relied upon on behalf of the applicants would not be any help inasmuch as the applicants did not seek discharge despite having opportunity for the same.

30. Sections 227 and 228 of the Code are supplemental and inter-related and are, therefore, to be read together.

31. The records of the case do not in any manner indicate that the court below has not followed the due procedure while proceeding to frame the charge.

32. Learned counsel for the applicants has not been able to point out any material error or irregularity so as to warrant interference.

33. Having regard to the aforestated facts and circumstances, this Court is not inclined to exercise its inherent jurisdiction under Section 482 Cr.P.C.

34. The application stands accordingly dismissed.

(2021)08ILR A635
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2021

BEFORE

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

Application U/S 482. No. 6727 of 2021

Kailash Nath Dwivedi ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Jitendra Prasad Mishra

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482, 156(3)-the case of the applicant rests on the allegation of manipulation of documents and forgery which can be proved only after investigation by the police-magistrate treated the application as a complaint and fixed the date for recording the statement of the complainant-revisional court held that while exercising the discretionary power Magistrate can either issue directions to register case u/s 154 or treat it as a complaint-order passed by the revisional court cannot be said to suffer from any illegality or procedural irregularity.(Para 1 to 31)

B. Where the complainant is in possession of the complete details of all the accused as well as the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no investigation would normally be required and the procedure of complaint case should be adopted.(Para 26)

The application is dismissed. (E-5)

List of Cases cited:

1. Gopal Das Sindhi & ors. Vs St. of Assam & anr. (1961) AIR SC 986

2. Suresh Chand Jain Vs St. of M.P. & anr.(2001) 2 SCC 628

3. Mohd. Yousuf Vs Afaq Jahan(Smt.) & anr. (2006) 1 SCC 627

4. Fakhruddin Ahmad Vs St. of Uttaranchal & anr. (2008) 17 SCC 157

5. Ram Babu Gupta & ors. Vs St. of U.P. & ors.(2001) 43 ACC 50 FB

6. Sukhwasi Vs St. of U.P.(2007) 9 ADJ 1 DB

7. Anil Kumar Vs M.K. Aiyappa & anr.(2013) 10 SCC 705

8. Jagannath Verma & ors Vs St. of U.P. & anr.(2014) 8 ADJ 439 FB

9. Samaj Parivartan Samudaya & ors. Vs St. of Karnataka & ors. (2012) 7 SCC 407

10. Madhao & anr. Vs St. of Mah. & anr. (2013) 5 SCC 615

11. Ram Dev Food Products Pvt. Ltd. Vs St. of Guj.(2015) 6 SCC 439

12. Lalita Kumari Vs Government of U.P & ors. (2014) 2 SCC 1

13. Gulab Chand Upadhyaya Vs St. of U.P & Ors (2002) CrLJ 2907 Alld

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

1. Heard Sri Jitendra Prasad Mishra, learned counsel for the applicant and Sri Pankaj Saxena, learned A.G.A.-I and Ms. Akanksha Gaur, learned State Law Officer for the State-opposite party.

2. The present application under Section 482 of the Code of Criminal Procedure, 19731 has been filed seeking to quash the order dated 16.01.2021 passed by Sessions Judge, Banda in Criminal Revision No.55 of 2020 (Kailash Nath Dwivedi v State of U.P. and others) as well as order dated 25.09.2020 passed by Chief Judicial Magistrate, Banda, in Misc. Case No.406 of 2020 (Kailash Nath Dwivedi v Rudra Narayan Dwivedi and others) under Section 156(3) of the Code, Police Station Tindwari, District Banda.

3. The facts of the case, as disclosed from the pleadings, are that an application dated 04.08.2020, filed by the applicant under Section 156(3) of the Code (registered as Misc. Case No.406 of 2020) before the Court of the Chief Judicial Magistrate, Banda, has been treated as a complaint and in terms of an order dated 25.09.2020, it has been directed to be registered as a complaint case fixing a date for recording of the statement of the complainant under Section 200 of the Code.

4. A revision against the aforesaid order was preferred by the applicant being Criminal Revision No.55 of 2020 (Kailash Nath Dwivedi v State of U.P. and others) primarily seeking to contend that the application filed under Section 156(3) of the Code discloses a cognizable offence and, accordingly, the court was required to direct the police to investigate and submit a report under Section 173(2) of the Code.

5. The revisional court, upon considering the facts and circumstances of the case and the legal position in this regard, has held that it is open for the Magistrate while exercising discretionary power under Section 156(3) of the Code to issue directions to register the case under Section 154 of the Code and conduct investigation or to take cognizance of the matter by treating it as a complaint and proceed for inquiry as per procedure under Sections 200 and 202 of the Code.

6. Taking notice of the fact that the civil and criminal litigation is pending between the parties and that the applicant had full knowledge of the facts of the

incident regarding which, he could lead evidence, the revisional court has held that there is no error in the view taken by the learned Magistrate that no case was made out for investigation by the police and in view thereof, has rejected the revision.

7. The principal ground sought to be raised by learned counsel for the applicant to assail the orders passed by the courts below is that the case of the applicant rests on the allegation of manipulation of documents and forgery which can be proved only after investigation by the police and submission of a report. Learned counsel for the applicant has sought to draw attention of the Court to certain documentary evidence appended as annexures alongwith the affidavit to support his contention with regard to manipulation of documents.

8. Per contra, learned counsel appearing for the State-opposite party have submitted that upon receiving the complaint, the Magistrate while exercising its discretionary power, may direct the police to register a criminal case under Section 154 of the Code and conduct investigation or where the facts of the case are such, the Magistrate may take cognizance of the matter by treating it as a complaint and proceed for the inquiry under Sections 200 and 202 of the Code. It is contended that there is nothing in the Code of Criminal Procedure which curtails or puts any embargo on the power of the Magistrate to make an inquiry in dealing with the application under Section 156(3) of the Code in order to satisfy itself about the veracity of the allegations with regard to commission of a cognizable offence. It is also pointed out that looking into the facts of the case and in particular, the civil and criminal litigation pending between the parties and also that the applicant is in possession of the documents, which form the basis of the allegations with regard to forgery and manipulation; the view taken by the Magistrate that the applicant can lead evidence to prove his allegations, which has been affirmed by the revisional court, do not call for any interference.

9. The principal issue involved in the present case is with regard to the scope and parameters for exercise of the discretionary powers of the Magistrate in dealing with a complaint containing allegations regarding commission of a cognizable offence.

10. The provisions relating to information to police and their power to investigate are contained under Chapter XII of the Code and in terms of the scheme contained therein it is provided that upon an information relating to commission of a cognizable offence being given orally or in writing, it is required to be registered as a case and investigation is to be proceeded with. In a situation where the officer in charge of the police station refuses to record the information, the informant may approach the Superintendent of Police giving substance of the information in writing or by post and in the event F.I.R. is not being lodged or the investigation is not being proceeded with, it is open to the aggrieved person to file an application under Section 156(3) of the Code before the Magistrate having jurisdiction, who can then direct the police to register the F.I.R. and conduct investigation.

11. The Magistrate upon receiving a complaint or an application under Section 156(3) of the Code, with regard to facts disclosing commission of an offence, "may take cognizance", which in the context of Section 190 of the Code, cannot be read as

"must take cognizance". The use of the expression "may" under Section 190 of the Code gives a discretion to the Magistrate to either take cognizance or to forward the complaint to the police and order investigation under Section 156(3) of the Code.

12. The question as to whether it is mandatory for the Magistrate to order registration of a criminal case and direct the officer in charge of the concerned police station to hold a proper investigation, is no longer res integra and it has been consistently held that where a Magistrate receives an application under Section 156(3) of the Code, he is not bound to take immediate cognizance even if the alleged facts disclose commission of an offence.

13. In the case of **Gopal Das Sindhi and others v State of Assam and another2,** while considering the provisions of Section 190 of the Code it was held that once a complaint is filed a Magistrate is not bound to take cognizance as the word "may" cannot be construed so as to be "must" and it would be within the discretion of the Magistrate to send the complaint to the police for investigation under Section 156(3) of the Code or to exercise his discretion and take cognizance and thereafter proceed. It was stated thus:-

"7. ...We cannot read the provisions of S. 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under S. 156 (3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Code..."

14. While considering the powers of the Magistrate under Sections 156(3) and 200 of the Code in **Suresh Chand Jain v State of M.P. and another3** it was held that the Magistrate, after taking cognizance of the offence, could order investigation under Section 156(3) of the Code or take cognizance of the offence and follow the procedure under Chapter XV of the Code. The relevant observations made in the judgment are as follows:-

"7. In our opinion, the aforesaid direction given by the learned Single Judge of the Punjab and Haryana High Court in Suresh Kumar v. State of Haryana (1996) 3 Rec Cri R 137 is contrary to law and cannot be approved. Chapter XII of the Code contains provisions relating to "information to the police and their powers to investigate", whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether, though there could be, a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII, deals with powers of the police officers to investigate cognizable offences. True, Section 202 which falls under Chapter XV, also refers to the power of a Magistrate to "direct an investigation

by a police officer". But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code. Section 156 of the Code reads thus:

"**156. Police officer's power to investigate cognizable cases**.--(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned."

8. The investigation referred to therein is the same investigation, the various steps to be adopted for it have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that Chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code would convince that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e.

"or direct an investigation to be made by a police officer or by such other persons as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding."

This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

10. The position is thus clear. Any judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the

magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

15. A similar view was taken in **Mohd. Yousuf v Afaq Jahan (Smt.) and another4** wherein it was held that upon receiving a complaint disclosing a cognizable offence, the Magistrate can order investigation under Section 156(3) of the Code or if he proposes to take cognizance of the offence, he need not order such investigation and may follow the procedure under Chapter XV of of the Code. The observations made in the judgment in this regard are as follows:-

"6. Section 156 falling within Chapter XII, deals with powers of police officers to investigate cognizable offences. Investigation envisaged in Section 202 contained in Chapter XV is different from the investigation contemplated under Section 156 of the Code.

7. Chapter XII of the Code contains provisions relating to "information to the police and their powers to investigate", whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a Magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether, though there could be a common factor i.e. complaint filed by a person. Section 156, falling within Chapter XII deals with powers of the police officers to investigate cognizable offences. True, Section 202, which falls under Chapter XV, also refers to the power of a Magistrate to "direct an investigation by a police officer". But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code.

8. The various steps to be adopted for investigation under Section 156 of the Code have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer in charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that chapter can be commenced by the police even without the order of a Magistrate. But that does not mean that when a Magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

9. But a Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he

takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code makes the position clear that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e.

"or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding".

10. This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

16. In **Fakhruddin Ahmad v State of Uttaranchal and another5**, it was reiterated that on receipt of complaint, the Magistrate has more than one course open to him to determine the procedure and the manner to be adopted for taking cognizance of the offence. One of the courses open to the Magistrate would be that instead of exercising his discretion and taking cognizance of the offence and following the procedure under Section 200 or Section 202 of the Code, he could order an investigation to be made by the police under Section 156(3). The observations made in the judgment in this regard are as follows:-

"9. Before examining the rival contentions, we may briefly refer to some of the relevant provisions in the Code. Chapter XIV of the Code, containing Sections 190 to 199 deals with the statutory conditions requisite for initiation of criminal proceedings and as to the powers of cognizance of a Magistrate. Sub-section (1) of Section 190 of the Code empowers a Magistrate to take cognizance of an offence in the manner laid therein. It provides that a Magistrate may take cognizance of an offence either (a) upon receiving a complaint of facts which constitute such offence; or (b) upon a police report of such facts; or (c) upon information received from any person other than a police officer, or upon his own knowledge that such offence has been committed.

10. Chapter XV containing Sections 200 to 203 deals with "Complaints to Magistrates" and lays down the procedure which is required to be followed by the Magistrate taking cognizance of an offence on complaint. Similarly, Chapter XVI deals with "Commencement of Proceedings before Magistrates". Since admittedly, in the present case, the Magistrate has taken cognizance of the complaint in terms of Section 190 of the Code, we shall confine our discussion only to the said provision. We may, however, note that on receipt of a complaint, the Magistrate has more than one course open to him to determine the procedure and the manner to be adopted for taking cognizance of the offence.

11. One of the courses open to the Magistrate is that instead of exercising his discretion and taking cognizance of a cognizable offence and following the procedure laid down under Section 200 or Section 202 of the Code, he may order an investigation to be made by the police under Section 156(3) of the Code, which the learned Magistrate did in the instant case. When such an order is made, the police is obliged to investigate the case and submit a report under Section 173(2) of the Code. On receiving the police report, if the Magistrate is satisfied that on the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence, he may take cognizance of the offence under Section 190(1)(b) of the Code and issue process straightaway to the accused. However, Section 190(1)(b) of the Code does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation makes out a case against the accused. Undoubtedly, the Magistrate can ignore the conclusion(s) arrived at by the investigating officer.

12. Thus, it is trite that the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion in this behalf, irrespective of the view expressed by the police in their report and decide whether an offence has been made out or not. This is because the purpose of the police report under Section 173(2) of the Code, which will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom is primarily to enable the Magistrate to satisfy himself whether on the basis of the report and the material referred therein, a case for cognizance is made out or not."

17. The question as whether a Magistrate while exercising power under Section 156(3) of the Code is required to apply his mind to the allegations in the complaint before proceeding to take cognizance or directing the police to register and investigate the same, was considered by a Full Bench of this Court in Ram Babu Gupta and others v State of U.P. and others6, and the reference was answered by holding that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated, or if the Magistrate takes cognizance, he would have to follow the procedure provided in Chapter XV of the Code. It was further held that in both the cases the Magistrate's order must indicate application of mind. The relevant extract from the judgment is as follows:-

"17. In view of the aforesaid discussion on the legal provisions and decisions of the Supreme Court as on date, it is hereby held that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated. The Magistrate's order must indicate application of mind. If the Magistrate takes cognizance, he proceeds to follow the procedure provided in Chapter XV of Cr.P.C. The first question stands answered thus."

18. The question whether the Magistrate is bound to pass an order on each and every application under Section 156(3) of the Code containing allegations of commission of a cognizable offence for registration of the F.I.R. and its investigation by the police, even if those allegations, prima facie, do not appear to be genuine and do not appeal to reason, or he can exercise discretion in the matter and can pass an order for treating the same as "complaint" or to reject it in suitable cases, was referred for consideration before a Division Bench in **Sukhwasi v State of U.P7**, and the Division Bench answered the reference by holding that there is no legal mandate under which the Magistrate is bound to allow an application under Section 156(3) of the Code and he has a discretion to treat an application under Section 156(3) of the Code as a complaint. The observations made by the Division Bench are as follows:-

"23. The reference is, therefore, answered in the manner that it is not incumbent upon a Magistrate to allow an application under Section 156(3) Cr.P.C. and there is no such legal mandate. He may or may not allow the application in his discretion. The second leg of the reference is also answered in the manner that the Magistrate has a discretion to treat an application under Section 156(3) Cr.P.C. as a complaint."

19. The requirement of application of mind by the Magistrate while exercising powers under Section 156(3) of the Code to order investigation on a private complaint was emphasized in **Anil Kumar v M.K. Aiyappa and another8**, it was stated thus:-

"11. The scope of Section 156(3) Cr.P.C. came up for consideration before this Court in several cases. This Court in Maksud Saiyed case (2008) 5 SCC 668 examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where a jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr.P.C., the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted..."

20. The power conferred upon the Magistrate to order investigation under Section 156(3) of the Code again came up

for consideration before a Full Bench of this Court in **Jagannath Verma and others v State of U.P. and another9**, and taking note of the provisions contained under Section 190 of the Code which uses the expression "the Magistrate may take cognizance" and not "the Magistrate must take cognizance", it was held that under Section 190 a Magistrate is not bound, once a complaint is filed, to take cognizance even though the complaint may disclose a cognizable offence and he may well be justified in sending the complaint under Section 156(3) to the police for investigation. It was stated thus:-

"14. Section 190 empowers a Magistrate to take cognizance of any offence: (i) upon receiving a complaint of facts which constitute such offence; (ii) upon a police report of such facts; and (iii) upon information received from any person other than a police officer, or upon his own knowledge, that such an offence has been committed. Under Section 190, a Magistrate is not bound, once a complaint is filed, to take cognizance if the facts stated in the complaint disclose the commission of any offences. Section 190 uses the expression that 'the Magistrate may take cognizance' and not that 'the Magistrate must take cognizance'. Though, a complaint may disclose a cognizable offence, a Magistrate may well be justified in sending the complaint under Section 156 (3) to the police for investigation. In Gopal Das Sindhi v. State of Assam, AIR 1961 SC 986, the Supreme Court held that there is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. The Magistrate before taking cognizance may well refer the complaint under Section 156(3) to the police for investigation. Cognizance, it is well-settled under CrPC, is where the Magistrate on receiving a complaint applies his mind for the purposes of proceeding under Section 200 and the succeeding Sections in Chapter XV of the Code. If, instead of proceeding under Chapter XV, the Magistrate orders an investigation by the police under Section 156(3), he is not said to have taken cognizance of an offence. In Mohd Yousuf v. Afaq Jahan, (2006) 1 SCC 627, this position was elaborated in the following observations of the Supreme Court:

"The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

15. When a written complaint disclosing a cognizable offence is made before a Magistrate, he may take

cognizance under Section 190(1)(a) and proceed in accordance with the provisions of Chapter XV. The other option available to the Magistrate is to transmit the complaint to the police station concerned under Section 156(3), before taking cognizance, for investigation. Once a direction is issued by the Magistrate under Section 156(3), the police is required to investigate under sub-section (1) of that Section and to submit a report under Section 173(2) on the complaint after investigation, upon which the Magistrate may take cognizance under Section 190(1)(b). (Madhu Bala v. Suresh Kumar, (1997) 8 SCC 476)."

21. The judicial discretion vested upon the Magistrate to take cognizance directly under Section 200 of the Code, or to direct registration of a case and order the police authorities to conduct an investigation in terms of Section 156(3) of the Code, was reiterated in **Samaj Parivartan Samudaya and others v State of Karnataka and others10,** and it was held as follows:-

"26. Section 154 of the CrPC places an obligation upon the authorities to register the FIR of the information received, relating to commission of a cognizable offence, whether such information is received orally or in writing by the officer in- charge of a police station. A police officer is authorised to investigate such cases without order of a Magistrate, though, in terms of Section 156(3) Cr.P.C. the Magistrate empowered under Section 190 may direct the registration of a case and order the police authorities to conduct investigation, in accordance with the provisions of the CrPC. Such an order of the Magistrate under Section 156(3) CrPC is in the nature of a pre-emptory reminder or intimation to police, to exercise their plenary power of investigation under that Section. This would result in a police report under Section 173, whereafter the Magistrate may or may not take cognizance of the offence and proceed under Chapter XVI CrPC. The Magistrate has judicial discretion, upon receipt of a complaint to take cognizance directly under Section 200 CrPC, or to adopt the above procedure. (Ref. Gopal Das Sindhi & Ors. v. State of Assam, AIR 1961 SC 986]; Mohd. Yusuf v. Smt. Afaq Jahan, (2006) 1 SCC 627 and Mona Panwar v. High Court of Judicature of Allahabad, (2011) 3 SCC 496.

x x x

32. A person who complains of commission of a cognizable offence has been provided with two options under Indian Criminal jurisprudence. Firstly, he can lodge the police report which would be proceeded upon as aforenoticed and secondly, he could file a complaint under Section 200 CrPC, whereupon the Magistrate shall follow the procedure provided under Sections 200 to 203 or 204 to 210 under Chapter XV and XVI CrPC. In the former case, it is upon the police report that the entire investigation is conducted by the investigating agency and the onus to establish commission of the alleged offence beyond reasonable doubt is entirely on the prosecution. In a complaint case, the complainant is burdened with the onus of establishing the offence and he has to lead evidence before the Court to establish the guilt of the accused. The rule of establishing the charges beyond reasonable doubt is applicable to a complaint case as well.

33. The important feature that we must notice for the purpose of the present

case is that even on a complaint case, in terms of Section 202, the Magistrate can refer the complaint to investigation by the police and call for the report first, deferring the hearing of the complaint till then."

22. The powers of the Magistrate, upon receiving complaint with regard to a cognizable offence again came up for consideration in the case of **Madhao and another v State of Maharashtra and another11,** and amongst the courses open, it was held that the Magistrate concerned can on the one hand invoke power under Section 156(3) of the Code, direct investigation in such matter and on the other hand he may take cognizance and embark upon the procedure embodied in Chapter XV. The relevant extracts from the judgment are as follows:-

"15. Chapter XIV of the Code speaks about conditions requisite for initiation of proceedings. Section 190 deals with cognizance of offences by Magistrates. In terms of sub-section (1) subject to the provisions of the said Chapter, any Magistrate of first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence:

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

(b) upon a police report of such facts;

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

16. Sub-section (3) of Section 156 of the Code enables any Magistrate empowered under Section 190 to order such an investigation in terms of sub-section (1) of that section.

17. In CREF Finance Ltd. vs. Shree Shanthi Homes (P) Ltd., (2005) 7 SCC 467, while considering the power of a Magistrate taking cognizance of the offence, this Court held: (SCC p.471, para 10)

"10. ...Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure."

It is clear that any judicial magistrate before taking cognizance of the offence can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein.

18. When a Magistrate receives a complaint he is not bound to take

cognizance if the facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3)."

23. The power to direct investigation under Section 156(3) of the Code or to call for a report under Section 202, by the Magistrate in exercise of its discretionary powers has been considered in **Ram Dev Food Products Pvt. Ltd. v State of Gujarat12**, and it has been held that the power of the Magistrate in this regard is discretionary and is to be guided by interest of justice from case to case. It was stated thus:-

"13. We may first deal with the question as to whether the Magistrate ought to have proceeded Under Section 156(3) or was justified in proceeding Under Section 202(1) and what are the parameters for exercise of power under the two provisions.

14. The two provisions are in two different chapters of the Code, though common expression 'investigation' is used in both the provisions. The normal rule is to understand the same expression in two provisions of an enactment in same sense unless the context otherwise requires. The heading of Chapter XII is "Information to the Police and their Powers to Investigate" and that of Chapter XV is "Complaints to Magistrate". Heading of Chapter XIV is "Conditions Requisite for Initiation of Proceedings". The two provisions i.e. Sections 156 and 202 in Chapters XII and XV respectively are as follows:

"**156. Police officer's power to investigate cognizable case.--(**1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered Under Section 190 may order such an investigation as above-mentioned.

202. **Postponement of issue of process.--**(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him Under Section 192, may, if he thinks fit, and shall in a case where the accused is residing at a place beyond the area in which he exercises his

jurisdiction, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath Under Section 200.

(2) In an inquiry Under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation Under Sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

15. Cognizance is taken by a Magistrate under Section 190 (in Chapter XIV) either on "receiving a complaint", on "a police report" or "information received" from any person other than a police officer or upon his own knowledge.

16. Chapter XV deals exclusively with complaints to Magistrates. Reference to Sections, 202, in the said Chapter, shows that it provides for "postponement of issue of process" which is mandatory if accused resides beyond the Magistrate's jurisdiction (with which situation this case does not concern) and discretionary in other cases in which event an enquiry can be conducted by the Magistrate or investigation can be directed to be made by a police officer or such other person as may be thought fit "for the purpose of deciding whether or not there is sufficient ground for proceeding". We are skipping the proviso as it does not concern the question under discussion. Clause (3) provides that if investigation is by a person other than a police officer, he shall have all the powers of an officer in charge of a police station except the power to arrest."

24. Referring to the guidelines laid down in the earlier judgment in the case of **Lalita Kumari v Government of U.P. and others13**, with regard to prompt registration of the F.I.R. and the requirement of application of mind by the Magistrate for directing investigation under Section 156(3), the Supreme Court in the case of **Ram Dev Food Products** (supra) further held as follows:-

"19. Thus, this Court has laid down that while prompt registration of FIR is mandatory, checks and balances on power of police are equally important. Power of arrest or of investigation is not mechanical. It requires application of mind in the manner provided. Existence of power and its exercise are different. Delicate balance had to be maintained between the

interest of society and liberty of an individual. Commercial offences have been put in the category of cases where FIR may not be warranted without enquiry.

20. It has been held, for the same reasons, that direction by the Magistrate for investigation under Section 156(3) cannot be given mechanically. In Anil Kumar vs. M.K. Aiyappa, (2013) 10 SCC 705, it was observed: (SCC p.711, para 11)

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in Maksud Saiyed case (2008) 5 SCC 668 examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case, the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation."

The above observations apply to category of cases mentioned in para 120.6 in Lalita Kumari (supra).

21. On the other hand, power under Section 202 is of different nature. Report sought under the said provision has limited purpose of deciding "whether or not there is sufficient ground for proceeding". If this be the object, the procedure under Section 157 or Section 173 is not intended to be followed. Section 157 requires sending of report by the police that the police officer suspected commission of offence from information received by the police and thereafter the police is required to proceed to the spot, investigate the facts and take measures for discovery and arrest. Thereafter, the police has to record statements and report on which the Magistrate may proceed under Section 190. This procedure is applicable when the police receives information of a cognizable offence, registers a case and forms the requisite opinion and not every case registered by the police.

22. Thus, we answer the first question by holding that:

22.1. The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone the issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued.

22.2. The cases where Magistrate takes cognizance and postpones issuance of process are cases where the Magistrate has yet to determine "existence of sufficient

ground to proceed". Category of cases falling under para 120.6 in Lalita Kumari (supra) may fall under Section 202.

22.3. Subject to these broad guidelines available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case."

25. The affirmative obligation cast upon the police to register F.I.R. and to investigate the offence as part of a fundamental and inalienable duty of the State has also been emphasized in the case of Lalita Kumari (supra), and it was stated thus:-

"53. Investigation of offences and prosecution of offenders are the duties of the State. For "cognizable offences", a duty has been cast upon the police to register FIR and to conduct investigation except as otherwise permitted specifically under Section 157 of the Code. If a discretion, option or latitude is allowed to the police in the matter of registration of FIRs, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality."

26. It may be apposite to refer to the case **of Gulab Chand Upadhyaya v State of U.P. and others14,** wherein considering the question whether the Magistrate was justified in directing that an application under Section 156(3) of the Code seeking for registration of an F.I.R. and investigation, be registered as complaint, certain guidelines were formulated for exercise of discretion by the Magistrate in regard to such cases. The relevant observations made in the judgment are as follows:-

"22. The scheme of Cr.P.C. and the prevailing circumstances require that the option to direct the registration of the case and its investigation by the police should be exercised where some "investigation" is required, which is of a nature that is not possible for the private complainant, and which can only be done by the police upon whom statute has conferred the powers essential for investigation, for example

(1) where the full details of the accused are not known to the complainant and the same can be determined only as a result of investigation, or

(2) where recovery of abducted person or stolen property is required to be made by conducting raids or searches of suspected places or persons, or

(3) where for the purpose of launching a successful prosecution of the accused evidence is required to be collected and preserved. To illustrate by example cases may be visualised where for production before Court at the trail (a) sample of blood soaked soil is to be taken and kept sealed for fixing the place of incident; or (b) recovery of cases property is to be made and kept sealed; or (c) recovery under Section 27 of the Evidence Act; or (d) preparation of inquest report; or (e) witnesses are not known and have to be found out or discovered through the process of investigation.

23. But where the complainant is in possession of the complete details of all the accused as well as the witnesses who have to be examined and neither recovery is needed nor any such material evidence is required to be collected which can be done only by the police, no "investigation" would normally be required and the procedure of complaint case

should be adopted. The facts of the present case given below serve as an example. It must be kept in mind that adding unnecessary cases to the diary of the police would impair their efficiency in respect of cases genuinely requiring investigation. Besides even after taking cognizance and proceeding under Chapter XV the Magistrate can still under Section 202(1) Cr.P.C. order investigation, even thought of a limited nature..."

27. It is therefore seen that upon an application received under Section 156(3) disclosing a cognizable offence, the Magistrate may direct the police to register the F.I.R. and investigate or alternatively the Magistrate can take cognizance of the complaint, register it as complaint case and follow the procedure under Chapter XV of the Code. While exercising this discretion and taking either of the courses, it would be incumbent upon the Magistrate to apply judicial mind and the exercise of discretion would have to be guided by interest of justice, depending upon the facts of the case. In a situation where the investigation required is of a nature which can only be made by a police officer upon whom the statute has conferred the powers of investigation, the Magistrate may be well within his discretion to direct the registration of an F.I.R. and its investigation by the police officer. In a case where the complainant is in possession of the complete details of the case and also the material evidence, such that 'investigation' by the police may not be required, the Magistrate may follow the procedure of a complaint case.

28. It may be added that while exercising the discretion in regard to such matters the Magistrate would be required to keep in view that under the scheme of the Code an affirmative obligation is cast on the police to investigate the cases involving cognizable offences and where the complaint discloses a cognizable offence requiring investigation by the police, the burden should not routinely be shifted on the complainant. This is more for the reason that there exists a vital societal interest in the investigation and prosecution of crime and the State has a fundamental and inalienable duty in this regard.

29. In the facts of the present case, the courts below have taken notice of the fact that civil and criminal litigation was pending between the parties and the applicant had full knowledge of the facts and also the material evidence in respect of the case and accordingly the order passed by the Magistrate while exercising discretionary powers under Section 156(3) of the Code and directing the registration of the case as complaint case and also its affirmation by the revisional court cannot be said to suffer from any material illegality or procedural irregularity so as to warrant interference.

30. Having regard to the aforesaid, this Court is not inclined to exercise its inherent jurisdiction under Section 482 of the Code.

31. The present application stands accordingly dismissed.

(2021)08ILR A651
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

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

Application U/S 482. No. 6826 of 2021

Sanjay Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Gajala Srivasatava, Sri Manish

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

A. Criminal Law-Code of Criminal Procedure,1973-Section 482 - Indian Penal Code,1860-Sections 323,504,506 & SC/ST Act,1989-Section 3(1) (r) & 3(1)(s)-quashing of summoning order-the allegations in the complaint have been found to be corroborated in the statement made on oath u/s 200 and also during inquiry made by the Magistrate u/s 202-Trial court justified in issuing process u/s 204 as the same has been passed taking into consideration the available material on record-At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter.(Para 1 to 13)

The application is dismissed. (E-5)

List of Cases cited:

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

2. Nirmaljit Singh Hoon Vs St. of of W.B. & anr.(1973) 3 SCC 753

3. Chandra Deo Singh Vs Prokash Chandra Bose(1964) 1 SCR 639

4. Smt. Nagawwa Vs Veeranna Shivalingappa Konjalgi & ors. (1976) 3 SCC 736

5. Nupur Talwar Vs CBI & anr. (2012) 11 SCC 465

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

1. Heard Sri Manish, learned counsel for the applicants and Sri Pankaj Saxena, learned Additional Government Advocate-I appearing for the State-opposite party.

2. The present application under section 482 Cr.P.C. has been filed seeking to quash the summoning order dated 05.12.2020 in Complaint Case No.151 of 2019 (Ramkewal v. Sanjay), under sections 323, 504 and 506 Indian Penal Code and sections 3(1) (r) and 3(1) (s) Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, P.S. Kerakat, District Jaunpur, pending before Special Judge (SC/ST Act), Jaunpur.

3 . Learned counsel for the applicants has sought to assail the summoning order principally by contending that the statement of the complainant recorded by the Magistrate under section 200 of the Code of Criminal Procedure, 19731 is not in conformity with the allegations made in the complaint. Further, he has sought to refer to the factual aspects of the matter and the defence, which is to be set up by the applicants.

4. On a specific query as to what are the contradictions between the statement under section 200 of the Code and the complaint, apart from referring to certain factual details, counsel for the applicants has not been able to point out anything specific.

5. Learned Additional Government Advocate-I points out that the statements of the witnesses, namely, PW1 and PW2 recorded before the Magistrate during the course of inquiry under section 202 of the Code contain complete particulars and fully corroborate the allegations made in the complaint. It is submitted that the statement of the complainant under section 200 also cannot be said to be contradictory to the complaint version. Further contention is that upon a consideration of the material on record the offences referred to in the

summoning order are made out and as such the order dated 05.12.2020, in terms of which the applicants have been summoned, cannot be said to be in any manner erroneous.

6. In order to advert to the rival contentions the provisions relating to the procedure to be followed by the Magistrate upon taking cognizance of an offence on complaint under sections 200 and 202 of the Code upto the stage of issuance of process under section 204 of the Code, are required to be referred to. The provisions contained under sections 200, 202 and 204 of the Code are being extracted below:-

"200. Examination of complainant.-- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses—

(a) if a public servant acting or-purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

202. Postponement of issue of process.--(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub- section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that

investigation all the powers conferred by this Code on an officer- in- charge of a police station except the power to arrest without warrant.

204. Issue of process.--(1)If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—

(a) a summons- case, he shall issue his summons for the attendance of the accused, or

(b) a warrant- case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub- section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process- fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87."

7. Section 200 provides that the Magistrate taking cognizance of an offence on a complaint shall examine upon oath the complainant and the witnesses present, if any, and that the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. The object of such examination is with a view to ascertain whether there is a prima facie case against the person accused of the offence in the complaint, and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person.

8. The object of section 202 is to enable the Magistrate to form an opinion as to whether the process is to be issued or not. The purpose of the investigation to be directed under this section is to help the Magistrate in arriving at a decision as to the issuance of process. The broad based inquiry by the Magistrate, as contemplated under this section, is with a view to enable him to arrive at a decision as to whether he should dismiss the complaint or whether he should proceed to issue process upon the complaint.

9. The provisions contained under sections 200, 202 and 204 and the degree of satisfaction required to be recorded at this stage by the Magistrate was subject matter of consideration in **S.W. Palanitkar and Others v. State of Bihar and Another2** and it was held that test which was required to be applied was whether there is "sufficient ground for proceeding" and not whether there is "sufficient ground for conviction". Referring to the earlier decisions in the case of **Nirmaljit Singh Hoon v. State of West Bengal and Another3, Chandra Deo Singh v. Prokash Chandra Bose4, and Smt.**

Nagawwa v. Veeranna Shivalingappa Konjalgi and Others5, it was stated that the scope of inquiry under section 202 is limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint (i) on the material placed by the complainant before the court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. The observations made in the judgment in this regard are as follows:

"15. In case of a complaint under Section 200 Cr.P.C. or IPC a Magistrate can take cognizance of the offence made out and then has to examine the complainant and his witnesses, if any, to ascertain whether a prima facie case is made out against the accused to issue process so that the issue of process is prevented on a complaint which is either false or vexatious or intended only to harass. Such examination is provided in order to find out whether there is or not sufficient ground for proceeding. The words "sufficient ground", used under Section 203 have to be construed to mean the satisfaction that a prima facie case is made out against the accused and not sufficient ground for the purpose of conviction.

16. This Court in Nirmaljit Singh Hoon v. The State of West Bengal, (1973) 3 SCC 753 in para 22, referring to scheme of Sections 200-203 of Cr. P.C. has explained that :

"The section does not say that a regular trial of adjudging truth or otherwise of the person complained against should take place at that stage, for, such a person can be called upon to answer the accusation made against him only when a process has been issued and he is on trial. Section 203 consists of two parts. The first part lays down the materials which the Magistrate must consider, and the second part says that if after considering those materials there is in his judgment no sufficient ground for proceeding, he may dismiss the complaint. In Chandra Deo Singh v. Prokash Chandra Bose, [1964] 1 SCR 639, where dismissal of a complaint by the Magistrate at the stage of Section 202 inquiry was set aside, this Court laid down that the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction, and observed (p. 653) that where there was prima facie evidence, even though the person charged of an offence in the complaint might have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue of a process could not be refused. Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case."

17. In Nagawwa v. Veeranna Shivalingappa Konjalgi, (1976) 3 SCC 736, this Court dealing with the scope of inquiry under Section 202 has stated that it is extremely limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint (a) on the materials placed by the complainant before the court; (b) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; (c) for deciding the question purely from the point of view of the complainant without at all adverting

to any defence that the accused may have. It is also indicated by way of illustration in which cases an order of the Magistrate issuing process can be quashed on such case being

"where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused."(SCC p. 741, para 5)."

10. The sufficiency of the material and the test to be applied at the stage of issue of process again came up for consideration in the case **of Nupur Talwar v. Central Bureau of Investigation and Another6** and it was reiterated that the limited purpose of consideration of material at the stage of issuing process being tentative as distinguished from the actual evidence produced during trial, the test to be applied at the stage was whether the material placed before the Magistrate was "sufficient for proceeding against the accused" and not "sufficient to prove and establish the guilt". Referring to the earlier authorities on the point it was observed as follows :

"37. The criterion which need to be kept in mind by a Magistrate issuing process, have been repeatedly delineated by this Court. I shall therefore, first examine the declared position of law on the subject. Reference in this behalf may be made to the decision rendered by this Court in Chandra Deo Singh vs. Prokash Chandra Bose, AIR 1963 SC 1430, wherein it was observed as under : (AIR p. 1433, para 8)

"(8) Coming to the second ground, we have no hesitation is holding that the test propounded by the learned single judge of the High Court is wholly wrong. For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is 'sufficient ground for proceeding' and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. A number of decisions were cited at the bar in which the question of the scope of the enquiry under Section 202 has been considered. Amongst those decisions are : Parmanand Brahmachari v. Emperor, AIR 1930 Pat 30; Radha Kishun Sao v. S.K. Misra, AIR 1949 Pat 36; Ramkisto Sahu v. State of Bihar, AIR 1952 Pat 125; Emperor v. J.A. Finan, AIR 1931 Bom 524 and Baidya Nath Singh v. Muspratt, ILR (1887) 14 Cal 141. In all these cases, it has been held that the object of the provisions of Section 202 is to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. The courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The learned Judges in some of these cases have been at pains to observe that an enquiry under Section 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in sub-section (1) of Section 202 itself, the object of the enquiry is to ascertain the truth or

falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant." (emphasis supplied).

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39. The same issue was examined by this Court in Jagdish Ram vs. State of Rajasthan and Anr., (2004) 4 SCC 432, wherein this Court held as under: (SCC p. 436, para 10)

"(10) The contention urged is that though the trial court was directed to consider the entire material on record including the final report before deciding whether the process should be issued against the appellant or not, yet the entire material was not considered. From perusal of order passed by the Magistrate it cannot be said that the entire material was not taken into consideration. The order passed by the Magistrate taking cognizance is a well-written order. The order not only refers to the statements recorded by the police during investigation which led to the filing of final report by the police and the statements of witnesses recorded by the Magistrate under Sections 200 and 202 of the Code but also sets out with clarity the principles required to be kept in mind at the stage of taking cognizance and reaching a prima facie view. At this stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the police, a Magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons.(Chief Controller of Imports and Exports v. Roshanlal Agarwal)"

(emphasis supplied)

All along having made a reference to the words "there is sufficient ground to proceed" it has been held by this Court, that for the purpose of issuing process, all that the concerned Court has to determine is, whether the material placed before it "is sufficient for proceeding against the accused"? The observations recorded by this Court extracted above, further enunciate, that the term "sufficient to proceed" is different and distinct from the term "sufficient to prove and established guilt".

11. In the facts of the present case, the allegations in the complaint have been found to be corroborated in the statement made on oath by the complainant during the course of examination under section 200 and also during inquiry made by the Magistrate under section 202. The order dated 05.12.2020 passed by the Trial Judge issuing process reflects that the same has been passed taking into consideration the available material on record. The order has

referred to the statements under sections 200 and 202 and also the fact that the statements recorded therein support the allegations made in the complaint.

12. The law on the point being well settled that at the stage of issue of process the opinion which is required to be recorded by the magistrate taking cognizance of the offence is that there is sufficient ground for proceeding against the accused, the order passed by the court below summoning the applicants does not suffer from any infirmity, so as to call for interference.

13. The application thus fails and is accordingly dismissed.

(2021)08ILR A658
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.07.2021

BEFORE

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

Application U/S 482. No. 8512 of 2021

Rohit Bhati @ Rohit Pratap Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Abhishek Tiwari

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

A. Criminal Law-Code of Criminal Procedure,1973-Section 482 - Indian Penal Code,1860-Sections 498-A, 323, 504, 506 & Dowry Prohibition Act, 1961-Section ¾ -quashing of entire criminal proceeding-parties having decided to settle the matter amicably amongst themselves, no useful purpose would be served in continuing with the proceedings-High Court is empowered to quash criminal proceedings of FIR or complaint in exercise of its inherent power, in case the parties have arrived at settlement agreement of their matrimonial disputes, and Section 320 Cr.P.C. does not limit or affect the powers u/s 482.(Para 1 to 12)

B. High Court may quash proceedings if in its view, because of 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.The criminal cases having predominatingly civil flavour stand on different footing for the purpose of quashing, particulary the offences arising from commercial, financial, mercantile, civil partnership or the offences arising out of matrimonial or family disputes where the wrong is basically private or personal nature and the parties have resolved their entire dispute.(Para 5 to7)

The application is allowed. (E-5)

List of Cases cited:

1. State Vs Rahit Bhati & ors.

2. B.S. Joshi Vs St. of Haryana & ors. (2003) 46 ACC Page 779 SC

3. Nikhil Merchant Vs C.B.I.(2008) 9 SCC 677

4. Gian Singh Vs St. of Punj. & anr .(2012) 10 SCC 303

5. Narinder Singh Vs. St. of Punj. & anr.(2014) 6 SCC 466

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

1. Heard Sri Abhishek Tiwari, learned counsel for the applicants, Sri Bhuvnesh Kumar Singh, learned counsel for opposite party no. 2 and Ms. Sushma Soni, learned Additional Government Advocate appearing for the State-opposite party.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the proceedings related to Case Crime No. 0721 of 2020 (State Vs. Rohit Bhati and others) under Section 498-A, 323, 504, 506 I.P.C. and 3/4 D.P. Act, P.S. Kavinagar, District Ghaziabad pending before Chief Judicial Magistrate, Ghaziabad.

3. On the previous occasion upon submissions of learned counsel for the parties that the matter relates to a matrimonial dispute and that the parties have amicably settled the dispute and have filed a compromise before the court below, the following order was passed.

"Heard learned counsel for the applicants, Mr Bhuvnesh Kumar Singh, learned counsel for the private respondent and learned AGA for the State.

It is contended that both the parties have entered into compromise in the court below. A short counter affidavit has been filed on behalf of opposite party no. 2 stating that she does not want to contest the case against the applicants.

The parties are directed to appear before the court below along with compromise within a week and the court below shall submit report about verification of compromise to this Court by 15.4.2021.

List this case on 15.4.2021 showing the name of Mr Bhuvnesh Kumar Singh, as counsel for the opposite party no. 2. Until the date fixed no coercive action shall be taken against the applicants pursuant to impugned charge sheet dated 23.09.2020 arising out of Case Crime No. 0721 of 2020, under Sections 498-A, 323, 504, 506 IPC and Section 3/4 of D.P. Act, P.S. Kavinagar, District Ghaziabad pending in the Court of CJM Ghaziabad."

4. Pursuant to the aforesaid order dated 26.3.2021, a report has been received from the Chief Judicial Magistrate Ghaziabad 16.4.2021 in terms of which the factum of the compromise between the parties has been verified.

5. In **B.S.Joshi Vs. State of Haryana & others1**, it has been held that High Court is empowered to quash criminal proceedings of FIR or complaint in exercise of its inherent powers, in case the parties have arrived at settlement agreement of their matrimonial disputes, and Section 320 Cr.P.C does not limit or affect the powers under section 482 Cr.P.C.

6. Similarly in **Nikhil Merchant Vs. C.B.I.2**, compromise was permitted and criminal proceedings were quashed on the basis of the compromise.

7. In **Gian Singh Vs. State of Punjab and another3**, it has been held thus :

"61...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 predominatingly 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."

8. The inherent power of this Court under Section 482 Cr.P.C. are wide and unfettered. In **B.S.Joshi** (supra), the powers of the High Court under Section 482 Cr.P.C. to quash the proceedings have been upheld, where the dispute is of a private nature and a compromise is entered into between the parties, who are willing to settle their differences amicably.

9. Thus, in view of the well settled principles of law as laid down in **B.S. Joshi Vs. State of Haryana1 Nikhil Merchant Vs. Central Bureau of investigation and another2, Gian Singh Vs. State of Punjab3 and Narinder Singh and others Vs. State of Punjab And Another4,** the proceedings of the aforesaid case are liable to be set aside.

10. The proceedings arise from a matrimonial dispute, which is of a personal nature. The parties having decided to settle the matter amicably amongst themselves, no useful purpose would be served in continuing with the proceedings. Matter deserves to be given quietus in the facts of the case.

11. Considering all the facts and circumstances of the case, the proceedings related to Case Crime No. 0721 of 2020 (State Vs. Rohit Bhati and others) under Section 498-A, 323, 504, 506 I.P.C. and 3/4 D.P. Act, P.S. Kavinagar, District Ghaziabad pending before Chief Judicial Magistrate, Ghaziabad are hereby quashed.

12. The application stands allowed accordingly.

(2021)08ILR A661
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 10076 of 2021

Rajesh Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri SunilKumar Srivastava

Counsel for the Opposite Parties:
A.G.A., sri Narendra Kumar Tiwari

A. Criminal Law-Code of Criminal Procedure, 1973-Section 482 - Indian Electricity Act, 1910-Section 138-B, 152-quashing of entire proceeding-applicant was not the owner of the premises in question and the same was already sold-the premises was mutated in favour of the purchaser-offence in question is compoundable and the applicant is ready to settle the matter, no useful purpose would be served by this application pending.(Para 1 to 9)

The application is disposed of. (E-5)

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

1. Heard Mr. Sunil Kumar Srivastava learned counsel for applicant, learned A.G.A. for State and Mr. Narendra Kumar Tiwari, learned counsel for respondent no.2 Electricity Department and perused the record.

2. This application under Section 482 Cr.P.C. has been filed with a prayer to quash the charge sheet dated 17.5.2016 along with entire proceedings in Case No.1460 of 2018 (State vs Rajesh Singh) arising out of Case Crime No.129 of 2016 under Section 138-B Indian Electricity Act, P.S. Naini District Allahabad and also quash the non bailable warrant dated 15.2.2021 which is pending in the court of Special Judge (E.C. Act), Allahabad.

3. Learned counsel for the applicant submits that the applicant is innocent and peace loving and law abiding citizen and abusively trapped in this criminal case without taking information by the applicant or tenants of the aforesaid premises. The applicant has purchased the aforesaid premises on 1.7.2014 and thereafter he has sold the aforesaid premises to Jai Singh on 26.6.2015 by registered sale deed which was registered in the office of Sub Registrar, Karchhana in Bahi No.1 Jild No.4184 Page No.23 to 100 Sl.No.5372 on 26.6.2015. He further submits that by the order dated 16.9.2015 passed by the Tehsildar Karchhana, District Allahabad the aforesaid premises was mutated in favour of the purchaser. Learned counsel also submits that when the FIR was lodged against the applicant under Section 138-B Electricity Act, the applicant was not the owner of the premises in question and the same was already sold to one Jai Singh, therefore, the present case cannot be lodged against the applicant as he is not consuming

the electricity as alleged by the Electricity Department.

4. It is submitted by learned counsel for the applicant that since offence in question is compoundable and the applicant is ready to settle the matter, some time may be granted to him for the said purpose and to approach the authority concerned under Section 152 of the Electricity Act.

5. Sri Narendra Kumar Tiwari, learned counsel for the Electricity Department has no objection if the offence is compounded under Section 152 of the Electricity Act. Learned AGA who represents opposite party no.1 State of U.P. has also no objection.

6. Having regard to the facts and circumstances of case and having considered the submissions made by learned counsel for parties and keeping in view the willingness shown by learned counsel for applicant, in my view, no useful purpose would be served by keeping this application pending. Hence, applicant is directed to move an application under the relevant provisions of Electricity Act before the concerned authority within one month from today. If such application along with certified copy of this order is moved by applicant, same shall be considered and decided expeditiously, preferably within a period of two months from the date of production of same in accordance with law after hearing the parties concerned.

7. For a period of three months or till the disposal of said application, whichever is earlier, no coercive action shall be taken against applicant in the aforesaid case.

8. In case of default on the part of applicant, interim protection granted to applicant shall automatically come to an end.

9. With the aforesaid observations, this application stands finally **disposed of**.

(2021)08ILR A662
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2021

BEFORE

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

Application U/S 482. No. 10431 of 2021

Rajesh Churiwala ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Brijrndra Prasad Shukla

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

A. Criminal Law-Code of Criminal Procedure,1973-Section 482 - Indian Penal Code,1860-Section 500-imputation made for public good would be a question of fact, can be decided during trial only and the benefit of the first exception to section 499 cannot be claimed at the stage of issuance of summons.(Para 1 to 18)

B. It is well settled that at the stage of issuing process the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceedings against the accused. At this stage, there is no requirement to enter into the detailed factual aspects or on the merits or demerits of the case.(Para 14)

The application is dismissed. (E-5)

List of Cases cited:

1. Chaman Lal Vs St of Punj.(1970) 1 SCC 590

2. Subramanian Swamy Vs U.O.I. (2016) 7 SCC 221

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

1. Heard Sri Birendra Prasad Shukla, learned counsel for the applicant and Ms. Sushma Soni, learned Additional Government Advocate appearing for the State-opposite party.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the proceedings of Complaint Case No.10 of 2019 (Mohan Lal Saravagi Vs. Rajesh Churiwala), under Section 500 I.P.C., pending before the Additional Chief Judicial Magistrate, Court No.3, Varanasi, within a stipulated time period.

3. Counsel for the applicant has also sought to assail the order dated 18.01.2020 in terms of which the applicant has been summoned.

4. The only contention which is sought to be canvassed to challenge the proceedings is that the offence under Section 499 I.P.C. is not made out inasmuch as the case is covered under the first exception to the section which provides that if the imputation is made for public good, the same would not amount to defamation.

5. Learned AGA points out that the question as to whether an imputation is made for public good or not would be a question of fact which is to be seen in the trial and the same cannot be taken as a ground to seek quashing of the proceedings.

6. In order to appreciate the rival contentions, the relevant statutory provisions relating to defamation under Chapter XXI of the Indian Penal Code, 18601 would be required to be referred to. Section 499 reads as follows :-

"499. Defamation--Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person."

7. The first exception to Section 499, which is also relevant for the purpose of the controversy at hand, is being extracted below:

"First Exception- Imputation of truth which public good requires to be made or published.- It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact."

8. Section 499 of the Penal Code states as to when an act of imputation amounts to defamation. It contains four explanations and ten exceptions and section 500 prescribes punishment in such cases. The ten exceptions to Section 499 state the instances in which an imputation, *prima facie* defamatory, may be excused. The first exception corresponds to the defence which may be set up by taking the plea of the imputation being true and for public good. This exception recognizes the publication of truth as a sufficient justification, if it is

made for the public good. Truth by itself would be no justification in criminal law, unless it is proved that its publication was for the public good.

9. The plea of defence of public good, under the first exception to Section 499, fell for consideration in **Chaman Lal Vs. State of Punjab2,** and it was held that public good is a question of fact and the onus of proving the two ingredients under the first exception i.e. the imputation is true and the publication is for public good, is on the accused. It was stated thus:

"8. Public good is a question of fact. Good faith has also to be established as a fact.

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15. In order to come within the First Exception to section 499 of the Indian Penal Code it has to be established that what has been imputed concerning the respondent is true and the publication of the imputation is for the public good. The onus of proving these two ingredients, namely, truth of the imputation and the publication of the imputation for the public good is on the appellant..."

10. The provisions relating to defamation under Section 499 were again considered in the case of **Subramanian Swamy Vs. Union of India3**, and in the context of the plea for justifying the imputation by referring to the first exception, it was observed as follows:-

"179. Having dealt with the four Explanations, presently, we may analyse the Exceptions and note certain authorities with regard to the Exceptions. It is solely for the purpose of appreciating how the Court has appreciated and applied them. The First Exception stipulates that it is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. "Public good" has to be treated to be a fact. In Chaman Lal v. State of Punjab : (1970) 1 SCC 590, the Court has held that in order to come within the First Exception to Section 499 of the Indian Penal Code it has to be established that what has been imputed concerning the Respondent is true and the publication of the imputation is for the public good. The onus of proving these two ingredients, namely, truth of the imputation and the publication of the imputation for the public good, is on the accused.

180. It is submitted by Dr. Dhawan, learned senior Counsel for the Petitioners that if the imputation is not true, the matter would be different. But as the Exception postulates that imputation even if true, if it is not to further public good then it will not be defamation, is absolutely irrational and does not stand to reason. It is urged that truth is the basic foundation of justice, but this Exception does not recognize truth as a defence and, therefore, it deserves to be struck down.

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191...It is submitted that the Exceptions make the offence more rigorous and thereby making the concept of criminal defamation extremely unreasonable. The criticism advanced pertain to truth being not a defence, and unnecessary stress on 'public good'. The counter argument is that if a truthful statement is not made for any kind of public good but only to malign a person, it is a correct principle in law that the statement or writing can amount to

defamation. Dr. Singhvi, learned senior Counsel for some of the Respondents has given certain examples. The examples pertain to an imputation that a person is an alcoholic; an imputation that two family members are involved in consensual incest; an imputation that a person is impotent; a statement is made in public that a particular person suffers from AIDS; an imputation that a person is a victim of rape; and an imputation that the child of a married couple is not fathered by the husband but born out of an affair with another man. We have set out the examples cited by the learned senior Counsel only to show that there can be occasions or situations where truth may not be sole defence. And that is why the provision has given emphasis on public good. Needless to say, what is public good is a question of fact depending on the facts and circumstances of the case. "

11. Defamation i.e. an injury to a person's reputation, is both a crime and a civil wrong. In a civil action for defamation in tort, truth is a defence, but in a criminal action, the accused would be required to prove both the truth of the matter and also that its publication was for public good and no amount of truth would justify a defamatory act unless its publication is proved to have been made for public good. The defence of truth is not satisfied merely by proving that the publisher honestly believed the statement to be true, he must prove that the statement was in fact true.

12. Truth by itself, would be not a defence to an action for criminal defamation if other ingredients are present, unless it can be shown that imputation in question besides being truthful was made for the public good. As to what is public good would be a question of fact depending upon the facts and circumstances of the case and the onus of proving two ingredients, namely, truth of the imputation and the publication of the imputation for the public good, would be on the accused.

13. The question whether or not the imputation was made for public good would therefore be a question of fact which would be required to be proved by the accused to seek the benefit of the first exception to Section 499. The defence in this regard being a question of fact, can be decided during trial only and the benefit of the first exception cannot be claimed at the stage of issuance of summons.

14. It is well settled that at the stage of issuing process the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be *prima facie* satisfied whether there are sufficient grounds for proceeding against the accused. At this stage, there is no requirement to enter into the detailed factual aspects or on the merits or demerits of the case.

15. In the present case the applicant has sought to raise a challenge to the order dated 18.01.2020 in terms of which he has been summoned. At this stage, the Magistrate is required only to be prima facie satisfied that there are sufficient grounds for proceeding against the accused and the defence of the accused is to be seen only during the course of the trial. The protection of the first exception to Section 499 of the Penal Code, which is being relied upon on behalf of the applicant, is not to be seen at this stage.

16. Learned counsel for the applicant does not dispute the aforesaid legal position and states that the applicant would appear before the court below, submit to its

jurisdiction and place his defence during the trial.

17. Having regard to the aforesaid, this Court is not inclined to entertain the present application in exercise of its inherent jurisdiction under Section 482 Cr.P.C.

18. The application stands accordingly dismissed.

(2021)08ILR A666
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 11315 of 2021

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

Counsel for the Applicants:
Sri Sudhir Kumar Agarwal, Sri Naveen Kumar

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Section 323,325,504-quashing of summoning order-impugned summoning order passed in mechanical manner through a printed order without applying judicial mind and without considering the material-cognizance order cannot be legally sustained, as it does not stand the test of the law laid down by the Apex Court.(Para 1 to 25)

B. Judicial orders can not be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. such tendency must be deprecated and cannot be allowed to perpetuate. this reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms.(Para 12 to 22)

The application is allowed. (E-5)

List of Cases cited:

1. Dilawar Vs St. of Har.(2018) 16 SCC 521

2. Menka Gandhi Vs U.O.I .(1978) AIR SC 597

3. Hussainara Khatoon (I) Vs St. of Bih.(1980) 1 SCC 81

4. Abdul Rehman Antulay Vs R.S. Nayak(1992) 1 SCC 225

5. Ramchandra Rao Vs St. of Karn.(2002) 4 SCC 578

6. H.N. Rishbud Vs St. of Delhi (1955) AIR SC 196

7. Basaruddin & Ors Vs St. of U.P & ors. (2011) 1 JIC 335 (AII) (LB)

8. Bhushan Kumar & Anr. Vs St. (NCT of Delhi) & Anr.(2012) AIR SC 1747

9. Sunil Bharti Mittal Vs CBI (2015) AIR SC 923

10. Darshan Singh Ram Kishan Vs St. of Mah. (1971) 2 SCC 654

11. Ankit Vs St. of U.P. & anr.

12. Megh Nath Guptas & anr.Vs St. of U.P & anr. (2008) 62 ACC 826

13. Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal , (2003) 4 ACC 686 SC

14. UP Pollution Control Board Vs Mohan Meakins (2000) 2 JIC 159 SC: AIR 2000 SC 1456

15. Kanti Bhadra Vs St. of W.B. (2000) 1 JIC 751 (SC): 2000 (40) ACC 441 SC

16. Kavi Ahmad Vs St. of U.P & anr.CRLR No. 3209 of 2019

17. Abdul Rasheed & ors Vs St. of U.P & anr.(2010) 3 JIC 761 All

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

1. Heard learned counsel for the applicants, learned AGA for the State and perused the record.

2. This application under Section 482 Cr.P.C. has been filed for quashing the proceedings of cognizance order dated 5.9.2020 as well as entire proceedings of Case No.1594 of 2020 (State vs Dharmraj and others) arising out of Case Crime No.68 of 2020 under Sections 325,323, 504 IPC P.S. Banshi District Siddharthnagar pending in the court of Judicial Magistrate, Banshi, District Siddarthnagar.

3. As per the prosecution version of the FIR which was lodged by the opposite party no.2, on 25.12.2019 when he was going to his home from the field, accused persons namely Dharmraj, Narku, Sushil, Sunil and Lavkush started abusing him without any reason and on being objected, they had beaten him with lathi and danda due to which he sustained injuries. The incident was witnessed by many people.

4. Learned counsel for the applicants further submits that the entire prosecution story is false. No such incident took place and the applicants have been falsely implicated in the present case.

5. Learned counsel for the applicants further submits that before arguing the case on merits, he wants to draw the attention of the Court on the charge-sheet submitted by the Investigating Officer and submitted that the Investigating Officer had submitted the charge-sheet against the applicants under Sections 323, 325, 504 IPC on 6.4.2020, copy of the same is filed as Annexure No.8 to the affidavit, whereas he further submits that on the charge-sheet, the learned Magistrate had taken cognizance on 5.9.2020 and the case was numbered as Case No.1594 of 2020. The cognizance was taken on the prined proforma by filling the sections of IPC, dates and number and in the said proforma the learned Magistrate without assigning any reason has summoned the applicants for facing trial. Copy of the same is annexed as Annexure No.9 to the affidavit.

6. Learned counsel for the applicant further submits that by the order dated 5.9.2020 cognizance taken by the learned Magistrate on printed proforma without assigning any reason is abused of process of law.

7. Learned counsel for the applicant further submits that after submission of charge sheet the applicant has been summoned mechanically by order dated 5.9.2020 and the court below while summoning the applicants has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the court below without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicant. The court below has summoned the applicants through a printed order, which is wholly illegal.

8. It is vehemently urged by learned counsel for the applicants that the impugned summoning order dated 5.9.2020 is not sustainable in the eye of law, as the same has been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned summoning order dated 5.9.2020 has been passed by the Magistrate concerned on printed proforma by filling up the gaps, therefore the same is liable to be quashed by this Court.

9. Learned counsel for the applicant has given much emphasis that if the cognizance has been taken on the printed proforma, the same is not sustainable.

10. Per contra, learned AGA for the State submitted that considering the material evidences and allegations against the applicants on record, as on date, as per prosecution case, the cognizable offence against the applicants is made out, therefore, application is liable to be dismissed but has not denied that the leaned Magistrate has taken cognizance on the printed proforma. This case is being finally decided at this stage without issuing notice to opposite party no.2 and without calling for a counter affidavit.

11. I have heard the learned counsel for the parties and perused the record.

12. The main issue for consideration before this Court is that whether the learned Magistrate may summon the accused person on a printed proforma without assigning any reason and take cognizance on police report filed under Sections 173 of Cr.P.C. In this regard, it is relevant to mention here that a Court can take cognizance of an offence only when condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled. Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr.P.C. provided that "subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

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

(b) upon a police report of such facts;

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

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

13. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly reveal that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since, it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to

appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject and the orders of Magistrate does not suffers from non-application of judicial mind while taking cognizance of the offence.

14. Fair and proper investigation is the primary duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need for time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, **vide Dilawar vs. State of Haryana, (2018) 16 SCC 521, Menka Gandhi vs. Union of India, AIR 1978 SC 597, Hussainara Khatoon (I) vs. State of Bihar, (1980)1 SCC 81, Abdul Rehman Antulay vs. R.S. Nayak, (1992) 1 SCC 225 and P. Ramchandra Rao vs. State of Karnatka, (2002) 4 SCC 578.**

15. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. **Investigation includes all the proceedings under the Cr.P.C. for the collection of evidence conducted by a police officer or by any person other than a Magistrate** (who is authorised by a Magistrate in his behalf). **Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case,** (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a chargesheet under Section 173, Cr.P.C., vide **H.N. Rishbud vs. State of Delhi, AIR 1955 SC 196.** Thereafter, the learned Magistrate has to take cognizance after application of judicial mind and by reasoned order and not in mechanical manner.

16. In the case of **Basaruddin & others Vs. State of U.P. and others, 2011 (1) JIC 335 (All)(LB),** the Hon'ble Court was pleased to obserave as under:-

"From a perusal of the impugned order, it appears that the learned Magistrate on the complaint filed by the complainant has summoned the accused in a mechanical way filling the date in the typed proforma. Learned Magistrate while taking cognizance of the offence on complaint was expected to go through the allegations made in the complaint and to satisfy himself as to which offences were prima facies, being made out against the accused on basis of allegations made in the complaint. It appears that the learned Magistrate did not bother to go through the allegations made in the complaint and ascertain as to what offences were, prima facie, being made out against the accused on the basis of allegations made in the complaint. Apparently, the impugned order

passed by the learned Magistrate suffers from non-application of mind while taking cognizance of the offence. The impugned order is not well reasoned order, therefore, the same is liable to be quashed and the petition deserves to be allowed and the matter may be remanded back to the learned Chief Judicial Magistrate, Lakhimpur Kheri with direction to him to go through the allegations made in the complaint and ascertain as to what offences against the accused were prima facie being made out against the accused on the basis of allegations made in the complaint and pass fresh order, thereafter, he will proceed according to law."

17. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747,** the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

18. In the case **of Sunil Bharti Mittal v. Central Bureau of Investigation, AIR 2015 SC 923,** the Hon,ble Apex Court was pleased to observe in paragraph no.47 of the judgment as under:

"47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself.."

19. In the case of ***Darshan Singh Ram Kishan v. State of Maharashtra , (1971) 2 SCC 654***, the Hon'ble Court was pleased to observe that the process of taking cognizance does not involve any formal action, but it occurs as soon as the Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

20. In the case of **Ankit Vs. State of U.P. And another passed in Application**

U/S 482 No.19647 of 2009 decided on 15.10.2009, this Court was pleased to observe in paragraph No.8 of the judgment as under:-

"8. In the beginning, the name of the court, case number, state vs. ..... under section ..... P.S. ..... District ..... case crime No. ..... /2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting "अभियुक्त अंकित की गिरफ्तारी मा0 उच्च न्यायायल द्वारा Crl. Writ No. 19559/08 अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी।"

Below aforesaid sentence, the seal of the court containing name of Sri Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short signature (initial) over his name. The manner in which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. Although as held by this Court in the case of Megh Nath Guptas & Anr V State of U.P. And Anr, 2008 (62) ACC 826, in which reference has been made to the cases ***of Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC),*** *the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."*

21. In the case **of Kavi Ahmad Vs. State of U.P. and another p**assed in Criminal Revision No. 3209 of 2010, wherein order taking cognizance of offence by the Magistrate under Section 190(1)(b) on printed proforma without applying his judicial mind towards the material collected by the Investigating Officer has been held illegal.

22. In the case of Abdul Rasheed and others Vs. State of U.P. and another 2010 (3) JIC 761 (All). The relevant observations and findings recorded in the said case are quoted below:-

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated in the report or complaint before taking cognizance. If after applying his mind to the facts of the

case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

23. In view of the above, the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind.

24. In light of the judgments referred to above, it is explicitly clear that the order dated 5.9.2020 passed by Civil Judge (J.D.)/Judicial Magistrate, Banshi, District Siddarthnagar is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance order dated 5.9.2020 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice.

25. Accordingly, the present Criminal Misc. Application U/S 482 Cr.P.C succeeds and is allowed. The impugned cognizance order dated 5.9.2020 passed by Civil Judge (J.D.)/Judicial Magistrate, Banshi, District Siddarthnagar in Case No.1594 of 2020 (State vs Dharmraj and others) arising out of Case Crime No.68 of 2020 under Sections 325,323, 504 IPC P.S. Banshi District Siddharthnagar is hereby quashed.

26. The Civil Judge (J.D.)/Judicial Magistrate, Banshi, District Siddarthnagar is directed to decide afresh the issue for taking cognizance and summoning the applicant and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of three months from the date of production of a certified copy of this order.

27. With the above direction, the application filed under Section 482 Cr.P.C. stands **allowed**.

(2021)08ILR A672
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.08.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 11334 of 2021

Pankaj Jaiswal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Anurag Shukla, Sri Amrendra Nath Singh (Senior Adv.)

Counsel for the Opposite Parties:
G.A.

A. Criminal Law-Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Section 406,420,506-quashing of chargesheet-opposite party purchased a plot from the applicant and after one year he came to know that the applicant is not the original owner of the plot-opposite party demanded his money back but the applicant refused to give the money and threatened to his life and his family-Order passed by the Chief Metropolitan Magistrate in mechanical manner through a printed order without applying judicial mind and without considering the material cannot be legally sustained, as it does not stand the test of the law laid down by the Apex Court.(Para 1 to 27)

B. Judicial orders can not be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. such tendency must be deprecated and cannot be allowed to perpetuate. this reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms.(Para 9 to 24)

The application is allowed. (E-5)

List of Cases cited:

1. Dilawar Vs St. of Har.(2018) 16 SCC 521

2. Menka Gandhi Vs U.O.I. (1978) AIR SC 597

3. Hussainara Khatoon (I) Vs St. of Bih.(1980) 1 SCC 81

4. Abdul Rehman Antulay Vs R.S. Nayak(1992) 1 SCC 225

5. Ramchandra Rao Vs St. of Karn.(2002) 4 SCC 578

6. H.N. Rishbud Vs St. of Delhi (1955) AIR SC 196

7. Basaruddin & ors. Vs St. of U.P & ors. (2011) 1 JIC 335 (AII) (LB)

8. Bhushan Kumar & anr. Vs St. (NCT of Delhi) & anr.(2012) AIR SC 1747

9. Sunil Bharti Mittal Vs CBI (2015) AIR SC 923

10. Darshan Singh Ram Kishan Vs St. of Mah. (1971) 2 SCC 654

11. Ankit Vs St. of U.P. & anr.

12. Megh Nath Guptas & anr.Vs St. of U.P & anr. (2008) 62 ACC 826

13. Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal , (2003) 4 ACC 686 SC

14. UP Pollution Control Board Vs Mohan Meakins (2000) 2 JIC 159 SC: AIR 2000 SC 1456

15. Kanti Bhadra Vs St. of W.B. (2000) 1 JIC 751 (SC): 2000 (40) ACC 441 SC

16. Kavi Ahmad Vs St. of U.P & anr.CRLR No. 3209 of 2019

17. Abdul Rasheed & ors. Vs St. of U.P & anr.(2010) 3 JIC 761 All

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

1. Learned counsel for the applicant is permitted to correct the district in the body of the application during course of the day.

2. Heard Sri Amrendra Nath Singh, learned Senior Counsel assisted by Sri Anurag Shukla, learned counsel for the applicant, learned AGA for the State and perused the record.

3. This application under Section 482 Cr.P.C. has been filed for quashing of the charge sheet dated 22.11.2019 and cognizance order dated 18.03.2020 in Case No.9149 of 2020 (State of U.P. Vs. Pankaj Jaiswal & others) arising out of Case Crime No.1242 of 2017, under Sections 406, 420, 506 I.P.C., Police Station Chakeri, District Kanpur Nagar, pending in the Court of Chief Metropolitan Magistrate, Kanpur Nagar. A further prayer has also been made to stay the further proceedings of the aforesaid case.

4. Learned counsel for the applicants submit that on 07.11.2017 the respondent no.2 lodged an F.I.R. against the applicants, which was registered as case crime no.1242/2017, under Sections 406, 420, 506 I.P.C., Police Station Chakeri, District Kanpur Nagar.

5. As per the prosecution version of the F.I.R, the opposite party no.2 purchased a plot (arazi no.684) from the applicant and after mutation the opposite party no.2 also raised boundary on the aforesaid plot. After one year of the sale deed, the opposite party no.2 came to know from one person namely Shukla Ji that the applicant-Pankanj Jaiswal is not the original owner of the aforesaid plot, which he has purchased from the applicant. Thereafter, the opposite party no.2 demanded his money back from the applicant. The applicant sought two months time to return the money, which he was received from the opposite party no.2. After two months, when the opposite party no.2 demanded his money then the applicant refused to return the money and also threatened to his life and his whole family.

6. Learned counsel for the applicant further submits that the entire prosecution story is false. No such incident took place and the applicant has been falsely implicated in the present case.

7. Learned counsel for the applicant further submits that before arguing the case on merits, he wants to draw the attention of the Court on the charge-sheet submitted by the Investigating Officer and submitted that the Investigating Officer had submitted the charge-sheet against the applicants under Section 406, 420 and 506 IPC on 22.11.2019, copy of the same is filed as Annexure No.14 to the affidavit, whereas he further submits that on the charge-sheet, the learned Magistrate had taken cognizance on 18.03.2020 and the case was numbered as Case No.9149 of 2020. The cognizance was taken on the printed proforma by filling the sections of IPC, dates and number and in the said proforma the learned Magistrate without assigning any reason has summoned the applicants for facing trial. Copy of the same is also annexed as Annexure No.14 to the affidavit.

8. Learned counsel for the applicants further submits that by the order dated 18.03.2020 cognizance taken by the learned Magistrate on printed proforma without assigning any reason is abused of process of law.

9. Learned counsel for the applicants further submits that after submission of charge sheet the applicants have been summoned mechanically by order dated 18.03.2020 and the court below while summoning the applicants has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the court below without dwelling into material

and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicant. The court below has summoned the applicant through a printed order, which is wholly illegal.

10. It is vehemently urged by learned counsel for the applicants that the impugned summoning order dated 18.03.2020 is not sustainable in the eye of law, as the same has been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned summoning order dated 18.03.2020 has been passed by the Magistrate concerned on printed proforma by filling up the gaps, therefore the same is liable to be quashed by this Court.

11. Learned counsel for the applicants has given much emphasis that if the cognizance has been taken on the printed proforma, the same is not sustainable.

12. Per contra, learned A.G.A. for the State submitted that considering the material evidences and allegations against the applicant on record, as on date, as per prosecution case, the cognizable offence against the applicants is made out, therefore, application is liable to be dismissed but has not denied that the leaned Magistrate has taken cognizance on the printed proforma. This case is being finally decided at this stage without issuing notice to opposite party no.2 and without calling for a counter affidavit.

13. I have heard the learned counsel for the parties and perused the record.

14. The main issue for consideration before this Court is that whether the learned Magistrate may summon the accused person on a printed proforma without assigning any reason and take cognizance on police report filed under Sections 173 of Cr.P.C. In this regard, it is relevant to mention here that a Court can take cognizance of an offence only when condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled. Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr.P.C. provided that "subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

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

(b) upon a police report of such facts;

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

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

15. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly

reveal that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since, it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject and the orders of Magistrate does not suffers from non-application of judicial mind while taking cognizance of the offence.

16. Fair and proper investigation is the primary duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need for time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, vide **Dilawar vs. State of Haryana, (2018) 16 SCC 521, Menka Gandhi vs. Union of India, AIR 1978 SC 597, Hussainara Khatoon (I) vs. State of Bihar, (1980)1 SCC 81, Abdul Rehman Antulay vs. R.S. Nayak, (1992) 1 SCC 225 and P. Ramchandra Rao vs. State of Karnatka, (2002) 4 SCC 578.**

17. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. Investigation includes all the proceedings under the Cr.P.C. for the collection of evidence conducted by a police officer or by any person other than a Magistrate (who is authorised by a Magistrate in his behalf). Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case, (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a charge sheet under Section 173, Cr.P.C., vide **H.N. Rishbud vs. State of Delhi, AIR 1955 SC 196**. Thereafter, the learned Magistrate has to take cognizance after application of judicial mind and by reasoned order and not in mechanical manner.

18. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr., AIR 2012 SC 1747,** the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceedIn the case of **Basaruddin & others Vs. State of U.P. and others, 2011 (1) JIC 335 (All)(LB**), the Hon'ble Court was pleased to observed as under:-

"From a perusal of the impugned order, it appears that the learned Magistrate on the complaint filed by the complainant has summoned the accused in a mechanical way filling the date in the typed proforma. Learned Magistrate while taking cognizance of the offence on complaint was expected to go through the allegations made in the complaint and to satisfy himself as to which offences were prima facies, being made out against the accused on basis of allegations made in the complaint. It appears that the learned Magistrate did not bother to go through the allegations made in the complaint and ascertain as to what offences were, prima facie, being made out against the accused on the basis of allegations made in the complaint. Apparently, the impugned order passed by the learned Magistrate suffers from non-application of mind while taking cognizance of the offence. The impugned order is not well reasoned order, therefore, the same is liable to be quashed and the petition deserves to be allowed and the matter may be remanded back to the learned Chief Judicial Magistrate, Lakhimpur Kheri with direction to him to go through the allegations made in the complaint and ascertain as to what offences against the accused were prima facie being made out against the accused on the basis of allegations made in the complaint and pass fresh order, thereafter, he will proceed according to law."

19. In the case of **Bhushan Kumar and Anr. v. State (NCT of Delhi) and Anr.,** AIR 2012 SC 1747, the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

20. In the case **of Sunil Bharti Mittal v. Central Bureau of Investigation, AIR 2015 SC 923,** the Hon,ble Apex Court was pleased to observe in paragraph no.47 of the judgment as under:

"47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself.."

21. In the case of **Darshan Singh Ram Kishan v. State of Maharashtra , (1971) 2 SCC 654,** the Hon'ble Court was pleased to observe that the process of taking cognizance does not involve any formal action, but it occurs as soon as the Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking

cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report."

22. In the case of **Ankit Vs. State of U.P. And another** passed in Application U/S 482 No.19647 of 2009 decided on 15.10.2009, this Court was pleased to observe in paragraph No.8 of the judgment as under:-

"8. In the beginning, the name of the court, case number, state vs. ..... under section ..... P.S. ..... District ..... case crime No. ..... /2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting "अभियुक्त अंकित की गिरफ्तारी मा0 उच्च न्यायायल द्वारा Crl. Writ No. 19559/08 अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी।"

Below aforesaid sentence, the seal of the court containing name of Sri Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short signature (initial) over his name. The manner in which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. Although as held by this Court in the case of ***Megh Nath Guptas & Anr V State of U.P. And Anr,*** *2008 (62) ACC 826, in which reference has been made to the cases of* ***Deputy Chief Controller Import and Export Vs Roshan Lal Agarwal, 2003 (4) ACC 686 (SC), UP Pollution Control Board Vs Mohan Meakins, 2000 (2) JIC 159 (SC): AIR 2000 SC 1456 and Kanti Bhadra Vs State of West Bengal, 2000 (1) JIC 751 (SC): 2000 (40) ACC 441 (SC),*** *the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."*

23. In the case of **Kavi Ahmad Vs. State of U.P. and another** passed in Criminal Revision No. 3209 of 2010, wherein order taking cognizance of offence by the Magistrate under Section 190(1)(b) on printed proforma without applying his judicial mind towards the material collected by the Investigating Officer has been held illegal.

24. In the case of **Abdul Rasheed and others Vs. State of U.P. and another 2010 (3) JIC 761 (All).** The relevant observations and findings recorded in the said case are quoted below:-

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated in the report or complaint before taking cognizance. If after applying his mind to the facts of the case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

25. In view of the above, this Court finds and observes that the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind and without satisfying himself as to which offence were prima-facie being made out against the applicants on the basis of the allegations made by the complainant. the impugned cognizance order passed by the learned Magistrate is against the settled judicial norms.

26. In light of the judgments referred to above, it is explicitly clear that the order dated 18.03.2020 passed by the Chief Metropolitan Magistrate, Kanpur Nagar is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance order dated 18.03.2020 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice.

27. Accordingly, the present Criminal Misc. Application U/S 482 Cr.P.C **succeeds and is allowed**. The impugned cognizance order dated 18.03.2020 passed by the Chief Metropolitan Magistrate, Kanpur Nagar, is hereby **quashed** in Case No.9149 of 2020 (State of U.P. Vs. Pankaj Jaiswal & others) arising out of Case Crime

No.1242 of 2017, under Sections 406, 420, 506 I.P.C., Police Station Chakeri, District Kanpur Nagar.

28. The Chief Metropolitan Magistrate, Kanpur Nagar, is directed to decide afresh the issue for taking cognizance and summoning the applicant and pass appropriate orders in accordance with law keeping in view the observations made by this Court as well as the direction contained in the judgments referred to above within a period of two months from the date of production of a copy of this order.

29. Let a copy of this order be placed before the learned Registrar General of this Court within a week from today and the learned Registrar General is directed to issue a circular/ memorandum in accordance with law to all the District Judges in the State of Uttar Pradesh intimating them to inform all the Judicial Officer not to use "**Printed Proforma**" in passing the Judicial Orders in view of the observations made herein above.

30. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

31. The concerned Court/ Authority/ Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)08ILR A680
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.07.2021

BEFORE

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

Application U/S 482. No. 15865 of 2020

Smt. Kripa Devi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Vishal Mohan Gupta

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 482 - U.P. Gangsters and Anti Social Activities (Prevention) Act, 1986-Section 14(1)-quashing of -the powers exercised by the police comissioner u/ s 14(1) for attachment of property are in his capacity as an Executive Magistrate and the order so passed is to be followed by a reference to the Special Court u/s 16-it would be open to the claimant to file a representation as per procedure u/s 15 within a period of 90 days-in the absence of which the matter would be referred to the Special Court, Gangsters Act-representation filed by the applicant has been disposed of –At this stage, necessary consequences under the Act, relating to inquiry by the Special Court would follow and any order passed after inquiry, would be subject to an appeal u/s 18 of the Act.(Para 1 to 36)

The application is dismissed. (E-5)

List of Cases cited:

1. Emperor Vs Khwaja Nazir Ahmed (1945) AIR PC 18

2. A.N. Roy, Commr. of Police & anr. Vs Suresh Sham Singh (2006) 5 SCC 745

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

1. Heard Sri Vishal Mohan Gupta, learned counsel for the applicant and Sri Pankaj Saxena, learned Additional Government Advocate-I appearing for the State-opposite parties.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the order dated 08.07.2020 passed in Case No. 07 of 2020 (State vs. Amit Sharma) under Section 14 (1) of the U.P. Gangsters and Anti Social Activities (Prevention) Act, 19861 by the Police Commissioner, Gautam Buddha Nagar, with all of its consequential effects and a further prayer to stay the proceedings of Case No. 7/2020 (State vs. Amit Sharma) under Section 14 (1) of the Act, 1986 by the Police Commissioner, Gautam Buddha Nagar.

3. Learned Additional Government Advocate-I at the very outset raises an objection with regard to the maintainability of the present application on the ground that the order of which quashment is sought has been passed under sub-section (1) of Section 14 of the Act which is in the nature of an administrative order and as such no proceedings under the Code of Criminal Procedure, 19732 being pending, the jurisdiction of this Court under Section 482 Cr.P.C. cannot be invoked.

4. Counsel for the applicant has referred to the factual aspects of the case in order to press for the relief for quashing of the order dated 5.7.2020, passed by the Police Commissioner and the consequential proceedings initiated under the Act, 1986.

5. In order to appreciate the rival contentions, the statutory provisions contained under the Act, 1986, would be required to be adverted to.

6. The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Ordinance, 1986, was promulgated to make special provisions for the prevention of, and for coping with gangsters and anti-social activities and for matters connected therewith or incidental thereto. The Ordinance was replaced by Uttar Pradesh Gangsters and Anti-Social Activities) Act, 1986 [U.P. Act No. 7 of 1986], passed by the State Legislature with the same objective.

7. The provisions under the Act, 1986 relating to attachment of property and consequential proceedings, which are relevant for the purpose of controversy in the present case, are being extracted below :-

"**14. Attachment of property**. - (1) If the District Magistrate has reason to believe that any property, whether moveable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.

(2) The provisions of the Code shall, mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under subsection (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. Release of property. - (1) Where any property is attached under Section 14, the claimant thereof may, within three months from the date of knowledge of such attachment, make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by Court. - (1) Where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section (1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such Court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3)(a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under subsection (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3) the Court shall have the power of a Civil Court while trying a suit under this Code of Civil Procedure, 1908 (Act No. V of 1908), in respect of the following matters, namely :

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court or office;

(e) issuing commission for examination of witness or documents;

(f) dismissing a reference for default or deciding it ex parte;

(g) setting aside an order of dismissal for default or ex parte decision.

(5) In any proceedings under this Section, the burden of proving that the property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything to the contrary contained in the Indian Evidence Act, 1872 (Act No. 1 of 1872), notwithstanding.

17. Order after inquiry. - If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.

18. Appeal. - The provisions of Chapter XXIX of the Code shall, mutatis mutandis, apply to an appeal against any judgment on order of a Court passed under the provisions of this Act."

8 . Section 14 of the Act, 1986 provides that if the District Magistrate has reason to believe that any property, whether moveable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.

9. In terms of sub-section (1) of Section 15, the claimant is entitled to make a representation to the District Magistrate, showing the circumstances in and the sources by which such property was acquired by him, within three months from the date of knowledge of such attachment.

10. Sub-section (2) of Section 15 provides that if the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1), he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

11. Section 16 provides for an inquiry into the character of acquisition of property by Court. As per sub-sections (1) and (2), it contemplates two situations : (i) where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2); (ii) where the District Magistrate has refused to attach any property under sub-section (1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15. In case of (i), the District Magistrate is to refer the matter with his report to the Court having jurisdiction to try an offence under the Act. In case of the situation under (ii), the State Government or any person aggrieved by such refusal for release, may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result

of the commission of an offence triable under the Act, and such Court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

12. In terms of sub-section (3) (a) of Section 16, on receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall proceed with the inquiry after due notice to the parties concerned. It is also provided that the Court shall hear the parties, receive the evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by gangster as a result of commission of an offence triable under the Act and shall pass such order under Section 17, as may be, just and necessary in the circumstances of the case. Sub-section (4) provides that for the purpose of inquiry under sub-section (3) the Court shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908, in respect of certain specified matters.

13. Section 17 relates to the order after inquiry and it provides that if upon an inquiry the Court finds that the property was not acquired by a gangster as a result of commission of any offence triable under the Act, it shall order for release of the property of the person from whose possession it was attached, and in any other case the Court may make such order as it thinks fit for disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise. Section 18 provides a forum of appeal against any judgement or order of a Court passed under the provisions of the Act.

14. The provisions referred to above in respect of attachment of property, would go to show that the scheme of the Act provides a complete procedure from the stage of passing of an order of attachment under Section 14 (1) to an opportunity to the claimant to make a representation, whereupon the Magistrate, upon being satisfied about the genuineness of the claim, is empowered to release the property from attachment. This is subject to a further inquiry by the Court under Section 16 and passing of an order after inquiry under Section 17 after due opportunity to all, which is subject to a statutory appeal under Section 18.

15. In order to examine as to whether the inherent powers of the High Court under Section 482 of the Code, may be invoked to seek quashing of the proceedings, at the stage of passing of an order of attachment under Section 14 (1) of the Act, 1986, the provisions contained under Section 482 are required to be adverted to. For ease of reference Section 482 of the Code is being extracted below :-

"482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

16. Section 482 of the Code envisages three situations under which the inherent powers of the High Court may be exercised, namely: (i) to give effect to any order under the Code, (ii) to prevent abuse of the process of the Court, or (iii) to otherwise secure the ends of justice.

17. The inherent jurisdiction under the section though wide, is to be exercised sparingly, carefully and with caution and

only when such exercise is justified by the tests specifically laid down in the section itself. The powers are to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone the Courts exist.

18. Section 482 provides for saving of the inherent powers of the High Court and it does not confer any new power on the Court. The section only recognizes the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code or prevent abuse of process of any Court or otherwise to secure the ends of justice.

19. The invocation of inherent power of the High Court, therefore, can be made in respect of proceedings pending before or disposed of by criminal courts and such powers cannot ordinarily be exercised in relation to orders passed by an authority not functioning under the Code or in respect of proceedings which are not criminal proceedings in a court.

20. Referring to Section 561-A of the Code of Criminal Procedure, 1898 (which corresponds to Section 482 of the new Code) the Privy Council in ***Emperor vs. Khwaja Nazir Ahmed3*,** held that the said section does not give to the High Court any increased powers, it only provides that those which the Court already inherently possess, shall be preserved. It was stated thus :-

"It has sometimes been thought that Section 561A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of that Act."

21 . It is, therefore, seen that the inherent powers of the High Court under Section 482 can be invoked only to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of process of any Court or otherwise to secure the ends of justice. The language and the phraseology used under the section make it clear that the powers are to be exercised in relation to a proceeding of a judicial character before a Court and not in respect of an order which is of an executive or administrative nature.

22. In the case at hand, the order impugned contains a recital that the State Government, in exercise of powers under Section 8 of the Code, has conferred the powers to be exercised under Section 14 of the Act, 1986, upon the Police Commissioner, Gautam Budh Nagar, for the purposes of Section 20 of the Code. It is in exercise of the powers so conferred under Section 14(1) of the Act, 1986, that the Police Commissioner has passed an order of attachment of property with a stipulation that the claimant may, within 90 days, make a representation as per the procedure under Section 15, failing which, the matter would be referred to the Special Court, Gangsters Act, Gautam Budh Nagar.

23. It may be taken note of that in terms of the mandate under the Constitution, the Code has provided for separation of the judiciary from the executive. Broadly speaking, functions

which are essentially judicial in nature are the concern of the Judicial Magistrates, while functions which are 'police' or 'administrative' in nature are the concern of the Executive Magistrates.

24. It would be apposite at this stage to refer to Section 8 and Section 20 of the Code, which are as follows :-

"**8. Metropolitan areas**.- (1) The State Government may, by notification, declare that, as from such date as may be specified in the notification, any area in the State comprising a city or town whose population exceeds one million shall be a metropolitan area for the purposes of this Code.

(2) As from the commencement of this Code, each of the Presidency-towns of Bombay, Calcutta and Madras and the city of Ahmedabad shall be deemed to be declared under sub-section (1) to be a metropolitan area.

(3) The State Government may, by notification, extend, reduce or alter the limits of a metropolitan area but the reduction or alteration shall not be so made as to reduce the population of such area to less than one million.

(4) Where, after an area has been declared, or deemed to have been declared to be, a metropolitan area, the population of such area falls below one million, such area shall, on and from such date as the State Government may, by notification, specify in this behalf, cease to be a metropolitan area; but notwithstanding such cesser, any inquiry, trial or appeal pending immediately before such cesser before any Court or Magistrate in such area shall continue to be dealt with under this Code, as if such cesser had not taken place.

(5) Where the State Government reduces or alters, under sub-section (3), the limits of any metropolitan area, such reduction or alteration shall not affect any inquiry, trial or appeal pending immediately before such reduction or alteration before any Court or Magistrate, and every such inquiry, trial or appeal shall continue to be dealt with under this Code as if such reduction or alteration had not taken place.

Explanation.-In this section, the expression "population" means the population as ascertained at the last preceding census of which the relevant figures have been published.

20. Executive Magistrates.- (1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have all or any of the powers of a District Magistrate under this Code or under any other law for the time being in force.

(3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive administration of the district, such officer shall, pending the orders of the State Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

(4) The State Government may place an Executive Magistrate in charge of a sub-division and may relieve him of the charge as occasion requires; and the Magistrate so placed in charge of a sub-division shall be called the Sub-divisional Magistrate.

(4A) The State Government may, by general or special order and subject to such control and directions as it may deem fit to impose, delegate its powers under sub-section (4) to the District Magistrate.

(5) Nothing in this section shall preclude the State Government from conferring under any law for the time being in force, on a Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area."

(6) The State Government may delegate its powers under sub-section (4) to the District Magistrate. [Vide U.P. Act 1 of 1984, section 5 (w.e.f. 1-5-1984)].

25. As per Section 8 of the Code, the State Government may, by a notification, declare any area in the State comprising a city or town whose population exceeds one million to be a metropolitan area for the purposes of Code. Section 20 of the Code contains reference to Executive Magistrates and in terms of sub-section (1) thereof, the State Government may appoint as many persons as it thinks fit to be an Executive Magistrate in every district and in every metropolitan area. Further, under sub-section (5), the State Government is empowered to confer, under any law for the time being in force, on a Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area.

26. The aforementioned provisions under Section 20 of the Code fell for consideration in **A.N.Roy, Commissioner of Police and another Vs. Suresh Sham Singh4**, in the context of a challenge having been raised to an order passed by the Police Commissioner in exercise of powers under Section 18 (1) of the Immoral Traffic (Prevention) Act, 19565, and reading sub-sections (1), (2) and (5) in conjunction, it was held that the State Government has power to appoint the Commissioner of Police of a metropolitan area, as an Executive Magistrate, who shall have powers of a District Magistrate for the purposes of provisions under the said Act. The relevant observations made in the judgment are as follows :-

"22. Under sub-section (1) of Section 20 the Government has got the power to appoint as many persons as it thinks fit to be Executive Magistrates in every district and in every metropolitan area and shall appoint one of them to be the District Magistrate. The words, "as many persons" employed in sub-section (1) are adequately elastic to include the Commissioner of Police. In other words, the State Government is not precluded from appointing the Commissioner of Police in a metropolitan area as an Executive Magistrate. We have already noted that Brihan Mumbay is a metropolitan area. Once the Commissioner of Police is appointed as an Executive Magistrate in Brihan Mumbay, he can be appointed as an Additional District Magistrate, who shall have the powers of the District Magistrate for the purposes of Sections 18 and 20 of the Act. In our opinion, this would be the correct reading of the statute. This view of ours is further clarified by sub-section (5) of Section 20 when it is stated that nothing in this section shall preclude the State

Government from conferring under any law for the time being in force, on the Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area."

27. The practice of conferring on a Commissioner of Police some magisterial powers of an executive nature has been prevalent, particularly in some metropolitan areas and the power of the State Government in this regard flows from a conjoint reading of sub-sections (1), (2) and (5) of Section 20 of the Code.

28. The order impugned contains a clear recital that the State Government, exercising powers under Section 8 of the Code, has conferred the powers exerciseable under Section 14 of the Act, 1986 upon the Police Commissioner, Gautam Buddha Nagar, for the purposes of Section 20 of the Code. It is in furtherance of the powers so conferred that the Police Commissioner has passed the order of attachment of property exerciseable by the District Magistrate under Section 14 (1) of the Act, 1986.

29. It may also be noticed that the order of attachment passed by the Police Commissioner clearly states that it would be open to the claimant to file a representation as per the procedure under Section 15, within a period of ninety days from the date of the order, in the absence of which the matter would be referred to the Special Court, Gangsters Act, Gautam Budh Nagar for its consideration.

30. Upon a consideration of the order in its entirety, it is clear that the Police Commissioner has exercised powers of a District Magistrate under Section 14 (1) and has left it open to the claimant to file a representation as per the procedure under Section 15 failing which the matter would be referred for inquiry before the Special Court as contemplated under Section 16 of the Act, 1986. The powers exercised by the Police Commissioner under Section 14 (1) are in his capacity as an Executive Magistrate, and the order so passed is to be followed by a reference to the Special Court under Section 16, making it clear that the Commissioner of Police while passing the order impugned has not exercised any judicial power as a court. This being the position it would not be open to the applicant to invoke the inherent powers of the High Court under Section 482 of the Code at this stage of the proceedings.

31. It would also be relevant to notice that the order of attachment of property under Section 14(1) is subject to a further inquiry into the character of acquisition of property by the Special Court constituted for the purpose under the Act, 1986. The provisions contained under Section 16 of the Act provides that the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of commission of an offence triable under this Act and shall pass such order under Section 17 as may be necessary in the circumstances of the case. If upon such inquiry, the Special Court finds that the property was acquired as a result of commission of any offence triable under the Act, it can order for release of the property of the person from whose possession it was attached. It is only in a situation otherwise, that the Court may make an order as it thinks fit for the disposal of the property for attachment, confiscation or delivery to any person entitled to the possession thereof. Even

after passing of the order under Section 17, consequent to an inquiry under Section 16, the party concerned would have the opportunity of availing statutory remedy of an appeal under Section 18.

32. The provisions contained under the Act, 1986, relating to attachment proceedings, thus, provide a complete scheme and ample opportunity to the claimant at the stage of inquiry before the Court and also the remedy of filing the appeal.

33. In the case at hand, the proceedings against which the present application has been filed, are at a stage, which is antecedent to the inquiry to be held by the Special Court and in view thereof, there appears to be no plausible cause for the applicant to have approached the Court at this stage.

34. Counsel for the applicant at this stage, submits that the representation dated 20.7.2020, as contemplated under Section 15, filed by the applicant, has been disposed of recently. If that be so, the necessary consequences under the Act of 1986, relating to inquiry by the Special Court, would follow and any order to be passed after inquiry, would be subject to an appeal under Section 18.

35. For all the aforestated reasons, this Court is not inclined to exercise its inherent jurisdiction under Section 482 Cr.P.C.

36. The application stands, accordingly, dismissed.

(2021)08ILR A689
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2021

BEFORE

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

Application U/S 482. No. 17735 of 2020

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

Counsel for the Applicant:
Sri Rajesh Kumar Tiwari

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860-Section 473 & U.P. Excise Act,1910-Section 60/63-seeking release of vehicle-magistrate rejected the application being not maintainable-Section 72 of the Act which is admittedly a local act does not contain any provision for release of anything seized or detained in connection with a offence committed under the Act in respect of which confiscation proceedings are pending-Section 72 of the Act clearly denudes the Magistrate of his power to pass any order u/s 457 Cr.P.C. for release of anything seized in connection with an offence purporting to have been committed under the Act-under the scheme of Excise Act, any vehicle used for carrying the intoxicant, upon being seized, is required to be produced before the Collector, who in turn has been conferred with the power of its confiscation.(Para 1 to 22)

The application is dismissed. (E-5)

List of Cases cited:

1. Virendra Gupta Vs St. of U.P.(2019) 108 ACC 438

2. Nand Vs St. of U.P.(1997) 1 AWC 41

3. Rajiv Kumar Singh Vs St. of U.P. & ors. (2017) 5 ADJ 351

4. Ved Prakash Vs St. of U.P.(1982) 19 ACC 183

5. St. (NCT of Delhi) Vs Narendra,(2014) 13 SCC 100

6. Maru Ram Vs UOI (1981) 1 SCC 107

7. St. (U.O.I.) Vs Ram Sharan(2003) 12 SCC 578

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

1. Heard Sri Rajesh Kumar Tiwari, learned counsel for the applicant and Sri Pankaj Saxena, learned Additional Government Advocate-I appearing for the State-opposite party.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the order dated 08.09.2020 passed by Additional District & Sessions Judge/F.T.C.-1, Deoria in Criminal Revision No. 20 of 2020 (Vikki Vs. State of U.P.) and the order dated 17.1.2020 passed by the Chief Judicial Magistrate, Court No. 17, Deoria in Misc. Application No. 36 of 2020 arising out of Case Crime No. 924 of 2019 under Section 60/63 of the U.P. Excise Act, 19101 and 473 IPC, Police Station Kotwali, District Deoria.

3. The facts as reflected from the records of the case indicate that an application was filed by the applicant herein before the court of Chief Judicial Magistrate seeking release of vehicle bearing Registration No. H.R.12-AJ-7586, Engine No. D13 A5636506 and Chassis No. MA3NYFB1SKE553161 contending that no recovery of any intoxicant had been made from the vehicle and that the applicant had possessed all the valid papers relating to the vehicle and accordingly a prayer was made for release of the vehicle. The Magistrate rejected the application as being not maintainable by referring to a Division Bench judgment of this Court in Virendra Gupta Vs. State of U.P.2, for the proposition that the provisions contained under sub-sections (1) to (4) of Section 72 of the U.P. Excise Act, 1910, clearly denude the Magistrate of his power to pass any order under Section 457 of the Code of Criminal Procedure3 for release of anything seized in connection with an offence purporting to have been committed under the Excise Act.

4. Aggrieved against the order, the applicant preferred a revision being Criminal Revision No. 20 of 2020. The revision was argued on the jurisdictional point as to whether the Magistrate had the power and jurisdiction to release the vehicle when the confiscation proceedings under Section 72 of the Act were pending before the Collector, and after referring to the facts and the material on record and also the law laid down in the case of **Virendra Gupta** (supra), the revision was rejected

5. Learned counsel for the applicant has sought to assail the orders of the courts below by contending that mere pendency of confiscation proceedings before the Collector under Section 72 of the Excise Act shall not operate as a bar against release of a vehicle seized under Section 60 of the Excise Act. In support of his contention, reliance was placed upon the judgments in the case of **Nand Vs. State of U.P.4, and Rajiv Kumar Singh Vs. State of U.P. and others5.**

6. Learned A.G.A.-I submits that in terms of the scheme of the Act, the release

of any property which is subject matter of confiscation proceedings under Section 72 of the Excise Act before the Collector cannot be sought in terms of the powers exerciseable under the Code. To support his submission, he has placed reliance upon the judgment in the case of **Ved Prakash Vs. State of U.P.6,** and also the Division Bench judgment in the case of **Virendra Gupta** (supra).

7. In order to appreciate the rival contentions the provisions as contained under Sections 5, 451, 452 and 457 of the Code of Criminal Procedure may be adverted to, and the same are as under :-

"**5. Saving.-**Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

4**51. Order for custody and disposal of property pending trial in certain cases.-**When any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation.-For the purposes of this section,"property" includes-

(a) property of any kind or document which is produced before the Court or which is in its custody,

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

452. **Order for disposal of property at conclusion of trial**.-(1) When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without sureties, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.

(3) A Court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate, who shall thereupon deal with it in the manner provided in Sections 457, 458 and 459.

(4) Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section (2), an order made under sub-section (1) shall not be carried out for two months, or when an

appeal is presented, until such appeal has been disposed of.

(5) In this section, the term" property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

457. **Procedure by police upon seizure of property.**-(1)Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

8. Sections 60 and 72 of the U.P. Excise Act, 1910 which are also relevant for the purposes of the controversy at hand, read as follows :-

"**60. Penalty for unlawful import, export, transport, manufacture, possession, sale, etc**.- (1) Whoever, in contravention of this Act or of any rule or order made thereunder, or of any licence, permit or pass obtained thereunder-

(a) exports any intoxicant; or

(b) transports or possesses any intoxicant which is not covered under Section 63 of this Act; or

(c) collects or sells the leaves and small stalks (not accompanied by flowering or fruiting tops) of natural and spontaneous growth of wild Indian Hemp plant (Cannabis Sativa) other than charas, ganja or any other intoxicating drug covered under the Narcotic Drugs and Psychotropic Substances Act, 1985; or

(d) constructs or works any distillery, brewery, manufactory or vintnery; or

(e) uses, keeps or has in his possession any material, still, utensil, implement or apparatus, whatsoever, for the purpose of manufacturing any intoxicant other than tari; or

(f) removes any intoxicant from any distillery, brewery, manufactory, vintnery or warehouse licenced, established or continued under this Act; or

(g) bottles any liquor for the purposes of sale; or

(h) sells any intoxicant, save in the case provided for by Section 61; or

(i) taps, or draws tari from any tari producing tree in the areas notified under Section 42;

shall be punished with imprisonment which may extend to two years and with fine which may extent to one thousand rupees in the case of an offence under sub-clause (i) and in any other case, with imprisonment which may extend to three years and with fine which shall, not be less than ten times of the amount of consideration fee or duty which would have been leviable if such intoxicant had been dealt with in accordance with this Act and the rules and orders made thereunder or in accordance with any licence, permit or pass obtained thereunder, or two thousand rupees whichever is greater.

(2) Whoever in contravention of this Act or any rule or order made thereunder or of any licence, permit or pass, obtained under this Act, manufactures any intoxicant shall be punished with imprisonment which shall not be less than six months and which may extend to three years and also with fine which shall not be less than five thousand rupees and which may extend to ten thousand rupees.

(3) Whoever, in contravention of this Act, or any rule or order made thereunder, consumes any intoxicant, shall be punished with fine which shall not be less than one thousand rupees and which may extend to two thousand rupees.]

"72. What things are liable to confiscation-(1) Whenever an offence punishable under this Act has been committed:

(a) every intoxicant in respect of which such offence has been committed;

(b) every still, utensil, implement or apparatus and all materials by means of which such offence has been committed;

(c) every intoxicant lawfully imported, transported, manufactured, held in possession or sold along with or in addition to any intoxicant liable to confiscation under clause (a);

(d) every receptacle, package and covering which any intoxicant as aforesaid or any materials, still, utensil, implement or apparatus is or are found, together with the other contents (if any) of such receptacle or package; and

(e) every animal, cart, vessel or other conveyance used in carrying such receptacle or package shall be liable to confiscation.

(2) Where anything or animal is seized under any provision of this Act and the Collector is satisfied for reasons to be recorded that an offence has been committed due to which such thing or animal has become liable to confiscation under sub-section (1), he may order confiscation of such thing or animal whether or not a prosecution for such offence has been instituted:

Provided that in the case of anything (except on intoxicant) or animal referred to in sub-section (1), the owner thereof shall be given an option to pay in lieu of its confiscation such fine as the Collector thinks adequate not exceeding its market value on the date of its seizure.

(3) Where the Collector on receiving report of seizure or on inspection of the seized things, including any animal, cart, vessel or other conveyance, is of the opinion that "any such things or animal is subject to speedy wear and tear or natural decay or it is otherwise expedient in the public interest so to do", he may order such things (except an intoxicant) or animal to be sold at the market price by auction or otherwise.

(4)Where such things or animals are sold as aforesaid, and-

(a) no order of confiscation is ultimately passed or maintained by the Collector under sub-section (2) or on review under sub-section (6); or

(b) an order passed on appeal under sub-section (7) so requires; or

(c) in the case of a prosecution being instituted for the offence in respect of which the thing or the animal is seized, the order of the court so requires,

the sale proceeds after deducting the expenses of the sale shall be paid to the person found entitled thereto.

(5) (a) No order of confiscation under this section shall be made unless the owner thereof or the person from whom it is seized is given-

(i) a notice in writing informing him of the grounds on which such confiscation is proposed;

(ii) an opportunity of making a representation in writing within such reasonable time as may be specified in the notice; and

(iii) a reasonable opportunity of being heard in the matter.

(b) Without prejudice to the provisions of clause (a), no order confiscating any animal, cart, vessel, or other conveyance shall be made if the owner thereof proves to the satisfaction of the Collector that it was used in carrying the contraband goods without the knowledge or connivance of the owner, his agent, if any, and the person in charge of the animal, cart, vessel or other conveyance and that each of them had taken all reasonable and necessary precautions against such use.

(6) Where on an application in that behalf being made to the Collector within one month from any order of confiscation made under sub-section (2), or as the case may be, after issuing notice on his own motion within one month from the order under the sub-section refusing confiscation to the owner of the thing or animal seized or to the person from whose possession it was seized, to show cause why the order should not be reviewed, and after giving him a reasonable opportunity of being heard, the Collector is satisfied that the order suffers from a mistake apparent on the face of the record including any mistake of law, he may pass such order on review as he thinks fit.

(7) Any person aggrieved by an order of the confiscation under subsection (2) or sub-section (6) may, within one month from the date of the communication to him of such order, appeal to such judicial authority as the State Government may appoint in this behalf and the judicial authority shall, after giving an opportunity to the appellant to be heard, pass such order

as it may think fit, confirming, modifying or annulling the order appealed against.

(8) Where a prosecution is instituted for the offence in relation to which such confiscation was ordered the thing or animal "shall subject to the provisions of sub- section (4) be disposed of in accordance with the order of the Court".

(9) No order of confiscation made by the Collector under this section shall prevent the infliction of any punishment to which the person affected thereby may be liable under this Act."

9. As per Section 72 of the Excise Act, whenever an offence punishable under the Act has been committed the articles enumerated under sub-section (1) are liable to confiscation and the Collector, upon being satisfied for reasons to be recorded, may pass an order for confiscation.

10. In the case of **Virendra Gupta (supra),** the question referred for consideration was as follows:-

"Whether pending confiscation proceedings under Section 72 of the U.P. Excise Act before the Collector, the Magistrate/Court has jurisdiction to release any property subject-matter of confiscation proceedings, in the exercise of powers under Sections 451, 452 or 457 of the Code of Criminal Procedure?"

11. The views taken in the judgments in the case of **Nand (supra) and Rajiv Kumar (supra),** which have been relied upon by counsel for the applicant, were considered and the views taken therein were not approved. It was stated as follows:-

"15. As far as Nand (supra) is concerned, Section 72 of the U.P. Excise Act was not examined by the learned Single Judge while deciding that case. In the case of Rajiv Kumar Singh (supra), the day on which the release application was rejected, no confiscation proceedings under Section 72 of the 'Act' were pending and were started thereafter. In Mustafa (supra), another single Judge of this Court although examined the effect of Section 5 of the Code of Criminal Procedure and Section 72 of the U.P. Excise Act on the power of a Magistrate to release the vehicle under Section 457 Cr.P.C. which was seized on account of it being connected with a case under the 'Act' but since the date on which the application for release was made, the confiscation proceedings stood decided and hence, the issue was left undecided. In the case of Dilipsinh Ramsinh Solanki (supra) and General Insurance Counsel (supra), the issue involved was entirely different from the one which is engaging our attention. Similarly, the Apex Court in Sundarbhai Ambalal Desai (supra) was dealing with a case in which challenge was to an order of police remand for the petitioners granted to the prosecuting agency, where the petitioners were police personnel involved in offences punishable under Sections 429, 420, 465, 468, 477A and 114 I.P.C. on the charges that they had committed offences for a period of time involving replacement of valuable articles retained as case property by other spurious articles, misappropriation of money also seized in connection with cases, unauthorized auction of property seized and kept at the police station, pending investigation. Thus, the offences which were the subject-matter of the case of Sundarbhai Ambalal Desai (supra) were under the I.P.C. to which the provisions of Section 451 and 457 Cr.P.C. were applicable with full force. The

Hon'ble Apex Court in the case of Sundarbhai Ambalal Desai (supra) had neither any occasion to examine the effect of Section 72 of the 'Act' on the power of a Magistrate to release seized properties in view of Section 5 of the Code of Criminal Procedure. Therefore, Sundarbhai Ambalal Desai (supra) can at best be said to be an authority on the general law regarding release of vehicles seized in connection with any criminal case.

16. Thus, in our opinion, none of the authorities relied upon by the learned counsel for the applicant can be said to be authorities on the issue involved in this matter."

12. The judgment in the case of **Ved Prakash** (supra) was also considered and the view taken therein that the provisions regarding disposal of property as contained in the Code, can be invoked only to the extent they are not inconsistent with Section 72 of the Excise Act, having regard to the language of Section 5 of the Code, was noticed, and the following paragraphs of the judgment in the case of **Ved Prakash** (supra) were reproduced with approval.

"5. Learned Counsel for the applicant urged that even accepting that the Collector has complete powers to deal with the property seized in connection with the commission of an offence under the U.P. Excise Act, the power of the Magistrate, before whom the prosecution is pending, is not taken away and if the Magistrate exercises his jurisdiction to pass an order under Section 457 Cr.P.C. it will prevail. In other words the argument is that the jurisdiction of the Magistrate under Section 457 Cr.P.C. shall override the jurisdiction conferred on the Collector under Section 72 of the U.P. Excise Act. The argument fails to impress me.

6. Section 5 of the Code of Criminal Procedure reads as follows:

"Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

7. There can be no controversy about the fact that the U.P. Excise Act is a "local law" within the meaning of that expression as used in Section 5 of the Criminal Procedure Code. Section 72 of that Act prescribes a special form of procedure for dealing with the property seized under the Excise Act and confers power or jurisdiction on the Magistrate to deal with the same. In view of the clear provisions contained in Section 5 of the Criminal Procedure Code, the provision contained therein regarding the disposal of property, can be used only to the extent they are not inconsistent with Section 72 of the U.P. Excise Act. Sub-section (4)(c) of Section 72 says that if anything is sold under Sub-section (3) the sale proceeds shall be disposed of in accordance with such order as the Magistrate trying the case may choose to pass at the end. Sub-section (8) provides that where the prosecution is instituted for the offence in relation to which such confiscation was ordered, the thing or animal shall, subject to the provisions of Sub-section (4), be disposed of in accordance with the order of the Court. It would mean that if the article in question is sold by the Collector under sub-section (3), then the Court seized of the

criminal case shall have jurisdiction to pass orders with respect to the sale proceeds only. If, however, the Collector has merely ordered confiscation under sub-section (1) and the sale of the property has not taken place, the Magistrate will also have jurisdiction, at the end of the trial, to pass orders regarding the disposal of the property and, despite the order of confiscation by the Collector, the property shall be handed over to such party as may be directed by the Court.

8. There can be yet another situation in which the order of the Magistrate will prevail. It will be where the criminal case is disposed of by the Court before the Collector is able to pass final orders under sub-section (1) of Section 72. In such a case, in my opinion, the Court shall have the jurisdiction to pass such orders regarding the disposal of property as it may deem fit and, thereafter, the Collector shall have no jurisdiction to further deal with the property.

9. It may be argued that since the words used in sub-section (8) "where a prosecution is instituted for the offence in relation to which such confiscation was ordered" indicate that sub-section (8) shall come into play only after the confiscation has been ordered. To my mind, however, it cannot be so. If even after the confiscation it is the order of the Court which shall be decisive regarding the custody or disposal, where is the sense in continuing proceedings for confiscation after final orders are passed by the Court, including orders regarding custody and disposal of property. Sub-section (8) has been couched in the existing language only because the legislature thought that the proceedings before the Collector being of summary nature, he shall always be able to finalise the same before the Court is able to decide the criminal case."

13. The Division Bench thereafter answered the reference by recording its conclusion that the view taken in the case of Ved Prakash had laid down the law correctly. It was stated thus :-

19. "...Section 72 of the 'Act' which is admittedly a local act does not contain any provision for release of anything seized or detained in connection with an offence committed under the Act in respect of which confiscation proceedings are pending. In fact the sub-section (1) to sub-section (4) of Section 72 of the 'Act' prescribe the manner in which anything seized in connection with an offence committed under the 'Act' and in respect of which confiscation proceedings under Section 72 of the 'Act' are pending, shall be dealt with. Section 72 of the 'Act' does not contain any provision indicating that such seized property may be released by the Magistrate in the exercise of his power under Section 457 Cr.P.C. The provisions contained in sub-sections (1) to (4) of Section 72 of the 'Act', clearly denudes the Magistrate of his power to pass any order under Section 457 Cr.P.C. for release of anything seized in connection with an offence purporting to have been committed under the 'Act'.

20. In view of the foregoing discussion, we find that the case of Ved Prakash (supra) lays down the correct law on the subject-matter of this reference and neither Nand v. State of U.P., 1997 (1) AWC 41 or Rajiv Kumar Singh v. State of U.P. and others, 2017 (5) ADJ 351 nor Sunderbhai Ambalal Desai v. State of Gujarat, 2002 (10) SCC 283, can be said to be authorities on the power of the

Magistrate to release anything seized or detained in connection with an offence committed under the 'Act' in respect of which confiscation proceedings under Section 72 of the U.P. Excise Act are pending before the Collector."

14. As per terms of Section 60 of the Excise Act, the transportation of any intoxicant in contravention of the provisions of the Act or of any rule or order made thereunder or any licence, permit or pass obtained thereunder, is punishable and any vehicle used for carrying the same, is liable for confiscation under Section 72 of the Excise Act.

15. Section 72 of the Excise Act deals with the powers of confiscation of the Collector and sub-section (2) thereof provides that where anything is seized under any provision of the Act, the officer seizing and detaining such property shall produce the same along with a detailed report, seizure memo and other relevant documents before the Collector. The Collector, if satisfied for reasons to be recorded that an offence has been committed, may order confiscation.

16. It is therefore seen that under the scheme of the Excise Act, any vehicle used for carrying the intoxicant, upon being seized, is required to be produced before the Collector, who in turn has been conferred with the power of its confiscation.

17. The question with regard to the applicability of the provisions contained under Sections 451, 452 and 457 of the Code in a case where the property had been seized and was subject to confiscation proceedings under the special Act namely Delhi Excise Act was considered in **State (NCT of Delhi) Vs. Narendra7** and it was held as follows :-

"12. It is relevant here to state that in the present case, the High Court, while releasing the vehicle on security has exercised its power under Section 451 of the Code. True it is that where any property is produced by an officer before a criminal court during an inquiry or trial under this section, the court may make any direction as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, as the case may be. At the conclusion of the inquiry or trial, the court may also, under Section 452 of the Code, make an order for the disposal of the property produced before it and make such other direction as it may think necessary. Further, where the property is not produced before a criminal court in an inquiry or trial, the Magistrate is empowered under Section 457 of the Code to make such order as it thinks fit.

13. In our opinion, the general provision of Section 451 of the Code with regard to the custody and disposal of the property or for that matter by destruction, confiscation or delivery to any person entitled to possession thereof under Section 452 of the Code or that of Section 457 authorising a Magistrate to make an order for disposal of property, if seized by an officer and not produced before a criminal court during an inquiry or trial, however, has to yield where a statute makes a special provision with regard to its confiscation and disposal."

18. The applicability of the Code in an area covered by a special or local law, in the context of the saving clause under Section 5 of the Code was considered in the Constitution Bench judgment in the case of

Maru Ram Vs. Union of India8 and also in **State (Union of India) Vs. Ram Sharan9,** and it was held that the section consists of three components: (i) the Code covers matters covered by it; (ii) if a special or local law exists covering the same area, the said law is saved and will prevail; (iii) if there is a special provision to the contrary, that will override the special or local law.

19. The U.P. Excise Act is a 'local law' within the meaning of Section 5 of the Code and in view thereof the general provision contained under Section 451 of the Code with regard to the custody and disposal of the property pending trial or the power for making an order for disposal of property at the conclusion of the trial under Section 452 or the procedure whereunder the Magistrate is authorised to make an order for disposal of property upon its seizure by the police under Section 457, would therefore be subject to the powers exerciseable under Section 72 of the Excise Act, which makes a special provision with regard to confiscation and disposal of the seized property.

20. It can therefore be said that the provisions contained under sub-sections (1) to (4) of Section 72 of the Act would have the effect of denuding the Magistrate of his power to pass any order under Section 457 of the Code for release of any article seized in connection with an offence purporting to have been committed under the Act.

21. The view taken by the courts below in declining to entertain the application of the applicant for release of the vehicle during the pendency of the confiscation proceedings under Section 72 of the Act before the Collector, thus does not warrant interference.

22. The application under Section 482 Cr.P.C. accordingly stands dismissed.

(2021)08ILR A699
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 30080 of 2019

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

Counsel for the Applicants:
Sri Karunesh Narayan Tripathi

Counsel for the Opposite Parties:
A.G.A., Sri Deepesh Kumar Ojha, Sri Saurabh Yadav, Sri Ved Prakash Pandey

A. Criminal Law-Code of Criminal Procedure,1973-Section 482 - Indian Penal Code,1860-Sections 498-A, 323, 504, 506, 342 & Dowry Prohibition Act,1961-Section ¾-quashing of entire proceedings-mediation failed-parties have not arrived at any positive agreement-at this stage, disputed question of fact cannot be considered-therefore, in view of the law laid down by the Apex Court prayer for quashing the entire proceedings, is refused. (Para 2 to 11)

The application is disposed of. (E-5)

List of Cases cited:

1. R.P. Kapur Vs St. of Punj.(1960) AIR SC 866

2. St. of Haryana Vs Bhajan Lal (1992) SCC (Cri) 426

3. St. of Bih. Vs P.P Sharma (1992) SCC (Cri) 192

4. Zandu Pharmaceutical Works Ltd Vs Mohd. Saraful Haq & anr. (2005) SCC(Cri) 283, para 10

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

1. Heard Shri Karunesh Narayan Tripathi, learned counsel for the applicants, learned A.G.A. for the State as well as Sri Ved Prakash Pandey and Sri Deepesh Kumar Ojha, learned counsel for opposite party no.2 and perused the record.

2. This application u/s 482 Cr.P.C. has been preferred for quashing of the entire proceedings including impugned charge sheet dated 13.1.2019 as well as cognizance order dated 22.4.2019 in Criminal case No.3684 of 2019, Case Crime No.829 of 2018 under Sections 498A, 323, 504, 506, 342 IPC and Section 3/4 D.P. Act P.S. Kotwali district Bareilly pending in the court of CJM Bareilly.

3. This Court vide order dated 5.8.2019 referred the matter before the Mediation and Conciliation Centre, High Court, Allahabad to decide the same. The proceeding in the Mediation Centre was initiated.

4. The Mediator has submitted its report in **Annexure E Form** 5 dated 7.1.2020 before the Court and submitted "**Mediation completed. No agreement**."

5. Learned AGA thereafter submitted that the mediation has failed and the parties have not arrived at any positive agreement, therefore, no useful purpose would be served in keeping this matter pending before this Court.

6. The contention of counsel for the applicants is that no offence against the applicants is disclosed and the present case has been instituted with a malafide intention for the purposes of harassment. He has also pointed out certain documents in support of his contention.

7. From the perusal of the material on record and looking into the facts of the case, at this stage it cannot be said that no offence is made out against the applicants. All the submissions made at the bar relate to the disputed questions of fact, which cannot be adjudicated upon by this Court under Section 482 Cr.P.C.

8. At this stage, disputed question of fact cannot be considered, therefore, in view of the law laid down by the Hon'ble Apex Court in the cases of **R.P. Kapur Vs. State of Punjab, AIR 1960 SC 866, State of Haryana Vs. Bhajan Lal, 1992 SCC (Cri.) 426, State of Bihar Vs. P.P. Sharma, 1992 SCC (Cri.) 192 and lastly Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283**, the prayer for quashing the entire cognizance order, Charge Sheet and proceedings of the aforesaid case is refused.

9. However, the applicants are directed to appear and surrender before the court below and apply for bail within a period of thirty days from today, the prayer for bail shall be considered expeditiously in accordance with law after hearing the Public Prosecutor.

10. In case the applicants fail to surrender within the stipulated period, the court below shall proceed in accordance with law.

11. With the aforesaid observations, this application is finally **disposed of.**

12. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

13. The concerned Court /Authority/ Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)08ILR A701
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, A.C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Special Appeal No. 109 of 2021

State of U.P. & Ors. ...Appellants
Versus
Kuldeep Naiyar ...Respondent

Counsel for the Appellants:
Sri Anand Kumar Ray

Counsel for the Respondent:
Sri Virendra Singh

A. Service Law – Recruitment - Uttar Pradesh Police Constable and Head Constable Service Rules, 2015: Rule 15(g) – The Rule gives authority to the Appointing Authority to ask the successful candidates to appear for medical examination, which is to be conducted in Police Line of the concerned district or at the place mentioned by the Appointing Authority. The aforesaid rule has been ignored by the learned Single Judge while giving authority to the Recruitment Board for holding the medical examination and passing order. The judgment under challenge is not sustainable as goes against the Rules. (Para 8)

Special appeal allowed. (E-3)

Present appeal assails the judgment and order dated 12.01.2021, passed by learned Single Judge.

(Delivered by Hon'ble Munishwar Nath Bhandari, A.C.J.
&
Hon'ble Piyush Agrawal, J.)

1. Heard Sri Anand Kumar Ray, learned Additional Chief Standing Counsel for the appellants and Sri Virendra Singh, learned counsel for the respondent.

2. By this appeal, a challenge is made to the judgment dated 12th January, 2021, whereby the writ petition preferred by the petitioner/non-appellant was allowed.

3. It is a case where post of Police Constables were advertised by the U.P. Police Recruitment and Promotion Board (for short "Recruitment Board") in the year 2015. The petitioner/non-appellant appeared in the selection and remained successful thus, his name was recommended to the Appointing Authority. In pursuant to it, the Appointing Authority directed the petitioner/non-appellant to appear before the Medical Board where he was found unfit on account of height. Petitioner/non-appellant challenged the decision of the Medical Board by a writ petition. The writ petition was dismissed. However, in an intra court appeal, an order was passed on 11th March, 2019 directing the respondents to hold physical examination of the petitioner/non-appellant again. The Review Medical Board was constituted by the Appointing Authority where the petitioner/non-appellant was

initially directed to appear before the Medical Board at Lucknow but finding Medical Board to be constituted at district level, he was sent to the Medical Board at Varanasi. In the Review Medical Board, the petitioner/non-appellant's colour vision was not found to be in order thus, he was declared unfit. The petitioner/non-appellant, however, approached the Recruitment Board to get him medically examined and pursuant to his request, Recruitment Board sent the petitioner/non-appellant for medical examination at Gorakhpur though the Recruitment Board had no authority to send the petitioner/non-appellant for medical examination. It is for the reason that after the recruitment and sending the select list, it becomes functus officio. The process of physical and medical examination is to be undertaken by the Appointing Authority. Since in the Review Medical Board, the petitioner/non-appellant was declared unfit on account of colour vision, the appointment could not be given to him.

4. The learned Single Judge, however, allowed the writ petition in reference to an order of the Recruitment Board dated 16th September, 2019. It is without realising that the Recruitment Board is authorised to make selection and on its completion, to send the list of successful candidates to the Appointing Authority. Subsequent to the aforesaid, physical and medical examination is to be conducted by the Appointing Authority and in fact the petitioner/non-appellant was medically examined by the Medical Board constituted by the Appointing Authority itself. Initially, he was declared unfit on account of height and in the Review Medical Board constituted by the Appointing Authority, the petitioner/non-appellant was declared to be unfit on account of colour vision. The Recruitment Board, however, send the petitioner/non-appellant for medical examination and based on a report only in regard to height, passed the order on 16th September, 2019 having no authority for it.

5. The learned Single Judge, however, relied on the said order without judging the competence of the Recruitment Board. The power of the Recruitment Board and the Appointing Authority was to be recognised. It has already been clarified that the Recruitment Board is to conduct the selection and send the list of successful candidates to the Appointing Authority. After receiving the select list of successful candidates, it is the Appointing Authority to get the candidate medically examined through a Medical Board in district for which selection is conducted. There is separation of powers in selection and appointment which has not been touched by the learned Single Judge.

6. Learned counsel for the petitioner/non-appellant has pressed upon the report of the Medical Board at Gorakhpur constituted by the Recruitment Board. It could not have relied on the report of the Medical Board at Gorakhpur having been constituted by the Recruitment Board without authority. The report of Medical Board constituted by the Appointing Authority shows petitioner/non-appellant to be deficient in colour vision and distance. In pursuant to the said report, a direction for appointment could not have been given. The learned Single Judge had wrongly considered Recruitment Board to be superior authority for constitution of Medical Board without realising that physical examination of the successful candidates does not fall in the domain of the Recruitment Board. Thus, the finding of the learned Single Judge holding that the

SSP Varanasi (the Appointing Authority) could not have ignored the letter of the Recruitment Board dated 16th September, 2019 cannot be accepted. The letter aforesaid was without authority of law as it has already been clarified that Recruitment Board has no authority to constitute a Medical Board thus, no sanctity was existing to the letter dated 16th September, 2019.

7. The judgment of the learned Single Judge is even in ignorance of the relevant Rule and for that, Rule 15 (g) of the Uttar Pradesh Police Constable and Head Constable Service Rules, 2015 is quoted herein:

"(g) Medical Examination

The candidates whose name are in the select list sent as per clause (e), will be required to appear for Medical Examination by the Appointing authority. Medical Examination will be conducted in the Police Line of the concerned District or at the place mentioned by the Appointing authority. Medical Examination will be conducted as per Appendix-3. The candidates found unsuccessful in Medical Examination shall be declared unfit by the Appointing authority and such vacancies shall be carried forward for next selection."

8. The Rule quoted above gives authority to the Appointing Authority to ask the successful candidates to appear for medical examination. The medical examination is to be conducted in Police Line of the concerned district or at the place mentioned by the Appointing Authority. It has to be as per Appendix-3. The Rule aforesaid has been ignored by the learned Single Judge while giving authority to the Recruitment Board for holding the medical examination and passing order. The judgment under challenge is not sustainable as goes against the Rules. It is, accordingly, set aside. The appeal is allowed with the aforesaid.

(2021)08ILR A703
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, A.C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Special Appeal No. 146 of 2021

State of U.P. & Ors. ...Appellants
Versus
Mahanand Pandey & Anr. ...Respondents

Counsel for the Appellants:
Sri Subhash Rathi

Counsel for the Respondents:
Sri Vinod Kumar Mishra

A. Service Law – Pension and Gratuity - Civil Service Regulations Relating to Pension to State Employees: Regulations 351-AA, 919-A(3) - The word "judicial proceeding" used u/Regulation 351-AA would include every proceeding pending in the Court whether original or at the appellate stage. The judicial proceeding means proceeding over which Judge presides. A criminal appeal cannot be taken out from the definition of "judicial proceeding" and thereby, if one is acquitted but appeal thereupon is pending, he/she would be governed by Regulation 351-AA and thereby, entitled to the provisional pension. (Para 15)

In present case, pending criminal appeal would fall in the definition of "judicial proceeding" and thereby, Regulation 351-AA read with Regulation 919-A(3) would be

applicable. The non-appellant would be entitled to the provisional pension. As per Regulation 919, the provisional pension now is the full pension though one would not be entitled to the gratuity till disposal of the appeal. (Para 17)

B. Before making claim for parity pursuant to Article 14 of the Constitution of India, one has to make out a legal right for grant of benefit. The case of parity cannot be accepted *dehors* the rules. It is otherwise to record that other co-employees were extended benefit of pension and gratuity in absence of the information about the pending criminal appeal against them. The appellant should have been careful in taking decision but finding it to be bona fide in reference to other co-employees facing criminal appeal, the claim of parity cannot be accepted. (Para 18)

Special appeal allowed. (E-3)

Precedent followed:

1. Amrit Lal Vs Chief Election Officer & ors., 2014 SCC OnLine All 12502 (Para 12)

2. Rajeev Sharma Vs St. of U.P. & ors., 2014 SCC OnLine All 12969 (Para 13)

3. St. of U.P. & ors. Vs Jai Prakash, 2013 SCC OnLine All 14150 (Para 13, 14)

4. Subhash Chandra Vs S.M. Agarwal, 1984 Criminal Law Journal 481 (Para 16)

Present Special Appeal arises out of order dated 16.03.2021, passed by Hon'ble Mr. Justice M.C. Tripathi, J. in Civil Misc. Writ Petition No. 2529 of 2021.

(Delivered by Hon'ble Munishwar Nath Bhandari, A.C.J.)

1. The State has preferred this appeal to challenge the judgment dated 16.03.2021 passed by learned Single Judge whereby the writ petition to seek full pension and gratuity apart from other retiral benefit was allowed.

2. The non-appellant/petitioner was appointed on the post of Constable on 27.12.1979. He was promoted to higher posts from time to time and thereupon retired on attaining the age of superannuation on 31.03.2020. Prior to retirement, an FIR was lodged against him for offence under Sections 307, 332, 353, 427 Indian Penal Code and Section 5 of Explosive Act. Apart from the aforesaid, a complaint was also registered by one Umesh Chand Mishra alleging commission of offence under Section 302 Indian Penal Code apart from other offences and thereby, another FIR was registered with investigation by CBCID. The charge-sheets in the cases were filed by the police, however, after the trial, non-appellant/petitioner was acquitted in both the cases. The State Government preferred an appeal against the order of acquittal and was registered bearing no. 3374 of 2013. The State appeal was admitted by this Court on 24.10.2013.

3. The department did not initiate departmental proceedings in reference to the commission of crime but non-appellant/petitioner was placed under suspension by the order dated 24.07.1996. The suspension was withdrawn on 26.12.1996.

4. The non-appellant/petitioner having retired on 31.03.2020, filed a writ petition to seek full pension and other retiral benefits when several representations sent by him could not get favourable result. The claim of full pension and other retiral benefit was not only in reference to rule but on the ground of parity because other co-employees were extended benefit of full

pension despite pendency of the State appeal against the order of acquittal in their cases also. Learned Single Judge allowed the petition with a direction to the respondents to extend benefit of all retiral benefits within six weeks otherwise to extend benefit of 12% interest on delayed payment.

5. Learned Standing Counsel submits that as per Civil Service Regulations Relating to Pension to State Employees, one was made entitled to provisional pension if any departmental or judicial proceedings or enquiry by the Administrative Tribunal is pending. Learned Single Judge ignored Regulation 351-AA while allowing the writ petition. Pendency of the appeal against the order of acquittal is judicial proceeding. In view of the above, judgment of learned Single Judge is in ignorance of the Regulations as well as judgment by this Court. The prayer is, accordingly, to set aside the judgment of learned Single Judge and allow the appeal.

6. Per contra, learned counsel for the respondents submits that pendency of the criminal appeal does not fall in the definition of "judicial proceeding". Learned Single Judge thus, allowed the writ petition by referring to the judgment of this Court wherein it was held that pendency of the criminal appeal should not be a bar to grant of retiral benefits. The prayer is, accordingly, to dismiss the appeal.

7. We have considered the rival submissions of the parties and perused the record.

8. It is a case where non-appellant/petitioner was made entitled to the provisional pension during pendency of the appeal against the order of acquittal. The facts disclosed earlier show two FIRs against the non-appellant/petitioner but after the trial, he was acquitted. The State Government preferred a criminal appeal and is pending in the Court.

9. The only question before us is as to whether pending criminal appeal would fall in the definition of "judicial proceeding" so as to attract Regulations 351-AA and 919-A(3). For ready reference, both the provisions are quoted hereunder :

"351-AA. *In the case of a Government Servant who retires on attaining the age of superannuation or otherwise and against whom any departmental or Judicial proceedings or any enquiry by Administrative Tribunal is pending on the date of retirement or is to be instituted after retirement a provisional pension as provided in Article 919-A may be sanctioned.*

919-A(3). *No death-cum-retirement gratuity shall be paid to the Government servant until the conclusion of the departmental proceedings or the enquiry by the Administrative Tribunal and issue of final orders thereon."*

10. Regulation 351-AA allows provisional pension to a Government servant against whom departmental or judicial proceeding or any enquiry by Administrative Tribunal is pending on the date of retirement or instituted after the retirement.

11. The facts on record show pendency of the criminal appeal against the non-appellant/petitioner. It is to challenge the judgment of the trial Court acquitting the non-appellant/petitioner. The issue aforesaid has not been decided by this

Court in any of the judgment referred by learned Single Judge.

12. In the case of *Amrit Lal Versus Chief Election Officer and others* reported in *2014 SCC OnLine All 12502*, the issue as to whether criminal appeal would fall in the definition of "judicial proceeding" has not been answered. In the said case, a challenge was made to the order denying benefit of gratuity due to pendency of the criminal appeal. The Court found that the appeal was dismissed on 17.05.2012. In view of the above, no justification was found to withhold benefit of gratuity. The judgment, however, makes an observation that pending criminal appeal cannot be a valid ground for non-payment of gratuity, more so after dismissal of the appeal. The judgment aforesaid does not address the issue whether criminal appeal falls in the definition of "judicial proceeding". An observation about the entitlement of the gratuity without consideration of issue cannot be said to be a judgment on the legal issue framed herein.

13. In the case of *Rajeev Sharma Versus State of U.P. and others reported in 2014 SCC OnLine All 12969*, the Division Bench relied on the judgment in the case of *Amrit Lal (supra)* where the issue involved herein was not decided. The Division Bench in the case of *Rajeev Sharma (supra)* has made a reference of the judgment of this Court in the case of State of U.P. and others Versus Jai Prakash reported in 2013 SCC OnLine All 14150 also. The relevant paragraph of the judgment in the case of *Rajeev Sharma (supra)* is quoted hereunder :

"Civil Service Regulation is applicable upon the employees of the power corporation regulation 351-AA and regulation 919-A(3), prohibits payment of death-cum-retirement gratuity until the conclusion of ***departmental or judicial proceeding.*** *Division Bench in Jai Prakash (Supra) has held "judicial proceedings" would necessarily include pendency of criminal case. The question to be answered is as to whether pendency of criminal appeal, against acquittal, will include "pending judicial proceeding". In Amrit Lal (Supra), Division Bench observed pendency of criminal appeal against acquittal is not a ground for withholding the retiral dues. After acquittal there is nothing against the employee, more so, in the facts of the case, the respondents did not choose to initiate any disciplinary proceedings after acquittal nor did they examine the judgment of the trial court to find out, as to whether petitioner was acquitted "honourably', once failing to exercise their powers under the rule to initiate any proceedings, it is not open for the respondents to withhold retiral dues, merely on pendency of criminal appeal."*

14. The judgment supra gives a reference of the judgment in the case of *Jai Prakash (supra)* to hold a criminal appeal to fall in the definition of "judicial proceeding". A careful reading of the judgment in the case of *Jai Prakash (supra)* does not show a finding on it though it was held that during pendency of the departmental or judicial proceeding, one would be entitled to the provisional pension only. In view of the aforesaid, we need to decide the issue directly involved in this case.

15. The word "judicial proceeding" used under Regulation 351-AA would include every proceeding pending in the Court whether original or at the appellate stage. The judicial proceeding means

proceeding over which Judge presides. A criminal appeal cannot be taken out from the definition of "judicial proceeding" and thereby, if one is acquitted but appeal thereupon is pending, he/she would be governed by Regulation 351-AA and thereby, entitled to the provisional pension.

16. The interpretation of word "judicial proceeding" otherwise came for consideration before the Apex Court in the case of *Subhash Chandra Versus S.M. Agarwal* reported in *1984 Criminal Law Journal 481*. Paragraph 7 of the said judgment is quoted hereunder for ready reference :

"Bawa Gurcharan Singh, learned counsel for the petitioner, also invited our attention to Section 2(C)(ii) of Contempts of Courts Act wherein a publication which prejudices or interferes or tends to interfere with, the due course of any judicial proceedings, has been defined as criminal contempt. His contention that by using the words "judicial proceeding' the Legislature has done away with the distinction between trial and appeal and has in its wisdom chosen to use the words "judicial proceedings' which are wider in sweep and which we (by) fair construction would mean even the appeal which is a continuation of the trial, to our mind appears to be well founded. It would thus be seen that respondent no. 1 went to the media to give interview in respect of a case which was pending trial before this court and the contents of the interview would show that it had not only a tendency and capacity to cause prejudice but it did make it difficult for the court to deal with the case in the manner which law and justice would require of it."

17. The judgment aforesaid covers the issue involved herein. In view of the discussion made above and the finding recorded by us, pending criminal appeal would fall in the definition of "judicial proceeding" and thereby, Regulation 351-AA read with Regulation 919-A(3) would be applicable. The non-appellant would be entitled to the provisional pension. As per Regulation 919, the provisional pension now is the full pension though one would not be entitled to the gratuity till disposal of the appeal. The non-appellant/petitioner can, accordingly, pursue pending criminal appeal against him.

18. In view of the finding recorded above, the case of parity cannot be accepted dehors the rules. It is otherwise to record that other co-employees were extended benefit of pension and gratuity in absence of the information about the pending criminal appeal against them. The appellant should have been careful in taking decision but finding it to be bonafide in reference to other co-employees facing criminal appeal, the claim of parity cannot be accepted. It is otherwise settled law that before making claim for parity pursuant to Article 14 of the Constitution of India, one has to make out a legal right for grant of benefit. We have already held that pending criminal appeal falls in the definition of "judicial proceeding" thus, one would be governed by Regulation 351-AA. If the direction is given to allow the benefit of pension and gratuity pending criminal appeal, it would be dehors the regulation.

19. Accordingly, we find reason to cause interference in the judgment of learned Single Judge. The direction for payment of all retiral benefits with interest on delayed payment is set aside. The non-appellant/petitioner, however, be entitled to provisional pension which would be the full pension as per Regulation 919-A(3).

20. With the aforesaid, the appeal is allowed.

(2021)08ILR A708
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.08.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE RAVI NATH TILHARI, J.

Special Appeal No. 147 of 2016

State of U.P. & Ors. ...Appellants
Versus
Shyam Lal 425(S/S)2011 ...Respondent

Counsel for the Appellants:
C.S.C.

Counsel for the Respondent:
Ram Harakh

A. Service Law – Dismissal - Maintainability of the review petition on the ground of dismissal of the Special Leave Petition against the same judgment. Mere rejection of a special leave petition does not take away the jurisdiction of the Court, Tribunal or Forum whose order forms the subject-matter of petition for special leave, to review its own order if grounds for exercise of review jurisdiction are shown to exist. The doctrine of merger would not apply even when the order rejecting an SLP is a speaking order (that is, where reasons have been assigned for rejecting the petition for special leave). But the law stated or declared shall attract applicability of Article 141 of the Constitution. The reasons assigned in the order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other Court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by the Apex Court. (Para 9, 11)

In the present case, mere rejection of the SLP vide order dated 29.7.2016 without assigning any reasoning would not take away the jurisdiction of this Court to review its own judgment if grounds for exercise of review jurisdiction exist. (Para 13)

B. Scope of Judicial Review – High Court, as a Court of record, has a duty to itself to keep all the records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it, the High Court has not only power, but a duty to correct it. (Para 19 to 21)

Review Petition allowed. Judgment dated 19.04.2016 is recalled and the Special Appeal is restored to its original number for decision afresh. (E-3)

Precedent followed:

1. Khoday Distilleries Ltd. (Now known as Khoday India Limited) & ors. Vs Sri Mahadeshwara Sahakara, (2019) 4 SCC 376 (Para 5)

2. Kunhayammed & ors. Vs St. of Kerala & anr., (2000) 6 SCC 359 (Para 11)

3. Kamlesh Verma Vs Mayawati, (2013) 8 SCC 320 (Para 15)

4. Perry Kansagra Vs Smriti Madan Kansagra, (2019) 20 SCC 753 (Para 16)

5.F.C.I. & anr. Vs M/s Seil Ltd. & ors., (2008) 3 SCC 440 (Para 17)

6. S. Nagraj Vs St. of Kar., (1993) Supp. 4 SCC 595 (Para 21)

7. M.M. Thomas Vs St. of Kerala & anr., (2000) 1 SCC 666 (Para 21)

Present review petition seeks review of the judgment and order dated 19.04.2016, passed by coordinate Bench in Special Appeal (D) no. 147 of 2016.

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

(1) Heard Sri Dileep Kumar Gautam, learned counsel for the petitioner/review

petitioner and learned standing counsel for the opposite parties.

(2) This review petition has been filed by the petitioner-respondent in special appeal, seeking a review of the judgment and order dated 19.04.2016 passed by a co-ordinate Bench in Special Appeal (D) no. 147 of 2016.

(3) The petitioner with respect to his grievance that he was being treated as Seasonal Collection Amin filed W.P. No. 425 (SS) of 2011 (Shyam Lal vs. State of U.P. and Ors.) for direction to the opposite parties to treat him as regular Collection Amin w.e.f. 03.07.1986, claiming the benefit of the judgment dated 19.08.2006 passed in W.P. No. 4031 (SS) of 2001 (Pratap Narain Pandey vs. State of U.P. and Ors.). In Pratap Narain Pandey, this court had quashed the order dated 19.09.2000 impugned therein and had directed the authorities to allow the petitioner of that writ petition to work as Regular Collection Amin since 05th June, 1986 for the purposes of seniority etc, except the salary for the period during which he did not work. The review petitioner was extended the same benefit vide order dated 09.09.2011 but in the Special Appeal, the judgment dated 09.09.2011 was set aside and the Writ Petition No. 425 (SS) of 2011 was dismissed after condoning the delay. The Special Leave Petition filed by the review petitioner was dismissed on 29.07.2016 by Hon'ble Supreme Court.

(4) A preliminary objection has been raised by the learned Standing Counsel that after dismissal of the S.L.P. against the judgment under review, the review petition is not maintainable.

(5) Sri Dilip Kumar Gautam has submitted that the review petition is maintainable, as the order of dismissal of S.L.P. was without assigning any reason, placing reliance on **Khoday Distilleries Ltd. (NOW KNOWN AS KHODAY INDIA LIMITED) and Others vs. Sri Mahadeshwara Sahakara [(2019) 4 SCC 376].**

(6) Learned counsel for the review petitioner has submitted that in compliance of the judgment dated 09.09.2011, the petitioner was given appointment on 13.09.2012 and his services were confirmed after completion of two years' probation period on 16.01.2015, and he was given benefit of seniority w.e.f. the year 1986 vide order dated 17.07.2015. The special appeal was filed in the year 2016 after all these events had taken place but without disclosing the facts correctly and by concealing the material facts of the confirmation of petitioner's services and giving of seniority etc benefits. He has submitted that the writ petition was decided after giving opportunity for filling counter affidavit to the State-opposite parties vide order dated 27.01.2011, however, no counter affidavit was filed, but in the Special Appeal plea was taken that the learned Single Judge without calling for any counter affidavit and opportunity to contest, allowed the writ petition, and resultantly in the judgment under review, it has been observed that the writ petition was decided on the first day, which is factually not correct. He has further submitted that counsel for the respondent-petitioner could not appear before this Court in appeal therefore these facts could not be brought to the notice of Hon'ble Court for its consideration. However the primary duty in this regard to disclose correct and complete facts was on the appellant, who did not discharge it. Non-consideration of these facts has resulted in grave miscarriage of justice as petitioner has been ousted from

service consequent to the judgment under review.

(7) Learned Standing Counsel has submitted that the judgment under review does not suffer from any apparent error of law and the review petition deserves to be dismissed. However, he could not dispute that the writ petition was not decided on the same day but was decided after providing opportunity of filing counter affidavit, which was not filed. He also could not dispute that the orders dated 13.09.2012, 16.01.2015 and 17.07.2015 passed by the authorities, much prior to filing of the Special Appeal, were not placed before the Court in the special appeal.

(8) We have considered the submissions advanced and have also perused the material brought on record.

(9) We first proceed to consider and decide the preliminary objection to the maintainability of the review petition on the ground of dismissal of the Special Leave Petition against the same judgment.

(10) Order dated 29.07.2016 by which SLP of the petitioner against the judgment under review reads as follows:-

"The Special Leave Petition is dismissed.

As a sequel to the above, pending interlocutory applications, if any, stand disposed of."

(11) The law on the above point is no longer res-integra. In the case of **Khoday Distilleries Limited (supra),** Hon'ble Supreme Court reiterated and followed the law laid down in **Kunhayammed and Ors. vs. State of Kerala and Anr. [(2000) 6 SCC 359]** in which it was held that mere rejection of a special leave petition does not take away the jurisdiction of the court, Tribunal or Forum whose order forms the subject matter of petition for special leave, to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned for rejecting the petition for special leave and are stated in the order still the order remains one rejecting the prayer for grant of leave to appeal. Here also the doctrine of merger would not apply. But the law stated or declared shall attract applicability of Article 141 of the Constitution. The reasons assigned in the order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by the Apex Court. Paragraph 38 of the **Kunhayammed and Ors. (supra)** reads as under:-

38. The review can be filed even after SLP is dismissed is clear from the language of Order 47 Rule 1(a). Thus the words "no appeal" has been preferred in Order 47 Rule 1(a) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior court. Therefore, the review can be preferred in the High Court before special leave is granted, but not after it is granted. The reason is obvious. Once special leave is granted the jurisdiction to consider the validity of the High Court's order vests in the Supreme Court and the High Court cannot entertain a review thereafter, unless such a review application was preferred in the High Court before special leave was granted.

(12) It is apt to refer paragraph 26 of the judgment of Hon'ble Apex Court in the case of **Khoday Distilleries Limited (supra).** Paragraph 26 is quoted hereinbelow:-

26. From a cumulative reading of the various judgments, we sum up the legal position as under:

26.1. The conclusions rendered by the three Judge Bench of this Court in Kunhayammed and summed up in paragraph 44 are affirmed and reiterated.

26.2. We reiterate the conclusions relevant for these cases as under:

"(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC."

26.3. Once we hold that law laid down in Kunhayammed is to be followed, it will not make any difference whether the review petition was filed before the filing of special leave petition or was filed after the dismissal of special leave petition. Such a situation is covered in para 37 of Kunhayammed case."

(13) In view of the above, we find the review petition to be maintainable and mere rejection of the SLP vide order dated 29.07.2016 without assigning any reasoning would not take away the jurisdiction of this Court to review its own judgment if grounds for exercise of review jurisdiction exist.

(14) We now proceed to consider the scope of review jurisdiction.

(15) The basic principles in which review application can be entertained and cannot be entertained have been eloquently laid down by Hon'ble the Apex Court in the case of **Kamlesh Verma vs. Mayawati [(2013) 8 SCC 320].** Paragraph 20 under

the heading "summary of principles" is being reproduced hereunder:-

20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki [(1921-22) 49 IA 144 : (1922) 16 LW 37 : AIR 1922 PC 112] and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius [AIR 1954 SC 526 : (1955) 1 SCR 520] to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. [(2013) 8 SCC 337 : JT (2013) 8 SC 275]

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived.

(16) In the case of **Perry Kansagra v. Smriti Madan Kansagra [(2019) 20 SCC 753]**, the Hon'ble Apex Court on the scope and power of review has reiterated the same principles. It is apt to reproduce paragraph nos. 14 to 16, which are as under:-

14. The issues that arise for our consideration can broadly be put under two heads:

14.1. (a) Whether the High Court was justified in exercising review jurisdiction and setting aside the earlier judgment?

14.2. (b) Whether the High Court was correct in holding that the reports of the Mediator and the Counsellor in this case were part of confidential proceedings and no party could be permitted to use the same in any court proceedings or could place any reliance on such reports?

15. As regards the first issue, relying on the decisions of this Court in Inderchand Jain v. Motilal [Inderchand Jain v. Motilal, (2009) 14 SCC 663 : (2009) 5 SCC (Civ) 461] , Ajit Kumar Rath v. State

of Orissa [Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596 : 2000 SCC (L&S) 192] and Parsion Devi v. Sumitri Devi [Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715], it was submitted by the appellant that the exercise of review jurisdiction was not warranted at all.

15.1. In Inderchand Jain [Inderchand Jain v. Motilal, (2009) 14 SCC 663 : (2009) 5 SCC (Civ) 461] it was observed in paras 10, 11 and 33 as under: (SCC pp. 669 & 675)

"10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order.

11. Review is not appeal in disguise. In Lily Thomas v. Union of India [Lily Thomas v. Union of India, (2000) 6 SCC 224 : 2000 SCC (Cri) 1056] this Court held: (SCC p. 251, para 56)

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise.'

33. The High Court had rightly noticed the review jurisdiction of the court, which is as under:

"The law on the subject--exercise of power of review, as propounded by the Apex Court and various other High Courts may be summarised as hereunder:

(i) Review proceedings are not by way of appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC.

(ii) Power of review may be exercised when some mistake or error apparent on the fact of record is found. But error on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on the points where there may conceivably be two opinions.

(iii) Power of review may not be exercised on the ground that the decision was erroneous on merits.

(iv) Power of review can also be exercised for any sufficient reason which is wide enough to include a misconception of fact or law by a court or even an advocate.

(v) An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit.'

In our opinion, the principles of law enumerated by it, in the facts of this case, have wrongly been applied."

15.2. In Ajit Kumar Rath [Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596 : 2000 SCC (L&S) 192] , it was observed: (SCC p. 608, para 29)

"29. In review proceedings, the Tribunal deviated from the principles laid down above which, we must say, is wholly unjustified and exhibits a tendency to rewrite a judgment by which the controversy had been finally decided. This, we are constrained to say, is not the scope of review under Section 22(3)(f) of the Administrative Tribunals Act, 1985...."

15.3. Similarly, in Parsion Devi [Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715] the principles were summarised as under: (SCC p. 719, para 9)

"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to

be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 C.P.C. it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

16. On the other hand, reliance was placed by the respondent on the decision in BCCI v. Netaji Cricket Club [BCCI v. Netaji Cricket Club, (2005) 4 SCC 741] to submit that exercise in review would be justified if there be misconception of fact or law. Para 90 of the said decision was to the following effect: (SCC p. 765)

"90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. An application for review may be necessitated by way of invoking the doctrine actus curiae neminem gravabit."

(17) It has thus been settled in law that;

(i) the power of review may be necessitated by way of invoking the doctrine *"actus curiae neminem gravabit'* which means that no act of the court in the course of whole of the proceedings does an injury to the suitors in the court. It has been held in **Food Corporation of India and Another vs. M/s Seil Ltd. & Ors. [(2008) 3 SCC 440]** that a writ court exercises its power of review under Article 226 of the Constitution of India itself and while exercising the jurisdiction it not only acts as a court of law but also as a court of equity. A clear error or omission on the part of the court to consider a justifiable claim would be subject to review, amongst others, on the *"actus curiae neminem gravabit'*.

(ii) The mistake or error must be apparent on the face of record i.e. that it must strike one on more looking at the record and would not require any long drawn process of reasoning. It should not be an error which has to be fished out and searched. Such an error must also be material which undermines the soundness of the judgment or results in miscarriage of justice. An error which may be apparent but is of inconsequential import, that would not furnish a ground for review.

(iii) An application for review would also be maintainable for "any other sufficient reason', which expression has been interpreted to mean a reason sufficient on grounds at least analogous to those specified in Order 47 Rule 1 C.P.C., which are wide enough to include a misconception of fact or law by a court or even an Advocate and what other grounds would constitute sufficient reason depends on the facts and circumstances of each case.

(iv) There are limitations on the exercise of review jurisdiction. Review proceedings are not by way of appeal. It cannot be treated like an appeal in disguise. A rehearing of the matter is not permissible in law. If there are two views possible, the power of review cannot be exercised to substitute the view already taken in the judgment under review. It is not for an erroneous decision to be "reheard and corrected' in review jurisdiction.

(18) Keeping in mind the above principles, we now proceed to consider as to whether the grounds on which review has been filed exist, and if yes, whether on such grounds review would be permissible.

(19) A perusal of the judgment dated 19.04.2016 shows that an error occurred therein as this Court proceeded on the premise that the writ petition was disposed of on the "first date' whereas it was not disposed of on the first date but later on after giving opportunity to the opposite parties to file counter affidavit vide order dated 27.01.2011. The error is apparent. The Special Appeal has been allowed only on the ground of laches in filing the writ petition but this Court did not notice that the State did not file any counter affidavit before the writ court raising the plea of laches. If the correct fact had been noted, the State-appellant might not have been permitted to raise a plea in special appeal which was not raised before the learned Single Judge, inspite of opportunity having been granted. We are saying so, not for substituting the view taken but to emphasize that the mistake which is apparent is not minor or of inconsequential import but is a material error.

(20) Most importantly, the petitioner had been given appointment on 13.09.2012, and his services were confirmed on 16.01.2015 and he was also given seniority in his cadre vide order dated 17.07.2015 with some other benefits in compliance of the order passed by the writ court and the Special Appeal was filed thereafter, in April 2016, after about four and half years. These facts had a bearing on the result of the appeal but were not placed before the Court in Special Appeal. Consequently, pursuant to the judgment passed in Special Appeal, a confirmed employee has been ousted from service on 12/13.05.2016 on account of appeal of the State being allowed. It was the primary duty of the State-appellant to have disclosed all the relevant facts correctly. Non-disclosure or suppression of material facts in our considered view would be covered by "any other sufficient cause' which furnishes a ground for review and is wide enough to include such a cause.

(21) At this stage, it would be apt to refer the judgment in the case of **S. Nagraj vs. State of Karnataka [(1993) Supp. 4 SCC 595],** wherein Hon'ble Apex Court has observed that it is the duty of the Court to rectify, revise and recall its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences. Again in the case of **M.M. Thomas vs. State of Kerala & Another [(2000) 1 SCC 666]** the Hon'ble Apex Court has held that the High Court, as a Court of record, has a duty to itself to keep all the records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it, the High Court has not only power, but a duty to correct it.

(22) For the aforesaid reasons, we are of the considered view that the judgment dated 19.04.2016 is liable to be reviewed and recalled. The Special Appeal deserves to be restored for hearing afresh.

(23) Accordingly, review petition is allowed. Judgment dated 19.04.2016 is recalled and the Special Appeal is restored to its original number for decision afresh.

(24) List the Special Appeal before appropriate Bench.

(2021)08ILR A716
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.08.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE DINESH KUMAR SINGH, J.

Special Appeal Defective No. 271 of 2021

State of U.P. & Ors. ...Appellants
Versus
Sunder Singh Solanki & Anr. ...Respondents

Counsel for the Appellants:
C.S.C.

Counsel for the Respondents:
Shailendra Singh Rajawat, Shubham Tripathi

A. Service Law – Reimbursement of medical bills - Uttar Pradesh Government Servants (Medical and Attendance) Rules, 2011 - The amount of the medical bills shall be paid in terms of 'Uttar Pradesh Government Servants (Medical and Attendance) Rules, 2011', particularly when the earlier Government orders operating the field were not adequate to grant the reimbursement of medical bills and expenses incurred by Government Servants and the Government itself had framed these Rules for that purpose. (Para 11)

The Government Servant cannot be denied the benefit of said Rules simply because at the time of accident the said Rules were not applicable. The Rules shall be made available to all such cases where the reimbursement of the medical bills and expenses have not been settled by the Government and the decision is pending in this regard. (Para 12)

Special Appeal dismissed. (E-3)

Present appeal assails the judgment and order dated 25.01.2021, passed by learned Single Judge.

(Delivered by Hon'ble Ritu Raj Awasthi, J.
&
Hon'ble Dinesh Kumar Singh, J.)

1. Mr. Shailendra Singh Rajawat, Advocate has accepted notice on behalf of respondent no.1 and Mr. Shubham Tripathi, Advocate has accepted notice on behalf of respondent no.2, as such, no steps are required to be taken for service of notices on respondents.

2. Heard learned Standing Counsel appearing on behalf of the appellants, Mr. Sushil Kumar Singh, learned counsel appearing on behalf of respondent no.1 as well as Mr. Shubham Tripathi, learned counsel for respondent no.2.

3. This intra court appeal has been filed under Chapter VIII, Rule 5 of Allahabad High Court Rules, 1952, challenging the judgment and order dated 25.01.2021, passed by learned Single Judge in Writ Petition No.6063 (SS) of 2017; Sunder Singh Solanki Vs. State of U.P. and others.whereby the writ petition preferred by respondent no.1 has been allowed and the impugned order dated 29.09.2016 has been set aside.

4. The special appeal has been filed with a reported delay of 166 days as on the date of filing of special appeal on 9.8.2021.The special appeal is accompanied with an application for condonation of delay supported with an affidavit.

5. The cause shown in the affidavit filed in support of application for

condonation of delay is sufficient and more particularly considering the Apex Court's order dated 27.04.2021, passed in Misc. Application No.665 of 2021 in SMW (C) No.3 of 2020; Cognizance for Extension of Limitation Vs. XXXX, we find it appropriate to condone the delay.

6. Application for condonation of delay (C.M. Application No.96200 of 2021) is accordingly allowed. Delay in filing of special appeal is hereby condoned. Office is directed to provide a regular number to the appeal.

Order on memo of Special Appeal:

7. Learned Standing Counsel appearing on behalf of the appellants submits that the learned Single Judge has grossly erred in holding that the respondent no.1 is entitled to get the reimbursement of medical bills in terms of 'Uttar Pradesh Government Servants (Medical and Attendance) Rules, 2011'. It is submitted that the aforesaid Rules had come into force on 2.9.2011, whereas the accident had taken place on 26.07.2010, as such, the respondent no.1 was not entitled to get the reimbursement as per the said Rules. The respondent was entitled to get the reimbursement as per the Government Order dated 26.07.2001 and accordingly the amount of reimbursement of medical bills to the tune of Rs.1,48,340/- has been calculated and the same has been paid to the respondent no.1. It is also submitted that under the 'Uttar Pradesh Government Servants (Medical and Attendance) Rules, 2011' now a provision has been made for reimbursement of the entire medical bills in case the treatment has been made in a private hospital outside the State. It is submitted that since the said Rules are applicable prospectively i.e. after coming into force of the said Rules, as such, the respondent no.1 was not entitled to get the reimbursement of medical bills as per the said Rules.

8. Mr. Sushil Kumar Singh, learned counsel appearing on behalf of the respondent no.1, on the other hand, submits that the respondent no.1 is a police officer. He had met with an accident on road on 26.07.2010 while on duty of patrolling. The accident was so serious that the respondent no.1 was admitted to Trauma Centre in King George Medical University, Lucknow and from there he was airlifted to Indraprashtha Appollo Hospital, New Delhi, where he undergone the treatment and after a prolonged illness of approximately ten months, he was able to join his duties. It was not that the respondent no.1 on his sweet will had gone to the private hospital for treatment but it was only under compelling circumstances as the advance treatment was not available in the Government Hospital. It is also submitted that the State Government has framed 'Uttar Pradesh Government Servants (Medical and Attendance) Rules, 2011' for the purpose of reimbursement of the medical bills for the government employees as well as attendant after treating the earlier government orders being inadequate in this regard.

9. The submission is that once the provision is available for reimbursement of the amount as per the medical bills and the expenses incurred by respondent no.1, then it shall not be denied to him simply because on the date when the respondent no.1 met with accident the said Rules were not in operation.

10. We have considered the submissions made by parties' counsel and gone through the records.

11. We are of the considered view that the learned Single Judge has rightly taken the view that the amount of the medical bills of the respondent no.1 shall be paid in terms of 'Uttar Pradesh Government Servants (Medical and Attendance) Rules, 2011', particularly when the earlier government orders operating the field were not adequate to grant the reimbursement of medical bills and expenses incurred by Government Servants and the Government itself had framed these Rules for that purpose.

12. It is to be noted that the Government Servant cannot be denied the benefit of said Rules simply because at the time of accident the said Rules were not applicable. The 'Uttar Pradesh Government Servants (Medical and Attendance) Rules, 2011' shall be made available to all such cases where the reimbursement of the medical bills and expenses have not been settled by the Government and the decision is pending in this regard.

13. The special appeal, with these observations is ***dismissed.***

(2021)08ILR A718
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2021

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Writ A No. 4847 of 2021

Kishan Singh Hyanki ...Petitioner
Versus
The Chairman, L.I.C, Mumbai Central Office, Mumbai & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishal Agrawal

Counsel for the Respondents:
Sri Siddharth Singhal, Ms. Divya Chaurasia

A. Service Law – Departmental Enquiry/Dismissal - L.I.C. of India (Staff) Regulations, 1960 - In the case of misconduct of a bank officer or employee, including the Corporation, if the officer/employee is found guilty of any kind of the financial irregularities irrespective of the amount involved, no punishment less than dismissal/termination should be passed. Any plea of leniency or sympathy regarding the quantum of amount or nature of misconduct is totally misplaced. (Para 22)

B. financial misconduct by an employee of a financial institution, is a serious misconduct. Corporation lost faith, confidence and trust in the petitioner and in such circumstances continuing him as an employee on the post of Cashier would jeopardise the interest of the Corporation and expose genuine policy holders to risk of fraudulent transactions. (Para 13, 15, 16)

Quantum of embezzlement is not relevant, it is the act of committing embezzlement that determines the quantum of punishment. (Para 14)

C. Scope of Judicial Review – A High Court, in the exercise of its jurisdiction u/Article 226 of the Constitution, cannot sit in appeal over the findings of fact recorded by a competent Tribunal in a properly conducted departmental enquiry except when it be shown that the impugned findings were not supported by any evidence. Whether or not the evidence on which the Tribunal relied was satisfactory and sufficient for justifying its conclusion would not fall to be considered in a writ petition. (Para 18)

The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision-making process, the Court must

exercise its discretionary power with great caution keeping in mind the larger public interest and only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene. (Para 17 to 21)

Writ petition dismissed. (E-3)

Precedent followed:

1. State Bank of Bikaner and Jaipur Vs Nemi Chand Nalwaya, (2011) 4 SCC 584 (Para 15)

2. S.B.I. & ors. Vs S.N. Goyal, (2008) 8 SCC 92 (Para 15)

3. T.N.C.S. Corpn. Ltd. & ors. Vs K. Meerabai, (2006) 2 SCC 255 (Para 16)

4. Disciplinary Authority-cum-Regional Manager Vs Nikunja Bihari Patnaik, 1996 (9) SCC 69 (Para 16)

5. Chairman and Managing Director, United Commercial Bank Vs P.C. Kakkar, 2003 (4) SCC 364 (Para 16)

6. State of Madras Vs G. Sundaram, AIR 1965 SC 1103 (Para 18)

7. State of Andhra Pradesh Vs Sree Rama Rao, AIR 1968 SC 1728 (Para 19)

8. S.B.I. Vs Ramesh Dinkar Punde, (2006) 7 SCC 212 (Para 19)

9. Nirmala J. Jhala Vs St. of Guj. & anr., (2013) 4 SCC 301 (Para 19)

10. S.R. Tewari Vs U.O.I. & anr., (2013) 6 SCC 602 (Para 21)

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

1. Heard Shri Vishal Agarwal, learned counsel for the petitioner and Ms. Divya Chaurasiya, learned counsel holding brief of Shri Siddharth Singhal, learned counsel for the respondents through video conferencing.

2. The petition is being decided of at the admission stage, as per rules, on the consent of the parties.

3. Petitioner a Cashier (SR No. 249026) at Branch Office, Gola in Lucknow Division, had to face departmental enquiry. A charge-sheet dated 21 November 2016, was issued by the third respondent-Senior Division Manager, Divisional Officer, Hazratganj, Lucknow (Disciplinary Authority). Petitioner was charged with six charges with allegations of committing financial irregularities and embezzlement. The charges briefly stated is as follows:

i. that petitioner while posted as Cashier in Branch Office, Palia, District Lakhimpur Kheri misused official position and misappropriated eight cheques favouring "L.I.C. of India" thereby facilitating siphoning of funds and misused it for the benefit of himself, his wife and persons not related to genuine policy holders;

ii. that petitioner in connivance with the record Clerk, Shri Anand Kumar (SR No. 254146) while performing duties as Officiating Cashier fraudulently misappropriated cheque of Rs. 13431/- prepared in favour of "L.I.C. of India' against surrender proceeds under a policy together with cash of Rs. 2385/- without authority and misused it for himself and his wife and persons not related to the genuine policy holders.

iii. that petitioner put himself as a witness on a form for surrender of policy whereas the signature of the policy holder did not match with the proposal form of the same policy;

iv. that petitioner prepared a cheque favouring "L.I.C. of India' without

any application/document submitted by the policy holder for the said cheque;

v. that the petitioner despite being a regular Cashier validated the loan voucher at Rs. 38,000/- under a policy which was raised without necessary documents and validated the transaction, whereas, the cheque for the said amount was prepared without necessary documents/applications submitted by the policy holder.

vi. that petitioner being a regular Cashier prepared loan voucher raising loan of Rs. 51,000/- without obtaining necessary documents and recording the loan details in the loan register.

4. It is alleged that as a consequence of the misconduct financial loss was caused to the Corporation at Rs. 1,61,864.30 paise of which Rs. 1,17,622.80 paise was misappropriated towards various policies by the petitioner himself and for his wife. Rs. 44,241.50 paise was misappropriated towards various policies of persons other than the original policy holders. The details of the cheques/documents and the fraudulent transaction/figures were detailed in the charge-sheet.

5. Provisions of L.I.C. of India (Staff) Regulations, 1960 (for short "Regulations'), governs the petitioner for disciplinary proceedings and imposition of penalty.

6. Petitioner participated in the disciplinary proceedings and contested by filing a written statement denying the charges. Petitioner also tendered unconditional apology to the Enquiry Committee. The Enquiry Officer upon following the Regulations and after giving opportunity to the petitioner and on perusal/examination of documents held Charge No. 1, 2, 4, 5 and 6 proved against the petitioner. Enquiry report dated 17 July 2017, was submitted to the disciplinary authority. The fourth respondent passed impugned order dated 30 July 2018, agreeing with the enquiry report, imposing punishment of removal from service and recovery at Rs. 1,54,696.60 paise. Aggrieved, petitioner preferred an appeal before the second respondent-Zonal Manager, North Central Zone, Kanpur, which came to be rejected vide order dated 21 February 2019, thereafter, petitioner preferred a Memorial dated 22 April 2019, before the first respondent-Chairman, Life Insurance Corporation of India, Mumbai which was rejected vide order dated 1 August 2019.

7. The aforementioned orders are under challenge.

8. Learned counsel for the petitioner submits that petitioner has deposited the fine imposed by the impugned orders, therefore, no loss was caused; petitioner merely carried out verbal instructions of his superior officials; there was no personal interest of the petitioner in the alleged charge; petitioner is the sole bread earner of the family and is facing hardship after passing of the impugned orders; petitioner committed mistake due to lack of knowledge; petitioner has not committed any fraud or cheating; the impugned orders have been passed without application of mind.

9. Learned counsel for the respondent-Corporation submits that the procedure prescribed under the Regulations was duly followed; petitioner was given full opportunity to defend himself; the charges have been proved by documentary evidence which was duly produced before the enquiry officer; petitioner is guilty of

embezzling the money due to the Corporation and policy holders; the money embezelled was used for personal and for his family members. It is not the case of the petitioner that there is any perversity in the findings recorded by the authorities. Petition being devoid of merit is liable to be dismissed.

10. Rival submissions fall for consideration.

11. The first respondent Chairman of the Corporation, on perusal of the record and the objections raised by the petitioner noted that he was satisfied that the procedure prescribed for initiation and completion of the disciplinary proceedings under the Regulations was adhered to by Enquiry Officer, reasonable opportunity was afforded to the petitioner to raise his defence in respect of the charge. It is further noted that finding of guilt recorded by the disciplinary authority is based on evidence available on record and on the facts and circumstances of the case. The disciplinary authority has considered the objection of the petitioner that he was performing his duties as per verbal instructions of his superior officials and that the transactions were carried out by the petitioner with no motive to cheat but to the best of his knowledge. The authority noted that the Enquiry Officer and the Disciplinary Authority duly considered the objections raised by the petitioner but lacks merit in the backdrop of admitted documentary evidence. The instructions, even if, carried out on verbal orders against the mandated procedures or in violation of the rules of the Corporation is of no avail to the petitioner. It is further noted in the impugned orders that objection is untenable, admittedly, petitioner himself benefited from the fraudulent transactions and knowingly adjusted the embezzled amount in favour of his own policies and policies of his wife. Petitioner misappropriated the proceeds which admittedly pertains to other genuine policy holders without their authority or approval. It is further noted that plea of the petitioner that he lacks procedural knowledge is without any basis as he had joined the Corporation in 2009 and took charge as Cashier in 2011.

12. The final objection of the petitioner that he is the sole bread earner and punishment imposed would subject his family to hardship was also not accepted by the authorities. It is noted in the order that on the strength of the documents on record, minutes of the proceedings and enquiry report, disciplinary authority had rightly arrived at the conclusion of guilt after duly evaluating the evidence, the facts and circumstances of the case and after due and reasonable opportunity being afforded to the petitioner to defend himself.

13. The punishment imposed is commensurate to the guilt committed by the petitioner. A financial misconduct by an employee of a financial institution, is a serious misconduct. Corporation lost faith, confidence and trust in the petitioner and in such circumstances continuing him as an employee on the post of Cashier would jeopardise the interest of the Corporation and expose genuine policy holders to risk of fraudulent transactions.

14. The contention of the learned counsel for the petitioner that no loss was caused to the bank lacks merit. Quantum of embezzlement is not relevant, it is the act of committing embezzlement that determines the quantum of punishment.

15. Supreme Court in **State Bank of Bikaner and Jaipur versus Nemi Chand Nalwaya1,** held that termination by way of

punishment was justified for loss of confidence in an employee by a bank for causing loss to the bank. Similarly, in **State Bank of India and others Versus S.N. Goyal,2** the Apex Court held that temporary misappropriation of customer's money by Bank employee is a serious misconduct warranting removal from service and tantamounts to breach of trust.

16. In the case of **T.N.C.S. Corpn. Ltd. and Ors. (appellants) v. K. Meerabai (respondent)3,** the plea of no loss or quantum of loss was rejected by the Court. It was pointed out at page SCC 267 para 29 as under:

"The scope of judicial review is very limited. Sympathy or generosity as a factor is impermissible. In our view, loss of confidence is the primary factor and not the amount of money mis-appropriated. In the instant case, respondent employee is found guilty of mis- appropriating the Corporation funds. There is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal."

(Refer: ***Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik4; Chairman and Managing Director, United Commercial Bank v. P.C. Kakkar5)***

17. The scope of judicial review under Article 226 is very limited.

18. The Supreme Court in the case of **State of Madras vs. G. Sundaram6** had explained the scope of judicial review::-

"7. It is well settled now that a High Court, in the exercise of its jurisdiction under Article 226 of the Constitution, cannot sit in appeal over the findings of fact recorded by a competent Tribunal in a properly conducted departmental enquiry except when it be shown that the impugned findings were not supported by any evidence.

Whether or not the evidence on which the Tribunal relied was satisfactory and sufficient for justifying its conclusion would not fall to be considered in a writ petition."

19. Similar view was emphatically expressed in **State of Andhra Pradesh v. Sree Rama Rao7,** wherein it was held that

"But the departmental authorities are, if the enquiry is otherwise properly held the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution."

(Refer: **State Bank of India vs. Ramesh Dinkar Punde8, Nirmala J. Jhala vs. State of Gujarat and another9)**

20. The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision- making process, the Court must exercise its discretionary power with great caution keeping in mind the larger public interest and only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene.

21. The findings of fact recorded by a tribunal can be held to be perverse if the findings have been arrived at by ignoring or

excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is against the weight of evidence, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Refer: **S.R. Tewari vs. Union of India and another10)**

22. The principle of law that emanates from the above noted judgments are that in the case of misconduct of a bank officer or employee, including the Corporation, if the officer/employee is found guilty of any kind of the financial irregularities irrespective of the amount involved, no punishment less than dismissal/termination should be passed. Any plea of leniency or sympathy regarding the quantum of amount or nature of misconduct is totally misplaced.

23. Having due regard to the facts and circumstances of the case and material placed on record, the Court declines to interfere in the matter.

24. It is clarified that no other point or ground was pressed.

25. The writ petition being devoid of merit is, accordingly, dismissed.

(2021)08ILR A723

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 10.08.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ A No. 9614 of 2018
connected with other cases

Divya Prakash Mishra & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rakesh Pande, Avadhesh Kumar Upadhyay, Ms. Vishakha Pandey

Counsel for the Respondents:
C.S.C., Sri Avneesh Tripathi, M.N. Singh

A. Service Law – Recruitment - U.P. Intermediate Education Act, 1921- Uttar Pradesh Subordinate Educational (Trained Graduates Grade) Service Rules, 1983: Rule 10- Uttar Pradesh Public Services (Relaxation of the age limits for recruitment) Rules, 1992- Rule 3 - Once the advertisement is issued and the candidate applies, the right of consideration in terms of Article 16 of the Constitution of India would arise in favour of such candidate. The Courts while affirming the right of employer to cancel the recruitment and initiating the recruitment afresh have recognized a limited light of age relaxation in certain circumstances. (Para 22)

Two distinct factual scenarios need to be carefully examined. The first exigency is where vacancies have arisen, but recruitment itself has not been initiated. The second exigency is where the vacancy arises and recruitment has also commenced, but for justifiable grounds the recruitment exercise is cancelled before issuance of select list and the recruitment process is initiated, afresh, as per the amended policy/rules. (Para 19)

Present case is w.r.t. the second exigency. Hon'ble Court held that even if previous

recruitment was cancelled and change of policy by the State has been affirmed, the applicants (who applied against vacancies advertised earlier on 19.12.2016) would be entitled to the limited protection of applying afresh against advertisement dated 15.03.2018 and also protection from the age bar imposed in accordance with Rule 10 of the Rules of 1983. (Para 26)

Writ petitions disposed off. (E-3)

Precedent followed:

1. Himanshu Shukla & anr. Vs St. of U.P. & ors., Writ Petition No. 48664 of 2017, decided on 13.04.2018 (Para 10)

2. St. of Andhra Pradesh & ors. Vs D. Dastagiri & ors., (2003) 5 SCC 373 (Para 13)

3. St. of M.P. & ors. Vs Sanjay Kumar Pathak & ors., (2008) 1 SCC 456 (Para 15)

4. Shri Prakash Srivastava & ors. Vs St. of U.P. & anr., Writ Petition No. 65848 of 2010, decided on 25.10.2013 (Para 16)

5. Sanjay Agarwal Vs St. of U.P. & ors., 2007 (6) ADJ 272 (Para 18)

6. Sanjay Kumar Pathak Vs St. of U.P. & ors., Writ Petition No. 65189 of 2006, decided on 25.05.2007 (Para 21)

7. Ramjit Singh Kardam & ors. Vs Sanjeev Kumar & ors., 2020 AIR (SC) 2060 (Para 24)

Precedent distinguished:

1. Sunil Dutt Tripathi Vs St. of U.P. & 3 ors., Writ Petition No. 8916 of 2018 (Para 7)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. This bunch of writ petitions raise common question of law and fact and, therefore, are being disposed of by this common judgment. Writ Petition No. 9614 (Divya Prakash Mishra and 32 others Vs. State of U.P. and 3 others) is taken as the leading case.

2. All the writ petitioners have applied for appointment to the post of Assistant Teachers (L.T. Grade) in Secondary Schools run by State of U.P. which are recognized under the U.P. Intermediate Education Act, 1921. Appointments to the posts are governed by the Uttar Pradesh Subordinate Educational (Trained Graduates Grade) Service Rules, 1983 (hereinafter referred to as the 'Rules of 1983'). These rules have also been amended from time to time, reference to some of which are necessary.

3. On 28.2.2014, vide Third Amendment Rules introduced in the Rules of 1983, the weightage given hitherto to Post Graduate Qualification was done away with. The process of recruitment was thereafter initiated on 22.7.2014 for filling up 6645 posts of Assistant Teachers (L.T. Grade) in Government Secondary Schools. This recruitment process apparently faced multiple difficulties and only part of the vacancies could be filled against the advertised 6645 vacancies. Considering the difficulties faced in undertaking recruitment, the State introduced Fourth Amendment Rules on 19.10.2016 and the Regional Cadre for the service was substituted with State Cadre. After including leftover vacancies, a fresh advertisement came to be issued on 19.12.2016 inviting applications to fill up 5342 vacancies of Assistant Teachers (L.T. Grade) in Government Secondary Schools.

4. All the petitioners in the present bunch of writ petitions were eligible for the post and consequently applied online as per the advertisement dated 19.12.2016 by deposing necessary fee etc. Rule 10 of the

Rules of 1983 required an applicant to be above 21 years of age as on 1.7.2016, but below the age of 40 years on that day. This recruitment, however, could not be concluded apparently due to change in the recruitment policy and a decision was taken to discontinue the recruitment. The advertisement was cancelled. The Rules of 1983 were amended yet again vide Fifth Amendment Rules, 2017 as per which the appointments were to be made through the U.P. Public Service Commission by holding a written examination. A fresh advertisement came to be issued on 15th March, 2018 advertising 10768 posts of Assistant Teachers (L.T. Grade) in Government Secondary Schools. These posts apparently included 5342 vacancies advertised earlier on 19.12.2016 against which the petitioners had applied.

5. Petitioners, who were eligible and had already applied against the previous Advertisement, dated 19.12.2016, however, became overage by the time fresh Advertisement was published on 15.3.2018. It is at this stage that the petitioners approached this Court by filing the present writ petition. It was contended that vacancy on the post of Assistant Teacher (L.T. Grade) had not only arisen when petitioners were eligible in terms of age but were also advertised and, therefore, petitioners acquired right to be considered for appointment against such advertised vacancy and such right could not be defeated in the manner as has been done by the State. The writ petition was entertained and following interim protection was granted in the leading case on 11.4.2018:-

"Thirty three petitioners are before this Court in the present petition contending that they had applied pursuant to advertisement issued in December, 2016 for recruitment to the post in question and that they possessed the requisite eligibility in terms of the advertisement as well as the Rules then enforced. The State Government has cancelled the recruitment process initiated in 2016. A fresh process is now initiated, in which the petitioners are not eligible as they have crossed the maximum age of 40 years.

Learned counsel for the petitioners places reliance upon Rule 10 of the Rules of 1983 in order to contend that the required age warranted in terms of Rule was above 21 years on the 1st July of the year of recruitment but below 40 years. Submission is that petitioners had a right to be considered for appointment which had been availed by them. Submission is that the State by cancelling the process and thereafter initiating a fresh process cannot be permitted to take away the petitioner's right to be considered for appointment against the vacancy advertised in the year 2016.

Matter was deferred on the previous occasion so as to permit learned Standing Counsel to obtain instructions. Sri P.K. Pandey, learned Additional Chief Standing Counsel has produced the instructions received from the State Government, as per which, it would not be permissible for the petitioners to be considered for the purposes, once they are not found eligible in terms of the advertisement and the Rules.

Submission, in reply, of the petitioners is that this would result in denial of opportunity to the petitioners to apply for the post and would clearly be arbitrary.

Matter requires consideration.

Notice on behalf of respondent Nos.1, 2 and 3 is accepted by Sri P.K. Pandey, learned Additional Chief Standing Counsel whereas Sri Avaneesh Tripathi appears for respondent no.4.

All the respondents may file counter affidavit within three weeks.

Rejoinder affidavit may be filed within one week, thereafter.

List thereafter.

Considering the facts and circumstances noticed above, it is provided as an interim measure that petitioners shall be permitted to apply for the post in question and their claim would not be non-suited merely for the reason that they have become over age. Their candidature, however, shall be subject to outcome of this petition."

6. Similar protection has been granted to other petitioners. The petitioners, consequently, have participated in the recruitment initiated vide Advertisement dated 15th March, 2018, but their results have not been declared on account of pendency of the present bunch of writ petitions and the orders passed therein. It is urged that the writ petitioners who have secured selection on the strength of their merit against Advertisement, dated 15th March, 2018, are entitled to declaration of their results and consequential appointment. Upon a specific query made, learned counsel for the Commission has produced written instructions from the Commission as per which 14 petitioners in this bunch of cases have qualified the exam and while result has been withheld in respect of two such candidates, the remaining 12 petitioners in the bunch of cases are selected provisionally subject to the outcome of these cases.

7. A counter affidavit has been filed on behalf of the State in which it is stated that the petitioners do not get any right to age relaxation merely on the strength of their previous application against Advertisement, dated 19.12.2016 and the petitioners cannot, therefore, claim relaxation in maximum age prescribed in Rule 10. Reliance is also placed upon a judgment of this Court in Writ Petition No. 8916 of 2018 (Sunil Dutt Tripathi Vs. State of U.P. and 3 others). A rejoinder has also been filed to the counter affidavit of the respondents. An amendment application has also been filed seeking correction in the details of some of the petitioners which has been allowed by a separate order of the date.

8. Heard Sri Rakesh Pande, learned Senior Counsel assisted by Sri Avadhesh Kumar Upadhyay as well as Ms. Vishakha Pandey for the petitioners in leading writ petition, Sri Navin Kumar Sharma, Sri Chandra Dutt, Sri Manish Kumar Tiwari, Dinesh Kumar Singh, Sri Saurabh Yadav, Sri Ashwani Kumar Pathak, Sri Phool Chandra Yadav, Sri Amresh Kumar Tiwari, Sri Praval Tripathi, Sri Jyoti Kumar Singh, Sri A.K. Upadhyay, Sri Shrawan Kumar Pandey and Sri Ghanshyam Maurya for the petitioners in the connected writ petitions, Sri Avneesh Tripathi, learned counsel for the Public Service Commission and Sri Vivek Rai, learned Additional Chief Standing Counsel for the State respondents and perused the materials brought on record.

9. Petitioners have essentially challenged the Advertisement No. A-1/E-1/2018, dated 15.03.2018, in so far as it specifies maximum age of eligibility as 40 years on 1.7.2018 and to permit them to participate in the selection process initiated for appointment against 9342 vacancies advertised earlier on 19.12.2016. It is contended that petitioners were well within the zone of eligibility in terms of Advertisement, dated 19.12.2016 and had also applied for appointment against such

vacancies and since the advertisement, dated 19.12.2016 has been withdrawn, on account of change of policy introduced by the State, therefore, their right to be considered against vacancies already notified on 19.12.2016, cannot be taken away by the State, even if the policy to discontinue the previous recruitment initiated on 19.12.2016 and re-advertised the post on 15.3.2018 is upheld.

10. Recruitment on the post of Assistant Teacher in L.T. Grade has to be made in accordance with the Rules of 1983. These rules have been amended from time to time. This Court in the case of Himanshu Shukla and another Vs. State of U.P. and others, writ petition no. 48664 of 2017, decided on 13.4.2018 while upholding the change of policy in recruitment has traced the amendments, which came to be made in the Rules of 1983, from time to time. In order to appreciate the controversy raised, it would be of help to reproduced the following passage from the judgment of this Court in Himanshu Shukla (supra):-

".....The Rules of 1983, as they originally stood, contemplated a cadre of Trained Graduate Teachers, both for men and women at regional level. Posts in the cadre were to be filled by direct recruitment and also by promotion through the U.P. Public Service Commission (hereinafter referred to as 'the Commission'). The Commission was to invite applications for direct recruitment and subject the candidates having eligibility in terms of the rule to interview, and accordingly prepare a select list. The Rules of 1983 have been amended from time to time, which have a material bearing on the controversy raised in this bunch of writ petitions. As all these writ petitions involve common questions of law and fact, and have been heard together, therefore, are being disposed of by this common judgment.

2. At the outset, it would be appropriate to refer to the successive amendments made in the Rules of 1983. First Amendment to the Rules of 1983 was made vide notification dated 6th November, 1992. Rule 5 of the 1983 Rules, which provided for direct recruitment to be made in the cadre through the Public Service Commission, was substituted with direct recruitment to be made by selection committee, as specified. For promotions also the Commission seized to have any role. Other amendments were also made with which the Court is not concerned as of now. Second Amendment in the Rules of 1983 was made vide notification dated 8th September, 2010. The qualifications prescribed for different posts in the cadre was amended. Rule 15, which provided for making of application to the Regional Deputy Director of Education, was amended to mean Regional Joint Director of Education. Recruitment procedure provided under the Second Amendment introduced in the Rules of 1983 remained intact.

3. Yet another notification was issued on 28.2.2014, incorporating amendment in the Rules of 1983 by way of Uttar Pradesh Subordinate Educational (Trained Graduates Grade) Service (Third Amendment) Rules, 2014. The maximum age for recruitment to the posts as provided in Rule 10 was increased from 32 to 40. Criteria for computation of quality point marks for selection by direct recruitment was altered. The weightage allocated for Postgraduate Degree was omitted. Rule 15 was also amended, which dealt with the manner of preparation of select list for selecting candidates by direct recruitment. With the changes brought about by the Third Amendment, recruitment to the cadre

was to be made region-wise, with the appointing authority for direct recruitment being Regional Deputy Director of Education for the men branch and Regional Inspectress of Girl's Schools in respect of women branch.

4. Rules of 1983 were yet again amended vide notification dated 19th October, 2016 pursuant to Fourth Amendment Rules of 2016. Rule 3 was amended and the appointing authority for both men branch and women branch was substituted as Additional Director of Education, Secondary, U.P. Allahabad. The regional cadre both for men and women branches, as it stood earlier, was substituted with a State cadre for men and women branches. The qualification for various posts were also prescribed. Rule 14, which provided for determination of vacancies to be filled during the course of year of recruitment, was required to be determined subjectwise for men and women branches. The procedure for direct recruitment was also modified. The selection committee also underwent a change.

5. The Rules of 1983 lastly came to be amended on 23rd August, 2017 by way of Fifth Amendment Rules of 2017. Sub-rule 3(c) was added to Rule 3, which defined 'Commission' as the 'U.P. Public Service Commission, Allahabad'. Rule 5 was also amended so as to provide for appointment by direct recruitment through the Public Service Commission. Rule 3(b) was omitted. Rule 10 was also amended and the maximum age for recruitment to the post covered under the Rules of 1983 was specified as 40 years. The procedure contemplated under Rule 15 was changed so as to ensure direct recruitment in the cadre to be made by the U.P. Public Service Commission. Such direct recruitment by the Commission is to be made on the basis of a written test and the consequential merit list prepared on the basis of the same. Such merit list is to be sent by the Commission to the appointing authority, who in turn was to make appointments therefrom. However, the appointing authority remained the same i.e. the Additional Director of Education."

11. Petitioners in Himanshu Shukla (supra) were claiming consideration pursuant to advertisements issued in the year 2011, 2014 and 2016, which had since been discontinued due to change of policy as well as consequential 5th Amendment in the Rules of 1983, notified on 23rd August, 2017. It was urged that vacancies advertised earlier had to be filled in accordance with the rules existing then and that vacancies caused previously are not open to be filled in accordance with 5th Amendment Rules. So far as the legal proposition urged was concerned, the Court proceeded to observe as under in paragraph 44 of the judgment in Himanshu Shukla (supra):-

"44. There is no dispute on the legal proposition canvassed on behalf of petitioners that amendment introduced in the Rules of recruitment cannot be given retrospective effect, unless the rules itself specifically permits it. The Principle that once the Game has commenced, the rules of Game cannot be changed in between is too well settled to be questioned. The question that arises on the facts of the case is as to whether State is justified in evolving a new policy for recruitment; amending the rules; cancelling the on-going recruitment process and undertaking the recruitment afresh as per the amended rules?"

12. However, on the facts of the case the Court found that change of policy

introduced by the State was based on a justifiable reason. Stand of the State Government was scrutinized by the Court to observe as under in paragraphs 45 to 50:-

"45. Before proceeding further, it would be appropriate to notice the concern express by the Additional Chief Secretary in his affidavit before this Court in para 10, which is extracted above. The recruitment as per Rules of 1983 were based upon quality point marks calculated on the basis of a candidate's performance in High School, Intermediate, Graduation and Training. Schedule to Rule 15(2) lays down the criteria for determining the quality point marks, which reads as under:-

''परिशिष्ट 'घ''

(नियम 015 (2) देखिये)

सीधी भर्ती द्वारा चयन के लिए गुणवत्ता बिन्दु :–

परीक्षा का नाम गुणवत्ता बिन्दु

1–हाईस्कूल

अंको का प्रतिशत

10

2–इण्टरमीडिएट

अंको का प्रतिशत X2

10

3–स्नातक उपाधि

अंको का प्रतिशत ग 4

10

अन्य

4–प्रशिक्षण :–	प्रथम श्रेणी	द्वितीय श्रेणी	तृतीय श्रेणी
(क) सिद्धान्त	12	6	3
(ख) क्रियात्मक	12	6	3
5–स्नातकोत्तर उपाधि	15	10	5

46. The post graduation qualification has been done away with in the Fourth Amendment to the Rules of 1983. Marks secured by a candidate in the High School and Intermediate, therefore, assumes significance. The Additional Chief Secretary has stated in Para 10 before this Court that questions are being raised about High School and Intermediate examinations, as such it was held proper to select candidate on the basis of written examination to be held by the Commission in place of academic performance and training marks. The Court also cannot shut its eye to what is widely reported in newspapers about High School and Intermediate Examinations conducted by the U.P. Board. In the High School and Intermediate Board Examination of the year, it was widely reported that on account of stringent checks placed against copying in Board Examinations, more than 11 lacs students have left the exam. This is a serious matter. Although, it would not be appropriate to express any doubts on the credibility of marks awarded by the Board, but the concern express by the Additional Chief Secretary in para 10 cannot be said to be unfounded. If the State, therefore, decides to have the merits of candidate examined by way of written examination conducted by U.P. Public Service Commission, then such a policy decision cannot be said to be irrational, discriminatory or arbitrary.

47. Learned counsel for the petitioners, during the course of submission, have also pointed out recent incidents questioning the credibility of recruitment undertaken by the Public Service Commission also. No doubt this Court had to intervene to maintain transparency in the matter of holding of examination by the Commission but for such reasons, the institutional integrity and competence of the Commission itself cannot be put to question. It remains a constitutional body and the constitutional faith reposed in its functioning in the matter

of undertaking recruitment cannot be doubted, or easily questioned by isolated acts of abrasion.

48. Although recruitment based on quality point marks has been held to be a valid criteria for recruitment, but it ultimately remains a matter of policy for the State to choose as to what would be the appropriate procedure to be followed for the purpose. The decision of State to have the recruitment made based upon written test conducted by the Commission cannot be said to be arbitrary.

49. The recruitment initiated pursuant to advertisement dated 19th December, 2016 has not culminated in creation of any vested right in the petitioners. They are mere applicants pursuant to advertisement and have no right to the post. The State for bona fide reasons can always take a decision not to proceed further pursuant to the previous advertisement, and to have the recruitment exercise undertaken afresh, after amending the rules.

50. Law relating to retrospective application of rules, as have been cited before this Court, will have no applicability in the present case. To cancel the recruitment and to undertake it afresh, on the basis of rules amended is not the same as retrospectively applying the recruitment rules. A fresh game starts here, and it can be played on the basis of rules already changed before its commencement."

13. For arriving at the above view, the Court relied upon the Supreme Court in State of Andhra Pradesh and others Vs. D. Dastagiri and others, (2003) 5 SCC 373, wherein the Supreme Court observed as under in paragraphs 4 & 5:-

"4. In the counter affidavit filed on behalf of the respondents in Civil Appeal No. 915/2000, in paragraph 16 it is stated that the process of selection was cancelled at the last stage, i.e., before publishing the list of selected candidates on the sole ground that the State Government wanted to introduce prohibitor and obviously the Government felt that there was no need of Excise Constables during imposition of prohibition in the State. There is serious dispute as to the completion of selection process. According to the appellants, the selection process was not complete. No record has been placed before us to show that the selection process was complete, but, it is not disputed that the select list was not published. In paragraph 16 of the counter affidavit, referred above, the respondents themselves had admitted that the selection process was cancelled at the last stage. In the absence of publication of select list, we are inclined to think that the selection process was not complete. Be that as it may, even if the selection process was complete and assuming that only select list was remained to be published, that does not advance the case of the respondents for the simple reason that even the candidates who are selected and whose names find place in the select list, do not get vested right to claim appointment based on the select list. It was open to the State Government to take a policy decision either to have prohibition or not to have prohibition in the State. Certainly, the Government had right to take a policy decision. If pursuant to a policy decision taken to impose prohibition in the State there was no requirement for the recruitment of Constables in the Excise Department, nobody can insist that they must appoint the candidates as Excise Constables. It is not the case of the respondent that there was any malafide on the part of the appellants in refusing the appointment to the respondents after the

selection process was complete. The only claim was that the action of the appellants, in not appointing the respondents as Excise Constables, was arbitrary. In the light of the facts that we have stated above, when it was open to the Government to take a policy decision, we fail to understand as to how the respondents can dub the action of the Government as arbitrary, particularly, when they did not have any right as such to claim appointments. In the absence of selection and publication of select list, mere concession or submission made by the learned Government Pleader on behalf of the appellant-State cannot improve the case of the respondents. Similarly, such a submission cannot confer right on the respondents, which they otherwise did not have.

5. Under these circumstances, we find it difficult to sustain the impugned judgment and order. However, having regard to the peculiar facts and circumstances of the case and that the respondents had the benefit of the order of the High Court, we think it is just and appropriate that as and when any fresh selection takes place to the post of Excise Constables, the respondents may apply for regular recruitment. In that event, age-bar will not be put against them put, they shall satisfy other eligibility conditions and requirements, including qualification."

(Emphasis supplied)

14. The judgment in State of Andhra Pradesh and others Vs. D. Dastagiri and others (supra) has been specifically relied upon in paragraph 51 of the judgment in Himanshu Shukla. In paragraph 5, the Supreme Court while affirming the change of policy and consequential decision to hold fresh recruitment proceedings protected the candidates against age bar who had applied previously and would have become ineligible due to age. In the facts of the present case also similar exigency arises, inasmuch as, the petitioners had participated in the previous recruitment which has since been discontinued and have become over age by the time new recruitment as per the amended policy/rule is resorted to.

15. In State of M.P. and others Vs. Sanjay Kumar Pathak and others, (2008) 1 SCC 456 also the Supreme Court examined a similar situation to hold that mere selection creates no indefeasible right to claim appointment and it is always open for the State not to fill up all or any number of vacancy with the only caveat that State action should not be arbitrary or discriminatory after analysing the judgments on the point and upholding the cancellation of selection the Court granted similar relief of age relaxation vide para 27 which is reproduced hereinafter:-

"27. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. However, keeping in view the peculiar facts and circumstances of the case, we direct that the respondents shall be entitled to relaxation of age in the event they intend to take part in the next selection process. The State is also directed to pay a sum of Rs 10,000 each to the respondents concerned. The appeals are allowed. No costs."

16. Respondents, however, rely upon a judgment of this Court in Sunil Dutt Tripathi (supra), in which the same advertisement was questioned on the ground that candidates who had participated earlier would become over age. The writ petition has been dismissed relying upon a previous judgment of this

Court in Shri Prakash Srivastava and others Vs. State of U.P. and another, writ petition no. 65848 of 2010, decided on 25.10.2013.

17. In Shri Prakash Srivastava (supra) the writ petitioners had become over age by the time advertisement was issued in the year 2018. It was contended that no recruitment was held in last three years despite availability of vacancy rendering the petitioners ineligible on account of being over age in terms of the advertisement. Similarly for the second set of petitioners also they had become over age on 1.7.2013 and their grievance was that vacancies occurring in the year 2010, 2011 and 2012 were not advertised. Argument before the Court was that the applicants cannot be made to suffer on account of failure of the recruitment agency to undertake recruitment. The Court relied upon the provisions of Uttar Pradesh Public Services (Relaxation of the age limits for recruitment) Rules, 1992 to observe as under in paragraphs 28, 34 and 36 of the judgment which are reproduced hereinafter:-

"28. However, the above consideration may not strictly apply to the present case inasmuch as, the Governor in exercise of power under proviso to Article 309 of Constitution has published and promulgated another set of Rules, i.e., Uttar Pradesh Public Services (Relaxation of the age limits for recruitment) Rules 1992 (hereinafter referred to "Rules 1992"), published vide notification dated 23rd July 1992. It is a small set of Rules having only three provisions. Rule 2 contains certain definitions. I propose to quote Rules 1 and 3 thereof hereunder:

"1. (1) These rules may be called the Uttar Pradesh Public Services (Relaxation of the age limits for recruitment) Rules, 1992.

(2) They shall come into force at once.

(3) They shall apply to all civil services and posts under the rule making power of the Governor under proviso to Article 309 of the constitution."

"3. Notwithstanding anything to the contrary in any rule-regulating the maximum age of recruitment to a service or post in connection with the affairs of the State relaxation in the maximum age-limit may be granted by the Governor in favour of a candidate or a class of candidates.

Provided that in the case in which recruitment is made through the Commission, that body shall be consulted before the relaxation is granted."

34. It is in these circumstances, I am clearly of the view that in the peculiar facts and circumstances of these cases, it would be in the fitness of things that the Governor ought to have examined the question of granting relaxation in the maximum age limit to the extent of non holding of recruitment for vacancies occurring during the concerned year(s) when no recruitment held and, and, thereby rendering certain candidates overage and ineligible in the matter of age. By exercising its power and considering entire facts and circumstances in accordance with law, whether relaxation is granted or not is a different thing, but at least the matter should have been examined by him. Since recruitment in the present case has to be made through UPPSC, such exercise of power shall be done by the Governor in consultation with UPPSC.

36. Resultantly, all these writ petitions are disposed of by directing the competent authority under Rule 3 of 1992 Rules to consider whether there should be relaxation in the matter of maximum age to such candidates who were otherwise eligible on 1st July of the year but due to

non-advertisement of vacancies/non recruitment, they could not apply and became overage. The aforesaid decision shall be taken in consultation with the UPPSC as required by proviso to Rule 3 of 1992 Rules. Such exercise shall be completed expeditiously, preferably within two months from the date of presentation of a certified copy of this order before the competent authority."

18. In Sunil Dutt Tripathi (supra), this Court also took note of the observations made by the Division Bench of this Court in paragraphs 41 & 42 of the judgment in Sanjay Agarwal Vs. State of U.P. and others, 2007 (6) ADJ 272, paragraphs 41 & 42 to hold as under in paragraph 12:-

"12. The Court has proceeded to examine the record in question and is of the opinion that a candidate cannot compel the employer to fill up a vacancy, as and when it occurred, and/or complain that he has some kind of vested right for process of recruitment, having not conducted with respect to the vacancy in the year when it was available and he was also eligible in the matter of age but become overage due to inaction on the part of respondents in initiation of recruitment process or non holding of any recruitment by recruiting agency. The right of consideration would come in picture only when the vacancy is put for recruitment and the advertisement is published. The right of consideration commences when the recruitment process starts. The incumbent would obviously has right of consideration in accordance with the provisions as they are applicable when the advertisement is made and in accordance with conditions provided in the advertisement read with relevant rules. For the purpose of direct recruitment no person in open market has a right of consideration unless and until the vacancy is offered to be filled in accordance with law by the competent authority. As soon as a post fell vacant, it would not give or confer any right upon an individual, who fulfil other qualifications, to claim right of consideration for employment against such post for the reason that the employer can always keep a post unfilled. A perspective candidate cannot compel the employer to consider him for employment even though the post has not been made open for recruitment and selection. In **Sanjay Kumar Pathak's** case (supra) the Full Bench of this Court has held that unless permitted by the Rules, no relaxation can be claimed."

19. Two distinct factual scenarios are noticed in the aforesaid judgments, which needs to be carefully examined. The first exigency is where vacancies have arisen, but recruitment itself has not been initiated. The second exigency is where the vacancy arises and recruitment has also commenced, but for justifiable grounds the recruitment exercise is cancelled before issuance of select list and the recruitment process is initiated, afresh, as per the amended policy/rules.

20. The judgments that have been relied upon in Sunil Dutt Tripathi (supra) were essentially dealing with the first exigency, inasmuch as, though vacancy had arisen but the recruitment itself was not undertaken. No advertisement was issued. It was in such exigency that the question arose about the nature of right that would accrue to a prospective candidate who becomes over age on account of non holding of recruitment for several years. It was in that context that this Court in Shri Prakash Srivastava (supra) observed as under in paragraph 25:-

"25. In the absence of any provision whatsoever, I have no manner of doubt that a candidate cannot compel the employer to fill up a vacancy, as and when it occurred, and/or complain that he has some kind of vested right for process of recruitment, having not conducted with respect to the vacancy in the year when it was available and he was also eligible in the matter of age but become overage due to inaction on the part of respondents in initiation of recruitment process or non holding of any recruitment by recruiting agency. Similar arguments have been discarded in Sanjay Agarwal Vs. State of U.P. and others 2007(6) ADJ 272 (DB)=2007(5) ALJ 328(DB). The Division Bench held:

"(40) Moreover, rule 12 provides for age which is independent and is not subject to other rules. Therefore, Rule 12 would apply on its own irrespective of whether determination of vacancies took place at regular intervals as envisaged in Rule 8 or not. Any other view would make Rule 12 subordinate to Rule 8 though the rule framing authority has not said so and, therefore, any attempt by this Court to relax rigour of Rule 12 with reference to Rule 8 would amount to legislation which this Court is neither supposed to do nor should do. Learned counsel for the petitioners could not show any provision whereunder Rule 12 could have been relaxed by the authorities. In the absence of any provision for relaxation, by judicial interpretation or by judicial exercise such relaxation cannot be granted. In Food Corporation of India Vs. Bhanu Lodh (2005) 3 SCC 618 the Apex Court held that rigor of statutory provisions cannot be relaxed giving a total go-bye to the statute.

(41) Further a person if fulfils requisite educational and other qualifications does not possess a fundamental or legal right to be considered for appointment against any post or vacancy as soon as it is available irrespective of whether the employer has decided to fill in the vacancy or not. The right of consideration does not emanate or flow from existence of the vacancy but commences only when the employer decides to fill in the vacancy and the process of recruitment commences when the notification or advertisement of the vacancy is issued. So long as the vacancy is not made available for recruitment, no person can claim that he has a right of consideration since the vacancy exists and therefore, he must be considered. We have not been confronted with any statutory provision or authority in support of this contention that the petitioners have a right of consideration on mere existence of vacancy. On the contrary, we are of considered view that the right of consideration would come in picture only when the vacancy is put for recruitment, i.e., when the advertisement is published. That being so, the right of consideration commences when the recruitment process starts. The incumbent would obviously have right of consideration in accordance with the provisions as they are applicable when the advertisement is made and in accordance with conditions provided in the advertisement read with relevant rules. It is also obvious that if there is any inconsistency between the advertisement and Rules, the statutory rules shall prevail. In Malik Mazhar Sultan (supra), the Apex Court has clearly held that recruitment to the service could only be made in accordance with the Rules and not otherwise." (Emphasis supplied)

21. A Full Bench of this Court in Sanjay Kumar Pathak Vs. State of U.P. and others, writ petition no. 65189 of 2006,

decided on 25th May, 2007, also observed as under:-

"Nobody can claim as a matter of right that recruitment on any post should be made every year."

22. Position in law, however, may not be the same in the second exigency where recruitment process is also initiated upon accrual of vacancy. Once the advertisement is issued and the candidate applies, the right of consideration in terms of Article 16 of the Constitution of India would arise in favour of such candidate. The Courts while affirming the right of employer to cancel the recruitment and initiating the recruitment afresh have recognized a limited right of age relaxation in certain circumstances. This aspect does not appear to have been highlighted before this Court in Sunil Dutt Tripathi's case.

23. The distinction between two exigencies i.e. where vacancy is not advertised and where vacancy is advertised has clearly been noticed in para 41 of the judgment in Sanjay Agarwal (supra).

24. Supreme Court in a recent judgment in Ramjit Singh Kardam and others Vs. Sanjeev Kumar and others reported in 2020 AIR (SC) 2060, observed as under in paragraph 73:-

"73. The learned Single Judge after quashing the select list published on 11.04.2010 directed for fresh selection on post of PTI. The learned Single Judge, however, did not issue appropriate consequential directions for holding the fresh selection. There was no defect in the advertisement dated 20.06.2006 and mode of selection as envisaged by public notice dated 28.12.2006. The arbitrariness crept thereafter from the stage of scrapping the written test scheduled to take place on 20.07.2008. The directions ought to have been issued to complete the process from that stage i.e. the stage of holding the written test. All the candidates who had applied for the post of PTI including those selected, ought to have been permitted to take the written test. We need to clarify that in the facts of the present case there was no requirement of fresh advertisement and inviting fresh applications. In the event fresh applications are called, large number of applicants who participated in the selection would have become over age. All the applicants who had applied in response to advertisement No.6 of 2006 had right to participate in selection as per criterion notified on 28.12.2006. The direction of learned Single Judge needs modification and clarification to the above effect."

(Emphasis supplied)

25. In view of the above discussions, it is apparent that the distinction between a case where vacancy arising was not advertised and where vacancy was advertised but the recruitment was cancelled to be followed by fresh recruitment rendering the applicants overage in the subsequent recruitment has been overlooked by this Court in Sunil Dutt Tripathi (supra) and, therefore, in view of the subsequent judgment of the Supreme Court in Ramjit Singh Kardam (supra), this Court is inclined to recognize the right of the petitioners to claim age relaxation as they were within age and had applied for recruitment pursuant to the earlier advertisement which got cancelled.

26. Following the course made permissible in para 5 of the Supreme Court Judgment in D. Dastagiri (supra) as well as para 27 of the Supreme Court Judgment in

State of M.P. Vs. Sanjay Kumar Pathak, I am of the considered opinion that even if previous recruitment was cancelled and change of policy by the State has been affirmed in the case of Himanshu Shukla (supra), which judgment has otherwise been affirmed with dismissal of Special Appeal and Special Leave Petitions, the applicants would be entitled to the limited protection of applying afresh against advertisement dated 15.3.2018 and also from the age bar imposed in accordance with Rule 10 of the Rules of 1983.

27. Ordinarily this Court would have referred the matter to State Government for grant of age relaxation in terms of Rule 3 of the Rules of 1992 but as this Court has already permitted them to appear provisionally for selection under its interim order and certain petitioners have also secured their selection on the strength of their merits it would be appropriate to direct declaration of their result notwithstanding the fact that they have become overage under the new advertisement. This direction, however, is on the facts of this case and shall not be treated as a precedent in other cases. Respondent Commission is thus directed to declare result of writ petitioners who have appeared against advertisement dated 15.3.2018 and to consider their case for appointment, if they are selected and fulfill other eligibility (except age). Such consideration would be made within a period of two months from today.

28. Writ petitions stand disposed of, accordingly. No order is passed as to costs.

(2021)08ILR A736
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2021

BEFORE

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

Writ A No. 11612 of 2017

Smt. Priti Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Education – Compassionate Appointment - Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981- Uttar Pradesh Education Service Selection Board Act, 1982: Sections 16G, 21-C, 33-D, 33-E, 33-F and 33G; Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974: Rule 2(a).

U.P. Intermediate Education Act, 1921- Regulation 103 - A dependent of a deceased employee of an aided and recognised Intermediate College is entitled to a consideration for compassionate appointment, by virtue of Regulation 103. On the plain terms of the Statute, it is evident that **where an employee is appointed according to the Rules prescribed against a vacancy that is substantive, and dies in harness, his dependents would be entitled to apply u/Regulation 103.** It would be reading something more into the Statute to infer that the employee or teacher also ought to be substantively appointed or on a permanent tenure. If that were the intention of the Statute, words to that effect would have been employed, and not ones that fall short of requiring the deceased employee to be permanently or substantively appointed. (Para 11, 13)

It cannot be said that the appointment of the petitioner's husband was one not made in

accordance with the Rules prescribed, as envisaged u/Regulation 103. It is, by no means, an appointment *dehors* the Rules. Only ground to deny appointment to the petitioner, is that her husband was not appointed in a substantive capacity to the post that is admittedly substantive. (Para 14, 22)

Petitioner's case makes her eligible for a consideration of her candidature for compassionate appointment under Regulations 103 - 107 of Chapter III of the Regulations framed under the Act of 1921.

B. The fact that the petitioner's husband would have been regularised u/s 33G, if he had continued in service, or to express the more macabre side of it, stayed on in this mortal world until 22.3.2016, when Section 33G was inserted by U.P. Act No. 7 of 2016, seems not to be much disputed. (Para 12)

Equity also requires the petitioner's case to be considered because the petitioner's husband served the College continuously from 1995 to 2012, until he died. In case he had continued in service, possibly, he would have been considered for substantive appointment and granted one in terms of S. 33G of the Act of 1982, which came into force w.e.f. 22.3.2016. His untimely death cut short that possibility. No doubt, this does not create a legal right in favour of the petitioner to receive a consideration of her candidature on that ground, but even otherwise the legal right has already been established under the terms of Regulation 103. (Para 23)

Writ petition allowed. (E-3)

Precedent distinguished:

1. Jahaj Pal Vs District Inspector of Schools, Muzaffarnagar & anr., (2019) 2 UPLBEC 1486 (Para 15, 16)

2. Pawan Kumar Yadav Vs St. of U.P. & anr., 2011 (1) AWC 1028 (FB) (Para 17 to 19)

Present petition challenges order dated 17.12.2016, passed by DIOS, Aligarh.

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

Smt. Priti Sharma, the petitioner, is the widow of the late Jaikrishna Bhardwaj, an Assistant Teacher with the DAV Inter College, Aligarh1. The College imparts education up to Class XII, and is recognised under the Uttar Pradesh Intermediate Education Act, 19212. The College receives grant-in-aid from the State Government and managed by a private management.

2. There is little quarrel that the petitioner's husband, the late Jaikrishna Bhardwaj, was duly appointed to the post of Assistant Teacher in L.T. Grade with the College by the respondent-Management, through a letter of appointment dated 28.07.1995. This appointment was made on a short-term vacancy against a substantive post, on account of the permanent incumbent, Mahesh Chandra Kansal, being promoted ad-hoc to the post of a Lecturer with the College, on 02.09.1994. The appointment was, therefore, terminable, upon the joining of an incumbent selected by the Uttar Pradesh Secondary Education Services Selection Commission, or upon Mahesh Chandra Kansal joining back his substantive post, whichever be earlier. The appointment of the petitioner's husband was one made in accordance with Paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 19813. The petitioner's husband joined on 01.08.1995, and financial approval to his appointment was granted by a detailed order dated 13.05.1996, passed by the District Inspector of Schools4 pursuant to a direction by this Court made in Civil Misc. Writ Petition No. 5327 of 1996 *vide* judgment and order dated 09.06.1996. That writ petition was instituted by the

petitioner's husband. The order granting financial approval to the appointment of the petitioner's husband, made after examining its legality, became final and was not questioned either by the Management or revoked by the Education Authorities.

3. Mahesh Chandra Kansal retired from service on 30.06.1997, while serving as an *ad-hoc* Lecturer, but holding his lien on the post of L.T. Grade Teacher, to which the petitioner's husband was appointed, to fill up the short-term vacancy. It appears that upon retirement of Kansal, payment of salary to the petitioner's husband was stopped with effect from the month of July, 1997 on ground that the vacancy had turned into a substantive one. The petitioner's husband represented in the matter to the Education Authorities, including the Government. The Special Secretary to the Government, *vide* order dated 27.02.1999, and the Deputy Director of Education (Secondary-I), Directorate of Education, Lucknow, *vide* order dated 08.03.1999, issued directions to the effect that the petitioner's husband was entitled to continue, till a regularly selected candidate by the Commission/Selection Board joined. In compliance with the said order, the DIOS, Aligarh passed an order dated 11.05.1999, sanctioning payment of the petitioner's husband's salary, until a regularly selected candidate by the Commission/Board joined. The appointment was expressed to be purely temporary and in the L.T. Grade. This fact about approval of tenure for the petitioner's husband, until a regularly selected candidate joined, is admitted to the respondents. It is also admitted that on the strength of the aforesaid orders of the Education Authorities, the petitioner's late husband continued in service as an L.T. Grade Teacher, until his decease on 06.01.2012.

4. Shorn of unnecessary details, the petitioner, who is a dependent of the late Jaikrishna Bhardwaj, applied for compassionate appointment, inasmuch as Bhardwaj's untimely demise had plunged the family into a grave financial crisis. Again, eschewing recapitulation of all that litigation that the petitioner had to undertake to enforce a consideration of her claim to compassionate appointment, suffice it to say, that the petitioner's claim was rejected by the impugned order dated 17.12.2016 passed by the DIOS, Aligarh.

5. Aggrieved, this writ petition has been instituted.

6. A perusal of the impugned order shows that at the tail-end of a long-winded narration of facts and the parties' case, the short reason assigned to disregard the petitioner's claim is that her husband's 'services had not been regularised', when he died on 06.01.2021. The way parties have taken stand before this Court in their pleadings, what appears from the expression that 'services of Bhardwaj had not been regularised' on the date of his death, is that he had not been granted a substantive and permanent appointment on the post of an L.T. Grade Teacher, until his death. In this regard, reference may be made to the stand of the DIOS in his supplementary counter affidavit dated 18.09.2020, where he has justified the order impugned, asserting :

"..... the then, District Inspector of Schools, Aligarh after hearing all concerned parties passed an order no. 7893-95/2016-17 dated 07.12.2016 stating therein that since the services of Late Jaikrishna Bhardwaj were not regularized and there is no provision for giving any service benefits to the dependents of temporary/non regularized employee, as such the petitioner, Priti Sharma was not

given any specific benefit of the dependents of deceased employee and her representation has been rejected accordingly. ....."

7. Next, following the aforesaid assertion, the DIOS has made a reference to the provision of Section 33G of the Uttar Pradesh Education Service Selection Boards Act, 19825 quoting the provision in extenso. There is then an assertion in the following terms carried in Paragraph No. 11 of the counter affidavit under reference :

" The aforesaid Government Order is implemented since 22.03.2016 whereas Shri Jaikrishna Bhardwaj died on 06.01.2021 and at the time of issuance of the aforesaid Government Order, husband of petitioner, Jaikrishna Bhardwaj was not in service, as such there is no question of regularizing of his services. Since at the time of death Jaikrishna Bhardwaj, his services were not regularized, as such his dependent (petitioner) is not entitled for any relief under the provisions of Dying in Harness Rules. "

8. It is not the respondent's case that the petitioner's husband had been appointed or permitted to function on the post of an L.T. Grade Teacher with the College *dehors* the Rules. Rather, it is acknowledged that he was appointed against a short-term vacancy caused by the *ad-hoc* promotion of Mahesh Chandra Kansal to the post of a Lecturer, in accordance with Paragraph 2 of the Removal of Difficulties (Second) Order. It has also been acknowledged that after Kansal's retirement, upon the vacancy whereagainst the petitioner was appointed turning substantive, his salary was stopped for a short while, but the financial approval to his appointment was restored by the DIOS, under orders of the State Government and the Deputy Director of Education, permitting the petitioner to continue on a temporary basis, until a regularly selected candidate from the Commission/Board joined. It is in terms of the aforesaid appointment and tenure that the petitioner's husband was employed, when he died on 06.01.2012.

9. It is vehemently argued by Mr. Sharad Chandra Upadhyay, the learned State Law Officer appearing for the respondents, that a teacher, unless he is substantively appointed to a post, the benefit of a consideration for appointment under the Dying in Harness Regulations is not available to his dependents.

10. Learned Counsel for the petitioner, Mr. Arvind Kumar Singh, on the other hand, submits that a substantive appointment, in the sense of a permanent appointment, is not what is envisaged under the Regulations 103 - 107 of Chapter III of the Regulations, framed under the Act of 1921. He urges that all that is envisaged under the Regulations last mentioned is that the deceased-employee, serving in a recognised and aided institution as a Teacher or as a Class III employee, should be one who has been appointed in accordance with the Rules. It is not necessary that he should be permanently appointed to a substantive post.

11. I have considered the rival submissions made by the learned Counsel for both parties. A dependent of a deceased employee of an aided and recognised Intermediate College is entitled to a consideration for compassionate appointment, by virtue of Regulation 103 of Chapter III of the Regulations framed under the Act of 1921. It would, therefore,

be profitable to refer to the aforesaid regulation. It is quoted in extenso :

"103. इस विनियमावली में दी गई किसी बात के होते हुए भी जहाँ किसी मान्यता प्राप्त, सहायता प्राप्त संस्था का अध्यापक या शिक्षणेत्तर कर्मचारी वर्ग के किसी कर्मचारी की, जो विहित प्रक्रिया के अनुसार नियुक्त किया गया हो, सेवा काल में मृत्यु हो जाये, तो उसके कुटुम्ब के एक सदस्य को, जो 18 वर्ष से कम आयु का न हो, प्रशिक्षित स्नातक की श्रेणी में अध्यापक के पद रूप में या किसी शिक्षणेत्तर पद पर, यदि वह पद के लिये विहित अपेक्षित शैक्षिक प्रशिक्षण अर्हताये, यदि कोई हों, रखता हो और नियुक्ति के लिये अन्यथा उपयुक्त हो, नियुक्त किया जा सकता है:

स्पष्टीकरण- इस विनियम के प्रयोजनार्थ "कुटुम्ब का सदस्य" का तात्पर्य मृत कर्मचारी की विधवा/विधुर, पुत्र, अविवाहित या विधवा पुत्री से होगा।

टिप्पणी- यह विनियम और विनियम 104 से 107 तक उन मृत कर्मचारियों के संबंध में लागू होंगे जिनकी मृत्यु 1 जनवरी, 1981 को या उसके पश्चात् हुई हो।"

12. The opening words of this Regulation show that it carries a *non-obstante* clause, giving it an overriding effect *vis-à-vis* other Regulations framed under the Act. The right created under the Regulation is attracted only in the case of a Teacher or Class-III employee, who dies in harness. It further requires that such teacher or employee should be employed with an institution, which is recognised under the Act of 1921 and in receipt of Government grant-in-aid. The next requirement is that the teacher or the employee concerned should have been appointed according to the prescribed procedure. The precise words used in the Regulations are : *"Jo vihit prakriya ke anusar niyukt kiya gaya ho"*. This would translate in English to read : "Who has been appointed according to the procedure prescribed". There are other conditions then to be satisfied, regarding the dependent to be a person above the age of 18 years and holding the prescribed educational and training qualifications, if any, prescribed for the post to which he/she is appointed. Here, there is no quarrel about the petitioner's qualifications, to be appointed to one or the other posts envisaged under Regulation 103. At least, this issue has not arisen so far. The petitioner's candidature has been rejected because in the opinion of the DIOS, the services of the petitioner's deceased husband had not been regularised until his death. Now, what the DIOS means by his opinion that the services of the petitioner's deceased husband were not regularised, is no more than this, that he had not been permanently appointed to the substantive post, against which he was functioning, in a temporary capacity, till a regularly selected candidate by the Commission/Board joined. The fact that the petitioner's husband would have been regularised under Regulation 33G, if he had continued in service, or to express the more macabre side of it, stayed on in this mortal world until 22.03.2016, when Section 33G was inserted by U.P. Act 13 of 2016, seems not to be much disputed.

13. To the understanding of this Court, what Regulation 103 envisages is the appointment of the deceased teacher or Class III employee made in accordance with Rules prescribed; it does not speak about the appointment being substantive, or, more particularly, permanent. A temporary employee can also be appointed and, in fact, ought to be appointed in accordance with the Rules prescribed against a substantive post. The position would be different, if the post against

which the employee is appointed, in accordance with Rules prescribed, is not substantive, but a temporary vacancy, where the some regular incumbent holds lien. If that were the case, a temporary or stop-gap appointment of an incumbent on a post that is temporary in nature, may not be within the scope of Regulation 103, affording the dependent of a teacher or employee appointed against a temporary vacancy, to claim compassionate appointment. Therefore, on the plain terms of the Statute, it is e*vide*nt that where an employee is appointed according to the Rules prescribed against a vacancy that is substantive, and dies in harness, his dependents would be entitled to apply under Regulation 103. It would be reading something more into the Statute to infer that the employee or teacher also ought to be substantively appointed or on a permanent tenure. If that were the intention of the Statute, words to that effect would have been employed, and not ones that fall short of requiring the deceased employee to be permanently or substantively appointed.

14. The appointment of the petitioner's deceased husband was made initially on 28.07.1995, in the short-term vacancy of an L.T. Grade Teacher, caused on account of an *ad-hoc* promotion of the incumbent to the post of a Lecturer. The DIOS, while granting financial approval to the petitioner's husband, initially appointed *vide* order dated 13.12.1996, has acknowledged the appointment to be one made in accordance with Paragraph 2 of the Removal of Difficulties (Second) Order, issued under the Act of 1982. It was, therefore, an appointment that, from the inception, was one made in accordance with the Rules prescribed. The appointment of the petitioner's husband, therefore, cannot be one said to be made *dehors* the Rules. No doubt, upon the promotee's retirement from service on 30.07.1997, the short-term vacancy was converted into a substantive one, and the salary of the petitioner's husband was stopped for the month of July, 1997. But, admittedly, he, in accordance with the Rule then in force, was permitted by the State Government and the Deputy Director of Education, *vide* orders dated 27.02.1999 and 08.03.1999 to continue in service until a regularly selected candidate by the Commission/Board joined.

15. Learned Counsel for the petitioner has referred to the Full Bench decision of this Court in **Jahaj Pal v. District Inspector of Schools, Muzaffarnagar and Another6** to submit that the petitioner's husband having been appointed in accordance with Rules, that is to say, Paragraph 2 of the Removal of Difficulties (Second) Order, he was entitled to a consideration of his candidature for a substantive and permanent appointment. The decision in **Jahaj Pal** *(supra)* expressly makes it inapplicable to the rights flowing from Sections 21-C, 33-D, 33-E, 33-F and 33-G of the Act of 1982. In this regard, Paragraph No. 208 of the report in **Jahaj Pal** is eloquent. It reads :

208. We do not propose to expand our observations in respect of subsequent provisions made for substantive appointment/absorption namely, Sections 21-C, 33-D, 33-E, 33-F and 33-G, since those issues are not necessary to examine to answer the questions referred to us.

16. For one, the decision in **Jahaj Pal** was about the right of an ad-hoc appointee, appointed against a short-term vacancy, where the appointment was subsequently converted into a substantive vacancy. It

was answered in favour of the teacher continuing in service, till his candidature was considered in accordance with the provisions of Section 33B of the Act of 1982. The said decision was about the rights of a teacher so appointed to continue in service and relates to a different time period of appointment, against a short-term vacancy. The rights there relate to the employee himself to continue in employment, who was appointed as an L.T. Grade Teacher in a short-term vacancy, in accordance with the Removal of Difficulties (Second) Order, on or before 14.03.1991 and his rights were governed by Section 33B of the Act of 1982. So far as the employee himself is concerned, the decision in **Jahaj Pal** relates to a different period of time, regarding appointment where rights are governed by Section 33B. The case here relates to a much later period of time, where the legislature had amended the Statute to take into account appointments made in accordance with Removal of Difficulties (Second) Order against a temporary vacancy, that subsequently turned permanent. But, those are not the issues that would arise for consideration in the present case. Here, the only issue is about what Regulation 103 *(supra)* envisages, where it says that the deceased employee or teacher should have been appointed in accordance with the Rules prescribed. **Jahaj Pal** is not an authority on the said question.

17. Mr. Upadhyay, the learned State Law Officer appearing for the State, on the other hand, has relied on a Full Bench decision of this Court in **Pawan Kumar Yadav v. State of U.P. & Others7.** The decision of the Full Bench in **Pawan Kumar Yadav** *(supra)* was about the right to compassionate appointment of dependents of daily wagers and work-charged employees, employed in connection with the affairs of the State Government. Two questions were considered by the Full Bench, which read :

1. Whether a daily wager and work charge employee, employed in connection with the affairs of Uttar Pradesh, who is hot holding any post whether substantive or temporary is a 'Government Servant' within the meaning of Rule 2 (a) of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974?

2. Whether the judgement in Smt. Pushpa Lata Dixit Vs. Madhyamik Shiksha Parishad and others, 1991 (18) ALR 591; Smt. Maya Devi Vs. State of U.P. (Writ Petition No. 24231 of 1998 decided on 02.03.1998); State of U.P. Vs. Maya Devi (Special Appeal No. 409 of 1998); Santosh Kumar Misra Vs. State of U.P. & Ors., 2001 (4) ESC (Alld) 1615; and Anju Misra Vs. General Manager, Kanpur Jal Sansthan, (2004) 1 UPLBEC 201, giving benefit of compassionate appointment to the dependents of daily wager and work-charge employees, have been correctly decided ?

18. These were answered against the employee in the following terms :

26. On the aforesaid discussion, and in view of the law laid down in General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi *(Supra)*, we answer the questions posted as follows :-

1. A daily wager and workcharge employee employed in connection with the affairs of the Uttar Pradesh, who is not holding any post, whether substantive or temporary, and is not appointed in any regular vacancy, even if he was working for more than 3 years, is not a 'Government servant' within the meaning of Rule 2 (a) of

U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974, and thus his dependents on his death in harness are not entitled to compassionate appointment under these Rules.

2. The judgements in Smt. Pushpa Lata Dixit Vs. Madhyamik Shiksha Parishad and others, 1991 (18) ALR 591; Smt. Maya Devi Vs. State of U.P. (Writ Petition No. 24231 of 1998 decided on 02.03.1998); State of U.P. Vs. Maya Devi (Special Appeal No. 409 of 1998); Santosh Kumar Misra Vs. State of U.P. & Ors., 2001 (4) ESC (Alld) 1615; and Anju Misra Vs. General Manager, Kanpur Jal Sansthan, (2004) 1 UPLBEC 201 giving benefit of compassionate appointment to the dependents of daily wage and workcharge employee have not been correctly decided.

19. The decision in **Pawan Kumar Yadav**, no doubt, is one that relates to the dependent's right to compassionate appointment, in case of an employee dying in harness, but the same is of little relevance. The decision relates to interpretation of Rule 2(a) of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 19748. Rule 2(a) last mentioned carries a very elaborate definition of as to who would be a government servant. Mr. Upadhyay has sought to rely on this decision by reference to the interpretation of the words *"regularly appointed"* by their Lordships of the Full Bench, occurring in Rule 2(a) of the Rules of 1974. He has sought to draw an analogy of what *"regularly appointed"* would mean in the context of the entitlement to compassionate appointment under Regulation 103, framed under the Act of 1921. Rule 2(a) of the Rules of 1974 reads :

(a) "Government servant" means a Government servant employed in connection with the affairs of Uttar Pradesh who-

(i) was permanent in such employment; or

(ii) though temporary had been regularly appointed in such employment;or

(iii) though not regularly appointed, had put in three years' continuous service in regular vacancy in such employment.

Explanation.-*"Regularly appointed"* means appointed in accordance with the procedure laid down for recruitment to the post or service, as the case may be;

(b) "deceased Government servant" means a Government servant who dies while in service;

(c) "family" shall include the following relations of the deceased Government servant:

(i) Wife or husband;

(ii) Sons;

(iii) Unmarried and widowed daughters;

(d) "Head of Office" means Head of Office in which the deceased Government servant was serving prior to his death.

20. The principle on which the decision of their Lordships in **Pawan Kumar Yadav** has turned, is adumbrated in Paragraph Nos. 23, 24 and 25 of the report. These read :

23. The regular need of work, of which presumption has been set to arise after working for long number of years and the principles of legitimate expectations, would not mean that there was a regular vacancy. The word 'regular' vacancy has not been defined

but that a distinction must be made between a need of regular employees, and the existence of regular vacancies. In Uttaranchal Jal Sansthan Vs. Laxmi Devi *(Supra)* the Supreme Court said; 'indisputably the services of the deceased had not been regularised. in both the cases the writ petitions were filed but no effective relief thereto had been granted. In the case of late Leeladhar Pandy, allegedly he was drawing salary on regular scale of pay. that may be so but the same would not mean that there existed a regular vacancy".

24. The Supreme Court further went on to explain in para 18 to 20 as follows:-

"18. Indisputably having regard to the equality clause contained in Articles 14 and 16 of the Constitution of India whether the appointment is in a regular vacancy or not is essentially a question of fact. Existence of a regular vacancy would mean a vacancy which occurred in a post sanctioned by the competent authority. For the said purpose the cadre strength of the category to which the post belongs is required to be taken into consideration. A regular vacancy is which arises within the cadre strength.

19. It is a trite law that a regular vacancy cannot be filled up except in terms of the recruitment rules as also upon compliance of the constitutional scheme of equality. In view of the explanation appended to Rule 2(a), for the purpose of this case we would, however, assume that such regular appointment was not necessarily to be taken recourse to. In such an event sub-clause (iii) of clause (a) as also the explanation appended thereto would be rendered unconstitutional.

20. The provision of law which ex facie violates the equality clause and permits appointment through the side door being unconstitutional must be held to be impermissible and in any event requires strict interpretation. It was, therefore, for the respondents to establish that at the point of time the deceased employees were appointed, there existed regular vacancies. Offers of appointment made in favour of the deceased have not been produced."

25. In General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi *(Supra)* the Supreme Court considered and interpreted the expression 'regular vacancy' in respect of same Rules namely U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974. The judgement of the Apex Court interpreting the same Rules and deciding the questions posed before us squarely covers question No.1, in favour of the State and is binding on the High Court.

(emphasis by Court)

21. It is apparent that what their Lordships held is that the existence of a regular vacancy, against which the deceased government servant was appointed in accordance with the procedure prescribed, was a *sine qua non* for his dependents to claim a right to compassionate appointment. A distinction was drawn between the need for regular employment and the existence of a regular vacancy, under the Rules of 1974. Therefore, the long continuance of the deceased employee as a daily wager or under the work-charged establishment, but not against a regular vacancy, was held not to entitle his dependents to claim consideration for compassionate appointment.

22. Here, there is no quarrel that there was a regular vacancy to begin with, albeit short-term, against which the petitioner's late husband was appointed in accordance with the Rules. He was appointed, to be

emphasized, in accordance with Paragraph 2 of the Removal of Difficulties (Second) Order. That he was so appointed, is a fact, which the DIOS has acknowledged in his order dated 13.05.1996, granting financial approval to the appointment. He was then permitted by the State Government, upon the vacancy turning permanent, to continue till a regularly selected candidate by the Commission/Board joined. The petitioner's husband died in harness, while continuing on those terms. It cannot, therefore, be said that the appointment of the petitioner's husband was one not made in accordance with the Rules prescribed, as envisaged under Regulation 103 of Chapter III of the Regulations framed under the Act of 1921. It is, by no means, an appointment *dehors* the Rules. Also, it is an appointment against a substantive vacancy, though not one that conferred a permanent tenure upon petitioner's deceased husband. It is also not the respondent's case that the appointment of the petitioner's deceased husband was one not made in accordance with the Rules prescribed. That is not the case urged either in the impugned order or the stand taken before this Court in the counter affidavit. All that the respondents say, to deny appointment to the petitioner, is that her husband was not appointed in a substantive capacity to the post that is admittedly substantive. They do not say that he was not appointed in accordance with the Rules prescribed.

23. In the opinion of this Court, therefore, the petitioner's case makes her eligible for a consideration of her candidature for compassionate appointment under Regulations 103 - 107 of Chapter III of the Regulations framed under the Act of 1921. This being the position under the law, equity also requires the petitioner's case to be considered. This is so because the petitioner's husband served the College continuously from 1995 to 2012, until he died. In case he had continued in service, possibly, he would have been considered for substantive appointment and granted one in terms of Section 16G of the Act of 1982, which came into force w.e.f. 22.03.2016. His untimely death cut short that possibility. No doubt, this does not create a legal right in favour of the petitioner to receive a consideration of her candidature on that ground, but that legal right is established under the terms of Regulation 103, as already said.

24. The equity, therefore, that arises in favour of the petitioner is that her family have plunged into poverty on account of the sudden demise of her husband and her circumstances have been detailed in ample measure, that require the family to be salvaged. It is on the aforesaid parameters, therefore, that the petitioner's right to be considered for compassionate appointment must be evaluated by the DIOS-respondent.

25. In the result, this petition **succeeds** and stands ***allowed.*** The impugned order dated 07.12.2016 passed by the DIOS, Aligarh is hereby **quashed.**

26. Let a writ of *mandamus* issue, commanding the DIOS, Aligarh to consider the petitioner's case for compassionate appointment in accordance with law and remarks in this judgment, within a month of receipt of a copy of this judgment.

27. Let this order be communicated to the DIOS, Aligarh by the Registrar (Compliance).

(2021)08ILR A746
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.07.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 12120 of 2021

Ashok Kumar Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sameer Kalia, Srideep Chatterjee

Counsel for the Respondents:
C.S.C.

A. Service Law – Suspension - U.P. Government Servant (Discipline and Appeal) Rules, 1999- Rule 4 - The disciplinary authority would record reasons and satisfaction in the suspension order against an employee. The respondents while passing the impugned order of suspension have failed to record reasons to arrive at conclusion of satisfaction that the charges are serious enough to impose major penalty. (Para 13, 14, 15)

There is no statement of fact that preliminary inquiry was conducted against the petitioner and thereafter the satisfaction was recorded. (Para 23)

B. Mere recommendation cannot be made a ground in passing the order. The competent authority who has been empowered to pass the order would apply its own mind - In present case, the order was passed without application of mind and on the dictate of the Election Commission and recommendation of the Commissioner. Respondent No. 1 merely relied upon the orders of the Election Commission and Commissioner Commercial Tax and has proceeded to pass the impugned order. (Para 16, 19, 20)

Writ petition allowed. (E-3)

Precedent followed:

1. Dr. Arvind Kumar Ram, 2007 SCC online page 1390 (Para 6, 18)

2. U.O.I. & anr. Vs Ashok Kumar Aggarwal, (2013) 16 SCC Page 147 (Para 7, 13)

Present petition challenges order of suspension dated 21.05.2021, passed by Additional Chief Secretary, Department of State Tax.

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

1. Heard Shri S.K. Kalia, learned Senior Advocate assisted by Shri Sameer Kalia and Shri C.D. Chatterji, learned Additional Chief Standing Counsel for the State Shri Alok Sharma.

2. By means of the present writ petition the petitioner is challenging an order of suspension dated 21.5.2021 passed by the respondent no.1 with the further prayer for issuance of writ of mandamus commanding respondents not to give effect the impugned order dated 21.5.2021 with the further prayer to allow the petitioner to work and function on the post of Joint Commissioner (SIB), Bulandshahar and also pay him regular salary as and when the same became due.

3. Brief facts of the case are as under :-

"The petitioner was initially appointed on the post of Assistant Commissioner Sales Tax under the respondent no.2 on 29.9.1998 after having been selected for the said post by the U.P. Public Service Commission. Subsequently, on account of his excellent services, the petitioner was promoted on the post of

Deputy Commissioner in the year 2009 and thereafter again in the year 2015, he was promoted on the post of Joint Commissioner Commercial Tax which post he presently holds.

In the month of July 2019 the petitioner was transferred from the Headquarters at Lucknow to District - Bulandshahr wherein he joined and started functioning as Joint Commissioner, Commercial Tax (SIB), Bulandshahr.

On 26.3.2021 The State Election Commission notified the Three Level Panchayat Elections - 2021 to be held in the State of Uttar Pradesh. Prior to that on 25.3.2021, the District Election Officer Bulandshahr/ District Magistrate appointed the petitioner as Returning Officer for Development Block- Sikandrabad, District - Bulandshahr. On being appointed so, the petitioner on 27.3.2021 issued public notice of election scheduled for the post of Gram Pradhan, Member Gram Panchayat, Member Kshetra Panchayat and lastly Member Zila Panchayat.

Subsequently, the District Election Officer (Panchayat)/ District Magistrate Bulandshahr amended its earlier order dated 25.3.2021 and appointed the petitioner as Returning Officer for Development Block - Khurja in place of Development Block - Sikandarabad.

As directed by the District Magistrate Bulandshahr the petitioner took charge of the post of Returning Officer, Development Block - Khurja and conducted the entire election process starting from the submission of nomination papers till the counting of votes and declaration of results (except for the Member Zila Panchayat), as per the notified election schedule, with utmost sincerity and transparency. The polling of votes took place on 29.4.2021 at all the polling booths of Development Block - Khurja and during which no untoward incident took place and the polling was got conducted in a peaceful and organized manner.

On 02.5.2021 at 08:00 AM the counting of vote commenced under the direction and supervision of the petitioner at Jatiya Bal Vihar Inter College, Khurja which is situated in the said development block Khurja. At around 05:00 PM on 03.5.2021 the counting of votes got concluded under the control and supervision of the petitioner. Subsequently, the petitioner declared the result of the concerned posts of Gram Pradhan, Member Gram Panchayat and Member Kshetra Panchayat and also handed over the prescribed certificate to the returned candidates. After conclusion of counting of votes at 05:00 PM and declaration of result of the aforesaid 03 posts the petitioner and the polling team secured all the necessary documents and completed all the formalities, which took some time and only at around 06:30 PM the petitioner along with his team proceeded to District Headquarters. Before the petitioner could reach the District Headquarters with his team the Additional District Magistrate (Administration)/ Deputy Election Officer Panchayat, Bulandshahar contacted the petitioner on his mobile no.7235001008 and directed the petitioner to return to the place where the counting took place as some dispute had to be resolved.

As per the directions of the Deputy Election Officer Panchayat/ Additional District Magistrate (Administration) the petitioner reached the place of counting where the Deputy District Election Officer, Panchayat also reached, whereafter the aforesaid officer apprised the petitioner about the complaint of one candidate for the post of Member Zila

Panchayat (Ward No.25) who made the request for re-counting.

On the request made by the candidate the petitioner required the other counting staff to be present at the place of counting and further directed the support staff to call the other candidates of Ward No.25 also till such time the support staff and the other candidates were reaching the place of counting, the petitioner along with his team in the presence of the Deputy Election Officer Panchayat/ Additional District Magistrate (Administration) tried to sort out the objections of the aforesaid candidate and due to the efforts of the Petitioner and Deputy Election Officer Panchayat/ Additional District Magistrate (Administration) and other district level officer the objections of the candidate were sorted out and upon which the said candidate requested for declaration of the result without insisting for re-counting of votes.

The District level election officers left with the required counting sheet to enable them to declare the result. In all this process of consideration/ removal of complaint / objection of the candidate (ward no.25) it took considerable time for its resolution by the petitioner along with other election authorities and as such, the delay was caused which was neither deliberate nor intentional and the entire process was well within the knowledge of the district level election authorities.

The Deputy Election Officer (Panchayat)/ Additional District Magistrate (Administration) on 04.5.2021 appears to have submitted a letter to District Election Officer Panchayat/ District Magistrate stating that the petitioner did not submit the counting sheet to the Election Officer till 12:00 PM despite the fact that the counting had concluded about 05:00 PM due to which certain candidates of Ward No.24, 25 and 26 had created a ruckus at the Collectorate premises as well as place of counting in Khurja citing that the result is being manipulated and due to which there was unrest at the said places.

On 04.5.2021 the said letter was forwarded to the State Election Commission by the District Election Officer panchayat/ District Magistrate vide his letter dated 04.5.2021. Thereafter, the State Election Commission, on the basis of the aforesaid letter of the District Magistrate dated 04.5.2021 forwarded a recommendation to the respondent no.2 for suspension and initiation of disciplinary inquiry against the petitioner stating that the petitioner had shown indifference and had been negligent towards his duties while functioning as Returning Officer of Development Block- Khurja.

The respondent no.2 on 13.5.2021 on the basis of the aforesaid letter dated 12.5.2021 of the State Election Commission forwarded a recommendation to the respondent no.1 for suspension and initiation of disciplinary inquiry against the petitioner. Thereafter in a most illegal and arbitrary manner, the State Government Issued the impugned order dated 21.5.2021 thereby placing the petitioner under suspension and also initiating disciplinary enquiry with respect to his role as Returning Officer, Development Block - Khurja."

4. Assailing the order of suspension, learned Senior Advocate submits that provisions of rule 4 of U.P. Government Servant (Discipline and Appeal) Rules, 1999 prescribes that in case the charges are serious enough to impose major penalty, by recording satisfaction on the charges, the order of suspension could be passed.

5. Here in the present case the charge is that the petitioner has delayed in declaration of result of the members of the Zila Panchayat and on the said basis he has been placed under suspension.

6. The submission is that the order is arbitrary and contrary to the provisions contained under Rule 4 of the Rule 1999. In support of his submission he placed reliance upon a judgment rendered in the case of ***Dr. Arvind Kumar Ram reported in 2007 SCC online page 1390*** and invited attention towards para 15 of the judgment.

7. He next submits that the order of suspension has been passed by the respondent on the dictates of the Election Commission and the recommendation made by the Commissioner Commercial Tax, U.P., Lucknow, therefore, the impugned order vitiates in law due to non application of mind while passing the impugned order. In support of submission he has placed reliance upon a judgment reported in ***Union of India and Another vs. Ashok Kumar Aggarwal 2013 (Vol.16) SCC Page 147.***

8. His last submission is that in the order it has been recorded that the charges levelled against the petitioner are proved. In this regard submission is that no preliminary inquiry was conducted against the petitioner to arrive at the conclusion that the charges levelled in the order of suspension are proved, therefore, his submission is that the order is bad in law and cannot be sustained.

9. On the other hand, learned Additional Chief Standing Counsel submits that the petitioner has carelessly handled the declaration of result and it is a serious charge which can impose a major penalty in initiation of disciplinary proceedings against the petitioner.

10. His last submission is that the submission advanced by the learned Senior Advocate that there is no application of mind, is incorrect. In fact, the competent authority after taking into consideration the recommendation of the Election Commission and Commissioner Commercial Tax has passed the order of suspension. The same does not suffer from any infirmity or illegality and is a just and valid order.

11. I have considered the submission advanced by the learned counsel for the parties, perused the judgment relied upon and the material brought along with the writ petition and the counter affidavit and rejoinder affidavit.

12. To resolve the controversy involved in the present writ petition, the provisions contained under Rule 4 of U.P. Government Servant (Discipline and appeal) Rules 1999 are quoted below :-

"4. Suspension. - (1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority :

Provided that suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established may ordinarily warrant major penalty :

Provided further that concerned Head of the Department empowered by the Governor by an order in this behalf may place a Government servant or class of

Government servants belonging to Group 'A' and 'B' posts under suspension under this rule :

Provided also that in the case of any Government servant or class of Government servants belonging to Group 'C' and 'D' posts, the appointing authority may delegate its power under this rule tgoing through the verdict of the Hon'ble Supreme Courto the next lower authority.

(2) A Government servant in respect of, or against whom an investigation, inquiry or trial relating to a criminal charge, which is connected with his position as a Government servant or which is likely to embarrass him in the discharge of his duties or which involves moral turpitude, is pending, may at the discretion of the appointing authority or the authority to whom the power of suspension has been delegated under these rules, be placed under suspension until the termination of all proceedings relating to that charge.

(3) (a) A Government servant shall be deemed to have been placed or, as the case may be, continued to be placed under suspension by an order of the authority competent to suspend, with effect from the date of his detention, if he is detained in custody, whether the detention is on criminal charge or otherwise, for a period exceeding forty-eight hours.

(b) The aforesaid Government servant shall, after the release from the custody, inform in writing to the competent authority about his detention and may also make representation against the deemed suspension. The competent authority shall after considering the representation in the light of the facts and circumstances of the case as well as the provision contained in this rule, pass appropriate order continuing the deemed suspension from, the date of release from custody or revoking or modifying it.

(4) Government servant shall be deemed to have been placed, or as the case may be, continued to be placed under suspension by an order of the authority competent to suspend under these rules, with effect from the date of his conviction if in the event of a conviction for an offence he is sentenced to a term of imprisonment exceeding forty-eight hours and is not forthwith dismissed or removed consequent to such conviction.

Explanation. - The period of forty-eight hours referred to in sub-rule will be computed from the commencement of the imprisonment after the conviction and for this purpose, intermittent periods of imprisonment, if any, shall be taken to account.

(5) Where a penalty of dismissal or removal from service imposed upon a Government servant is set aside in appeal or on review under these rules or under rules rescinded by these rules and the case is remitted for further inquiry or action or with any other directions :

(a) if he was under suspension immediately before the penalty was awarded to him, the order of his suspension shall, subject to any such directions as aforesaid, be deemed to have continued in force on and from the date of the original order of dismissal of removal;

(b) if he was not under suspension, he shall, if so directed by the appellate or reviewing authority, be deemed to have been placed under suspension by an order of the appointing authority on and from the date of the original order of dismissal or removal:

Provided that nothing in this sub-rule shall be construed as affecting the power of the disciplinary authority in a case where a penalty of dismissal or

removal in service imposed upon a Government servant is set aside in appeal or on review under these rules on grounds other than the merits of the allegations which, the said penalty was imposed but the case is remitted for further inquiry or action or with any other directions to pass an order of suspension pending further inquiry against him on those allegations so, however, that any such suspension shall not have retrospective effect.

(6) Where penalty of dismissal or removal from service imposed upon a Government servant is set aside or declared or rendered void in consequence of or by a decision of a Court of law and the appointing authority, on a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal or removal was originally imposed, whether the allegations remain in their original form or are clarified or their particulars better specified or any part thereof a minor nature omitted :

(a) if he was under suspension immediately before the penalty was awarded to him, the order of his suspension shall, subject to any direction of the appointing authority, ho deemed to have continued in force on and from the date of the original order of dismissal or removal;

(b) if he was not under such suspension, he shall, if so directed by the appointing authority, be deemed to have been placed under suspension by an order of the competent authority on and from the date of the original order of dismissal or removal.

(7) Where a Government servant is suspended or is deemed to have been suspended (whether in connection with any disciplinary proceeding or otherwise) and any other disciplinary proceeding is commenced against him during the continuance of that suspension, the authority competent to place him under suspension may, for reasons to be recorded by him in writing, direct that the Government servant shall continue to be under suspension till the termination of all or any of such proceedings.

(8) Any suspension ordered or deemed to have been ordered or to have continued in force under this rule shall continue to remain in force until it is modified or revoked by the competent authority.

(9) A Government servant placed under suspension or deemed to have been placed under suspension under this rule shall be entitled to subsistence allowance in accordance with the provisions of Fundamental Rule 53 of the Financial Hand Book, Volume 11, Parts II to IV."

13. On its perusal it is evident that the disciplinary authority could have recorded its satisfaction while passing the order of suspension against an employee of the State Government. On perusal of the impugned order it is evident that the order does not contain satisfaction to arrive at the conclusion that the charges levelled against the petitioner is sufficient to impose major penalty. I have also perused the paragraph 21 and 22 of the judgment in the case of ***Ashok Agarwal (supra)*** which is being quoted below :-

"21. The power of suspension should not be exercised in an arbitrary manner and without any reasonable ground or as vindictive misuse of power. Suspension should be made only in a case where there is a strong prima-facie case against the delinquent employee and the allegations involving moral turpitude, grave misconduct or indiscipline or refusal

to carry out the orders of superior authority are there, or there is a strong prima-facie case against him, if proved, would ordinarily result in reduction in rank, removal or dismissal from service. The authority should also take into account all the available material as to whether in a given case, it is advisable to allow the delinquent to continue to perform his duties in the office or his retention in office is likely to hamper or frustrate the inquiry.

22. In view of the above, the law on the issue can be summarised to the effect that suspension order can be passed by the competent authority considering the gravity of alleged misconduct, i.e. serious act of omission or commission and the nature of evidence available. It cannot be actuated by mala fide, arbitrariness, or for ulterior purpose. Effect on public interest due to the employee's continuation in office is also a relevant and determining factor. The fact of each case have to be taken into consideration as no formula of universal application can be laid down in this regard. However, suspension order should be passed only where there is a strong prima facie case against the delinquent, and if the charges stand proved, would ordinarily warrant imposition of major punishment i.e., removal or dismissal from service or reduction in rank etc."

14. On perusal of the aforesaid provisions, it is evident that the disciplinary authority would record reasons and satisfaction in the suspension order against an employee.

15. In view of the above, I am of the considered opinion that the respondents while passing the impugned order of suspension has failed to record reasons to arrive at conclusion of satisfaction that the charges are serious enough to impose major penalty.

16. In regard to the second submission of Shri Kalia, learned Senior Advocate that the order was passed without application of mind and on the dictate of the Election Commission and recommendation of the Commissioner I examined the material on record.

17. On examination of the letter of the election commission dated 12.5.2021 it is evident that it is a clear cut dictate to take decision to place the petitioner under suspension.

18. I have also perused the letter of the Commissioner dated 13.5.2021 who also by recording the story has recommended to pass the order of suspension against the petitioner, therefore, the submission advanced by the learned Senior Advocate appears to have some substance in the matter. In this regard the ingredients and finding returned is also relevant for consideration as has been laid down in the case of ***Dr. Arvind Kumar Ram (supra),*** para 15 of which is being quoted below :-

"15. Rule 4 (1) and the first proviso, in our opinion, should be read strictly and the appointing authority should exercise its discretion after calling for the record and after applying its mind. Otherwise the exercise of discretion would lead to arbitrariness and would result in injustice and unfairness to the Government Servant. The intention of the rule being that suspension should be an exception, it must be followed strictly. The first proviso being a restriction on exercise of power of the appointing authority, it requires the subordinate authority to make

recommendation an a fair and just consideration of material on record. Even if the subordinate authority fails to discharge its duty it does not absolve the appointing authority from discharging its obligation by calling for the records and consider objectively if the allegations were so serious that it would result in imposition of major penalty/ unless allegations were such that there could be no doubt about the applicability of the proviso. Even in such cases, the rule; of fair play must be read as requiring the appointing authority to record its own reasons. Otherwise it would be surrendering his discretion to the recommendation of the subordinate authority. Such action would be arbitrary and contrary to the letter and spirit of the rule."

19. On examination of the ratio laid down in para 15, it is evident that mere recommendation cannot be made a ground in passing the order. The competent authority who has been empowered to pass the order would apply its own mind.

20. On perusal of the recommendation of the Election Commission as well as the Commissioner Commercial Tax, it is evident that the respondent no.1 merely relied upon the orders of the Election Commission and Commissioner Commercial Tax and has proceeded to pass the impugned order.

21. Thus, in the opinion of the Court, the order impugned cannot be sustained.

22. I have also perused the statement of fact made in para 38 of the writ petition in regard to recording of finding that the charges are proved and the submission in this regard that without holding preliminary inquiry against an employee this satisfaction cannot be recorded.

23. The statement of fact made in para 38 of the writ petition has been replied in para 32 of the counter affidavit wherein on perusal it is reflected that there is no statement of fact that preliminary inquiry was conducted against the petitioner and thereafter the satisfaction was recorded. Therefore, the submission advanced by the learned Senior Advocate in this regard appears to be correct.

24. In view of the reasons assigned above, the impugned order cannot be sustained and it is hereby set-aside.

25. Writ petition succeeds and is allowed.

26. Respondents are directed to permit the petitioner to allow to work on the post of Joint Commissioner (SIB), Bulandshahar and pay him regular salary month by month as and when became due.

27. It is, however, made clear that the disciplinary proceedings pending against the petitioner shall go on and shall be completed within three months from the date of production of certified copy of this order.

(2021)08ILR A753
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.07.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 12394 of 2020

Sanjay Kumar Shukla & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Laltaprasad Misra, Rishabh Tripathi, Santosh Kumar Shukla

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra, Santosh Kumar Tripathi, Santosh Tripathi

A. Service Law – Challenge to seniority - No limitation has been prescribed for filing a petition u/Article 226 of the Constitution but one of the several rules of self imposed restraint evolved by the superior Courts is that the High Court will not entertain petitions filed after long lapse of time because that may adversely affect the settled/crystallized rights of the parties. If the writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits. (Para 13, 15)

In present case, a tentative seniority list was issued and objections were invited to the same from the Constables appointed in pursuance to the selection made. In pursuance thereof, the final seniority list was issued on 11.12.2017 and rights have settled between the parties but the petitioners did not challenge the same within time and now, after lapse of almost three years, the same has been challenged by way of present writ petition that too beyond prescribed limit to file civil suit. (Para 14)

Writ petition dismissed. (E-3)

Precedent followed:

1. Banda Development Auth., Banda Vs Moti Lal Agarwal & ors., (2011) 5 SCC 394 (Para 4, 13, 15)

2. H.S. Vankani & ors. Vs St. of Guj. & ors., (2010) 4 SCC 301 (Para 4)

3. Rajesh Kumar Singh & anr. Vs Rajeev Nain Upadhyay & 24 ors., Spl. Appl. No. 819 of 2019 (Para 4)

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

1. Heard Sri L.P. Misra, learned counsel for the petitioners, Sri Alok Sharma, learned ACSC for respondent Nos.1 to 6, Sri Gaurav Mehrotra, learned counsel for respondent No.692 and Sri Sudeep Seth, learned Senior Counsel assisted by Sri Santosh Tripathi, learned counsel for respondent Nos.717 & 816.

2. Learned counsel for respondent No.692 raised preliminary objection in regard to maintainability of writ petition on the ground of laches. He submitted that while issuing the tentative seniority list, objections were invited from the Constables appointed in pursuance to the selection made. The final seniority list was issued on 11.12.2017. The petitioners were not vigilant to know the order passed on their seniority list and they kept sleeping on the matter till filing of writ petition before this court.

3. His next submission is that the petitioners have not challenged the order passed on their objection to the seniority list dated 11.12.2017 and same was not challenged in the writ petition, therefore, his submission is that without challenging the order of rejection of the objection filed in regard to seniority list, the writ petition cannot be maintained.

4. On the point of rejection of objection to the seniority list as well as laches in challenging the final seniority list in the writ petition, he placed reliance upon following judgments:

a) Banda Development Authority, Banda Vs. Moti Lal Agarwal and others; (2011) 5 SCC 394, paragraph 17.

b) H.S. Vankani and others Vs. State of Gujarat and others; (2010) 4 SCC 301, paragraph 38 & 39.

c) Rajesh Kumar Singh and another Vs. Rajeev Nain Upadhyay and 24 others; Special Appeal No.819 of 2019, paragraph 24, 25 & 33.

5. On the other hand, learned counsel for the petitioners invited attention of this Court on paragraph-31&32 of the writ petition and on the said basis he submitted that at no point of time the final seniority list as well as the order of rejection of petitioner's objection was communicated to petitioners.

6. He further submitted that the petitioners came to know about the final seniority list when juniors to them were granted promotion from the post Sub Inspector to Inspector and immediately thereafter, the petitioners filed the present writ petition before this Court, therefore, there is no delay or laches on the part of petitioners in filing the writ petition.

7. His next submission is that the objection raised on behalf of the respondents is not acceptable in the eyes of law. The petitioners have approached to this court within time from the date of knowledge of final seniority list, thus, the writ petition cannot be thrown out on the ground of laches.

8. He also invited attention of this Court on paragraph-5 of counter affidavit filed by respondent Nos.5&6, wherein the statement of fact made in the writ petition has not been specifically denied.

9. He further submitted that Writ Petition No.14319 (S/S) of 2021 is lying pending consideration in regard to same seniority list in as much as in regard to same selection.

10. In reply to aforesaid submission made by learned counsel for the petitioners, Sri Gaurav Mehrotra, learned counsel for the respondent No.692 submitted that he is counsel for the petitioner in the writ petition pointed out by learned counsel for the petitioners. He submitted that in the said writ petition, there is no challenge in regard to seniority of same selection.

11. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

12. To resolve the controversy involved in the present writ petition, the judgments relied upon by learned counsel for respondent No.692 are being quoted below:

a) Banda Development Authority, Banda (Supra):

"17. It is true that no limitation has been prescribed for filing a petition under Article 226 of the Constitution but one of the several rules of self imposed restraint evolved by the superior courts is that the High Court will not entertain petitions filed after long lapse of time because that may adversely affect the settled/crystallized rights of the parties. If the writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits."

b) H.S. Vankani and others (Supra):

"38. Seniority is a civil right which has an important and vital role to play in one's service career. Future

promotion of a Government servant depends either on strict seniority or on the basis of seniority-cum-merit or merit-cum-seniority etc. Seniority once settled is decisive in the upward march in one's chosen work or calling and gives certainty and assurance and boosts the morale to do quality work. It instills confidence, spreads harmony and commands respect among colleagues which is a paramount factor for good and sound administration. If the settled seniority at the instance of one's junior in service is unsettled, it may generate bitterness, resentment, hostility among the Government servants and the enthusiasm to do quality work might be lost. Such a situation may drive the parties to approach the administration for resolution of that acrimonious and poignant situation, which may consume lot of time and energy. The decision either way may drive the parties to litigative wilderness to the advantage of legal professionals both private and Government, driving the parties to acute penury. It is well known that salary they earn, may not match the litigation expenses and professional fees and may at times drive the parties to other sources of money making, including corruption. Public money is also being spent by the Government to defend their otherwise untenable stand. Further it also consumes lot of judicial time from the lowest court to the highest resulting in constant bitterness among parties at the cost of sound administration affecting public interest.

39. Courts are repeating the ratio that the seniority once settled, shall not be unsettled but the men in power often violate that ratio for extraneous reasons, which, at times calls for departmental action. Legal principles have been reiterated by this Court in Union of India and another v. S.K. Goel and others (2007) 14 SCC 641, T.R. Kapoor v. State of Haryana (1989) 4 SCC 71, Bimlesh Tanwar v. State of Haryana, (2003) 5 SCC 604. In view of the settled law the decisions cited by the appellants in G.P. Doval's case (supra), Prabhakar and Others case, G. Deendayalan, R.S. Ajara are not applicable to the facts of the case."

c) Rajesh Kumar Singh and another (Supra):

"24. The exercise of creation of the fresh seniority list in the year 2009, was premised on the finality of the seniority list of 2006. The said communication dated 29.12.2009, clearly records that the final seniority list of the Junior Engineers (Minor Irrigation), was duly published on 05.09.2006. In this manner, the communication of date, while inviting objections to the tentative seniority list of 2009, precluded the officials from challenging the seniority list of 2006, and restricted the scope of the objections only to the proposed seniority list of 2009. Five petitioners, namely, petitioner no.2, petitioner no.3, petitioner no.6, petitioner no.9, and petitioner no.11, submitted their objections, in response to the communication dated 29.12.2009.

25. It is noteworthy that even at this stage, the said petitioners did not object to the seniority list of 2006. The said objections were rejected by orders supported with reasons. Thereafter, the final seniority list was drawn up on 05.03.2010.

33. We, therefore, find no illegality in the judgment of the High court in quashing the order dated 29th September, 1993 and upholding the seniority of the candidates of 1980-81 batch over the candidates of 1979-81 batch."

13. On perusal of judgment in the case of **Banda Development Authority,**

Banda (Supra), it is evident that no limitation has been prescribed for filing a petition under Article 226 of the Constitution but one of the several rules of self imposed restraint evolved by the superior courts is that the High Court will not entertain petitions filed after long lapse of time because that may adversely affect the settled/crystallized rights of the parties. If the writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits.

14. In the case in hand, a tentative seniority list was issued and objections were invited to the same from the Constables appointed in pursuance to the selection made. In pursuance thereof, the final seniority list was issued on 11.12.2017 and rights have settled between the parties but the petitioners did not challenge the same within time and now, after lapse of almost three years, the same has been challenged by way of present writ petition that too beyond prescribed limit to file civil suit.

15. In view of above, the submissions advanced by learned counsel for respondent No.692 in the light of judgment in the case of **Banda Development Authority, Banda (Supra)** appears to have substance in the matter and the ratio of the judgment in the case of **Banda Development Authority, Banda (Supra)** is fully applicable to the facts and circumstances of the case.

16. In view of reasons assigned above, the writ petition is **dismissed** on the ground of laches.

(2021)08ILR A757
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 13222 of 2018

Kuldeep Kumar Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ajay Kishor Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – Payment of back wages and other benefits – When an order of termination by way of punishment i.e dismissal or removal is set aside being in violation of principle of natural justice, such an order of punishment renders in nullity and legal consequence is that concerned employee was never terminated by way of removal or dismissal and has already continued in service. It is only to avoid any administrative doubt that a direction of reinstatement is normally given but the nature of such an order is nothing but a declaration that termination of service by way of dismissal/removal is a nullity and the natural consequence is that incumbent concerned is deemed to continue in service as for he was never terminated. (Para 4)

The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The reinstatement of such an employee, entitles him to claim full back wages. (Para 4)

Impugned order was set aside being arbitrary and violative of Article 14 of Constitution and Hon'ble Court ordered for payment of full back wages with all consequential benefits including seniority etc. (Para 5, 6)

Writ petition allowed. (E-3)

Precedent followed:

1. U.P.S.R.T.C. & ors. Vs Presiding Officer Labour Court, Faizabad & anr., 2019 (5) AWC 4287 (LB) (Para 4)

Present petition assails order dated 25.11.2017.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ajay Kishor Pandey, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

By means of this petition, the petitioner has prayed following reliefs:-

"i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 25/11/2017 passed by Opposite party no.3.

ii) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to pay all back wages, increment with 12% interest and the seniority maintained at the time of joining."

2. Learned counsel for the petitioner has contended that since the impugned order of dismissal was illegal and arbitrary, therefore, it was quashed by this Court vide judgment and order dated 17.11.2016 passed in Service Single No.9114 of 2016; Kuldeep Kumar Tripathi Vs. State of U.P. and others. Sri Pandey has further submitted that the judgment and order dated 17.11.2016 has not been assailed by the State Government by filing appeal before this Court or before the Hon'ble Supreme Court, therefore, the judgment and order dated 17.11.2016 has attained finality. Learned counsel for the petitioner has further submitted that even the reason indicated in the impugned order, which was quashed by this Court, has also lost its efficacy inasmuch as in the criminal case indicated in the impugned order, the petitioner has already been acquitted.

3. Learned Standing Counsel has, however, tried to defend the impugned order dated 25.11.2017 but on being confronted on the point that when the dismissal order has already been quashed by this Court treating the same as illegal and arbitrary, as to how the petitioner may be denied the benefit of arrears of salary w.e.f. the date of dismissal to his reinstatement, learned Standing Counsel could not explain the said anomaly of the impugned order dated 25.11.2017.

4. Having heard learned counsel for the parties and perused the material available on record, I am of the considered opinion that if the punishment order of dismissal has already been quashed by this Court and the order of this Court has attained finality, then it shall be presumed that the punishment order has lost its efficacy and it shall be treated as if it was not issued against the petitioner. Further, if the punishment order was declared non-est in the eyes of law, then the benefit of salary from the date of dismissal till the date of reinstatement may not be denied. This Court in re; U.P.S.R.T.C. and others Vs. Presiding Officer, Labour Court, Faizabad and another, 2019 (5) AWC 4287 (LB), has decided more or less the identical controversy holding that the employee whose punishment order has been set aside

shall be entitled for all benefits. Paragraphs 20 to 24 of the aforesaid judgment are being reproduced herein below:-

"20. When an order of termination by way of punishment i.e dismissal or removal is set aside being in violation of principle of natural justice, such an order of punishment renders in nullity and legal consequence is that concerned employee was never terminated by way of removal or dismissal and has already continued in service. That being so, question of direction of reinstatement in fact is a misnomer. Since such a person in law continued in service without any interruption as if no order of termination was ever passed. It is only to avoid any administrative doubt that a direction of reinstatement is normally given but the nature of such an order is nothing but a declaration that termination of service by way of dismissal or removal is a nullity and the natural consequence is that incumbent concerned is deemed to continue in service as for he was never terminated. That being so, it is normal rule that incumbent is entitle for all consequential benefits as for he was never terminated. Consequently when an order of termination is set aside on the ground that it was not legally passed following the procedure laid down in law, the concerned employee is not supposed to be made to suffer for something for which he was not responsible inasmuch an illegal order obviously could have resulted due to negligence or illegality committed by concerned authorities i.e Enquiry Officer or Disciplinary Authority and above and for their fault employee concerned is not to be made to suffer otherwise it will amount to victimize a person for something for which he was not at fault even if order of termination is found to be illegal and void ab initio.

21. In Pawan Kumar Agrawala Vs General Manager-II and Appointing Authority, State Bank of India and others, 2015 (13) SCALE 45, Court having considered various earlier authorities on the subject said in para 38:-

"38. The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. ...

iv) The cases in which the Labour Court/Industrial Tribunal ... finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have

the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the Court or Tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power Under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-a-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (1979) 2 SCC 80.

vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (2007) 2 SCC 433 that on reinstatement the employee/workman cannot claim continuity of service as matter of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman." (emphasis added)

22. Thereafter in the penultimate para 20 in Pawan Kumar Agrawala (supra), Court held that findings of Enquiry Officer on the charges are vitiated on account of non compliance of the statutory Rules and the principles of natural justice. In the absence of evidence, order of reinstatement without full back wages is unjustified in law. Court after setting aside judgment of High Court, awarded reinstatement with full back wages for the period from date of removal till the date employee attained age of superannuation on the basis of periodical revisions of salary but after deducting amount of pension already paid from back wages.

23. In K.S. Ravindran Vs Branch Manager, New India Assurance Company Ltd., 2015 (7) SCC 222, Court referred to legal principles laid down in its earlier decision in Mohan Lal Vs Bharat Electronics Ltd., 1981 (3) SCC 225 and quoted the following observation:

"But there is a catena of decisions which rule that where the termination is illegal especially where there is an ineffective order of retrenchment, there is neither termination nor cessation of service and a declaration follows that the workman concerned continues to be in service with all consequential benefits." (emphasis added)

24. Earlier, in Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, 2013 (10) SCC 324, Court said;

"The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages." (emphasis added)

5. Considering the entirety of the issue and the decision of this Court in re; U.P.S.R.T.C. (supra), I find that the impugned order dated 25.11.2017 passed by opposite party no.3 is not sustainable in law, therefore, the same is liable to be set aside being arbitrary and violative of Article 14 of the Constitution of India.

6. Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 25.11.2017 passed by opposite party no.3. A writ in the nature of mandamus is issued commanding the opposite parties to make payment of full back wages to the petitioner with all consequential benefits including seniority etc., with promptness, preferably within a period of two months from the date of receipt of certified copy of this order, failing which the petitioner shall be entitled for the interest at the rate of 8% from the date the dues accrued till the date of its actual payment.

7. No order as to costs.

(2021)08ILR A761
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.07.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 14891 of 2020

Dr. Ratna Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Laltaprasad Misra, Prafulla Tiwari

Counsel for the Respondents:
C.S.C., Sudeep Kumar

A. Service Law – Education - Absorption - U.P. State Universities Act, 1973; U.P. High Education Service Commission Act, 1980: Sections 12, 13 and 31-E (1)- U.P. High Education Services Commission (Third Amendment) Act, 2006 – The principles of natural justice are to be followed where valuable right of the employee is going to be affected. In the present case, taking into consideration the requirement as prescribed under absorption Rules the petitioner was absorbed on the post of Lecturer in Education and thereafter, the order impugned was passed without giving her notice or opportunity of hearing. Thus, the order being violative of principles of natural justice cannot be sustained. (Para 11)

B. Absorption on the post in Education cannot be cancelled on the ground that the petitioner did not have requisite qualification at the time of initial appointment. The petitioner was selected by the selection committee on the post of Part-time Teacher and continued to discharge her duties on the said post and was paid salary from the State Exchequer. Before the enforcement of Rules, she acquired requisite qualification and after due consideration of the claim of the petitioner she was absorbed in service as Lecturer in Education, therefore after lapse of almost 22 years the appointment on the post of Lecturer cannot be held to be illegal. (Para 12, 18, 19)

It is the case of the petitioner that as per the amended provisions incorporated under the Act, the petitioner was fulfilling all eligibility criteria which was required for the grant of absorption. The petitioner was M.A. with more than 55% marks and Ph.D. in the concerned subject obtained in 2001, thus the petitioner was eligible and qualified for absorption on the date when his claim for absorption was considered by the respondents. She was absorbed vide order dated 29.05.2017 which has been cancelled vide the impugned order dated 20.08.2020 on the ground that at the time of initial appointment the petitioner did not have requisite qualification. (Para 13)

C. Petitioner has been working on the post of Lecturer since 1998 and at no point of time objection was raised by the respondents w.r.t. requisite qualification, therefore the objection taken at this juncture is not permissible in the eyes of law. (Para 15)

Writ petition allowed. (E-3)

Precedent followed:

1. M.S. Mudhol & anr. Vs S.D. Halegkar & ors., (1993) 3 SCC 591 (Para 16, 18)

2. Mrs. Rekha Chaturvedi Vs University of Rajasthan & ors., (1993) 2 BLJR 854 (Para 17)

Present petition assails order dated 20.08.2020, whereby the order of absorption on the post of Lecturer in Education has been cancelled by the respondents.

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

1. Heard Dr. L.P. Misra, learned counsel for the petitioner, Shri Satrughan Chaudhary, learned Additional Chief Standing Counsel appearing for respondent nos.1,2 and 3 and Shri Sudeep Kumar, learned counsel for the respondent no.4.

2. By means of the present writ petition, the petitioner is challenging an order dated 20.08.2020 (Annexure no.1 to the writ petition) whereby the order of absorption on the post of Lecturer in Education have been cancelled by the respondents with further prayer for issuance of direction to the respondents to treat the petitioner as absorbed Lecturer and pay her salary as was being paid prior to the impugned order.

3. Facts of the case are that Navyug Kanya Post Graduate Maha Vidyalaya, Rajendra Nagar, Lucknow (hereinafter referred to as 'College') is a post of Graduate Degree College affiliated to Lucknow University. The service conditions of the teachers of the College are governed in accordance with the provisions contained under the U.P. State Universities Act, 1973, First Statute of Lucknow University made under the said Act and the Higher Education Service Commission Act, 1980 together with the Government Orders issued from time to time under the aforesaid enactments. In the year 1980, the State Government enacted as Act known as U.P. Higher Education Service Commission Act (hereinafter referred to as Act, 1980) and the object to enact the said Act was to maintain high standard of education in the affiliating private degree and post graduate colleges in the entire State of Uttar Pradesh and affiliated with the different Universities.

The State Government vide Government Order dated 7.4.1998 authorized the Committee of Management of affiliated Degree and Post Graduate Colleges to appoint ad-hoc teachers subject to certain conditions laid down in the Government Order and one of the condition mentioned in the Government Orders was that the "appointment shall be till 30th June, 1999" or till "duly selected candidates by the Higher Education Service Commission joins the post whichever is earlier". Another condition mentioned in the Government Order was that a fresh selection shall be made before expiry of the session.

Pursuant to the aforesaid Government Order issued by the State Government, the Committee of Management of the College advertised the post of Lecturer teaching B.Ed. Classes and an order dated 17.09.1998 was issued by the Director of Higher Education, Allahabad approving the petitioner's appointment as such on a fixed honorarium of Rs.5,000/- per month. Pursuant to the approval order dated 17.9.1998, an appointment order dated 22.09.1998 was issued to the petitioner who joined as teacher for imparting education in B.Ed. On the same date i.e. 22.09.1998.

The petitioner being aggrieved by the condition mentioned in the Government Order dated 07.4.1998 that her appointment will continue till 30th June, 1999, preferred Writ Petition No.1163 (SB) of 1999 titled 'Ratna Shukla v. State of U.P. and others' and the ssame was allowed by this Court vide judgment and order dated 7.4.2000 thereby holding that the petitioner be allowed to continue till the time appropriate regularly selected incumbents joins the respective post. Pursuant to the judgment and order dated 07.04.2000 passed by this Court, an appointment letter dated 17.4.2000 was issued in favour of the petitioner wherein it was mentioned that the petitioner shall continue to work till duly selected candidate by the U.P. Higher Education Service Commission joins the post. The petitioner completed her Doctorate of Philosophy (Ph.D.) in the year 2001.

The State Government in order to absorb the teacher on honorarium who were working continuously in grant-in-aid college for a minimum period of three academic session till the date of commencement of the Uttar Pradesh Higher Education Services Commission (Third Amendment) Act, 2006 promulgated the Act known as Uttar Pradesh Higher Education Services Commission (Third Amendment) Act, 2006 (hereinafter referred to as Act, 2006). Undisputedly, the

petitioner was working till the date of commencement of the aforesaid Act, 2006 and she also completed minimum period of three academic session w.e.f. 2003 to 2006 and she was conferred Ph.D. in the year 2001. A bare perusal of Section 31-E(1) reveals that the State Government while promulgating the said Act wrongly mentioned the word "cannot be filled", inasmuch as there could not be any vacancy which could not be filed under Sections 12 and 13 of the U.P. Higher Education Service Commission Act, 1980.

The State Legislature in order to rectify the Legislative oversight enacted the Uttar Pradesh (Amendment) Act, 2014 by means of which the words "cannot be filled" occurring in Section 31-E(1) of the Uttar Pradesh Higher Education Services Commission Act, 1980 were substituted by the words "could not be filled". The petitioner was absorbed vide order dated 18.05.2017 passed by the respondent no.2 against the post lying vacant in Khun Khun Ji Girls Post Graduate College, Lucknow in furtherence of recommendations made by the statutory committee under Section 31-E of the Act, 2006. Pursuant to the order of absorption being passed by the respondent no.2, the Manager of Khun Khun Ji Girls Post Graduate College issued the appointment letter dated 29.05.2017 directing the petitioner to give joining in the College within 15 days on the post of Lecturer in B.Ed. Department. The petitioner gave her joining on the post of Lecturer in B.Ed. Department of Khun Khun Ji Girls Post Graduate College, Lucknow on 31.5.2017 and since then she is continuously teaching.

Now after a lapse of about more than 3 years as regular teacher and after putting of more than 22 years of total service, respondent no.2 has passed the impugned order dated 20.08.2020 cancelling the order of absorption dated 18.05.2017. A bare perusal of the impugned order reveals that the impugned exercise has been undertaken on the basis of recommendation made by a Committee constituted for the purpose of reexamining the educational qualifications of the absorbed teachers but at no point of time the said committee gave any opportunity of hearing to the petitioner and also did not issue any show cause notice to the petitioner to have her say in the matter. The impugned exercise has been undertaken on the ground that the petitioner did not possess the requisite educational qualification of Ph.D./NET/SLET prescribed by the U.G.C./ State Government at the time of her initial appointment which apart from being illegal and arbitrary is also against the prescriptions contained in Section 31-E(1) of the U.P. Higher Education Service Commission Act, 1980 in terms of which the petitioner was absorbed.

4. Submission of Dr. L.P. Misra, learned counsel for the petitioner is that prior to passing the impugned order, no notice nor opportunity of hearing was provided to the petitioner, thus his submission is that the order is in violation of principles of natural justice. His next submission is that although at the time of selection, the petitioner was not having PH.D. degree but under the amendment incorporated under the Statute Book by making amendment in U.P. Higher Education Services Commission Act by adding Section 31-E(1) it was provided that those teachers who are working on honorarium basis if they are having requisite qualification on the date of amendment, their candidature shall be considered for absorption on the post of Lecturer.

5. Learned counsel for the petitioner next submits that the date of amendment is 28th December, 2006 prescribing cut of date for the requisite eligibility criteria which was required to be fulfilled on the date of consideration of claim for absorption. It is the case of the petitioner that at the time of consideration of claim of the petitioner, she was fulfilling the requisite qualification for absorption, therefore, cancelling the absorption on the ground that the petitioner was not having requisite qualification at the time of initial appointment on honorarium basis is per se illegal and the order cannot be sustained.

6. Learned counsel next submits that in the amendment word 'can' was used, therefore no absorption/ regularization could not have been made by the respondents and it was subsequently amended and in place of word 'can', word 'could' was added, therefore, absorption proceeding was initiated and absorption was made.

7. Learned counsel next submits that the petitioner has been discharging her duties since 22.9.1998 on honorarium basis and subsequently, her appointment has been regularized by absorbing her on the post of Lecturer in Education. Therefore, after such a long delay there was no occasion on the part of the respondents to cancel absorption on the ground that the petitioner was not having requisite qualification at the time of initial appointment. In this view of the matter, the order is bad in law and cannot be sustained.

8. On the other hand, Shri Satrughan Chaundary, learned Additional Chief Standing Counsel submits that in paragraphs 4 and 6 of the counter affidavit, objection has been taken in support of the impugned order that the petitioner was having no requisite qualification, therefore, she was not entitled to be absorbed on the post of Lecturer in Education. Thus, his submission is that the order under challenge is just and valid and does not suffer from infirmity or illegality.

9. Shri Sudeep Kumar, learned counsel for the respondent-Committee of Management submits that the appointment of the petitioner was made by following the selection process on the post of Lecturer on honorarium basis. The Director of Higher Education approved selection and appointment of the petitioner and thereafter, he joined in the institution and started discharging her duties with full satisfaction and was paid salary accordingly.

10. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

11. In regard to first submission of Dr. L.P. Misra, learned counsel for the petitioner that the order has been passed in violation of principles of natural justice, I have perused the impugned order. On its perusal, the order does not disclose that at any point of time the petitioner was issued notice prior to passing the impugned order. Therefore, the submission of learned counsel that the order is in violation of principles of natural justice has substance. Accordingly, this Court holds that the order has been passed in utter disregard of principles of natural justice. The principles of natural justice is to be followed where valuable right of the employee is going to be effected. Here in the present case, taking into consideration the requirement as prescribed under absorption Rules the petitioner was absorbed on the post of

Lecturer in Education and thereafter, the order impugned was passed without giving her notice or opportunity of hearing. Thus, the order being violative of principle of natural justice cannot be sustained.

12. In regard to second submission of learned counsel for the petitioner that the appointment of the petitioner was made by following procedure prescribed under law on the post of Lecturer in Education on honorarium basis which was duly approved by the Director of Higher Education and thereafter, approval was granted by the Director of Higher Education and in pursuance thereof, the petitioner continued to discharge her duties for long spell of time and the family members of the petitioner were dependent upon the income of the petitioner, the appointment/ absorption after such a long delay cannot be termed to be illegal on the count that the petitioner was not having requisite qualification at the time of his initial appointment. In the provision of absorption, the required qualification was as under:-

"31-E(1) Subject to the provisions contained in Sections 12 and 13, if any vacancy exists, which cannot be filled under the provisions of the said sections, a teacher on honorarium shall be absorbed in the manner prescribed under sub-Section (2), who is working in grant-in-aid college, possessing educational qualifications determined by the State Government, receiving honorarium thereby working for a minimum period of three academic sessions and has been working till the date of commencement of the Uttar Pradesh Higher Education Services Commission (Third Amendment) Act, 2006.

(2) Where any substantive vacancy in the post of a teacher in a grant-in-aid college is to be filled by direct recruitment, such post shall, at the instance of the Director,be offered by the management to teacher on honorarium referred to in sub-section (1).

(3) Where any teacher on honorarium who has been offered appointment in accordance with the provisions of sub-section (2) fails to join the post within the time allowed, which shall not be less than fiften days, his further claim shall cease automatically."

13. It is the case of the petitioner that as per the amended provisions incorporated under the Act, the petitioner was fulfilling all eligibility criteria which was required for the grant of absorption. The petitioner was M.A. with more than 55 % marks and Ph.D. in the concerned subject obtained in 2001, thus the petitioner was eligible and qualified for absorption on the date when his claim for absorption was considered by the respondents. Therefore, on the ground that the petitioner was not having requisite qualification at the time of initial appointment cannot be made a ground for cancellation of her absorption on the post in Education. The submission advanced by the learned counsel for petitioner in this regard is accepted and the order impugned being non-consideration of the aforesaid aspect of the matter is illegal and bad in the eyes of law.

14. The submission of learned Additional Chief Standing Counsel that the order of absorption has been cancelled on the ground that the petitioner was not having requisite qualification at the time of initial appointment is not accepted, once her absorption was made in accordance with the provisions contained under the amended Act on which date the petitioner was eligible and qualified.

15. It is relevant to point out that since 1998 the petitioner has been working on the post of Lecturer and at no point of time objection has been raised by the respondents in regard to required qualification on the basis of which her absorption has been cancelled, therefore the objection taken at this juncture is not permissible in the eyes of law.

16. The Hon'ble Supreme Court in the case of **M.S. Mudhol and another v. S.D. Halegkar and others** reported in **(1993)3 SCC 591** while dealing with the matter of an employee, who was holding the post of Principal from year 1981 and at the first time his appointment was challenged in year 1990 i.e. after a lapse of about nine years, has held as under:

"5. As regards the teaching experience, the 1st respondent's contention is that he had worked as a teacher for 9 years in a High School and Higher Secondary School which had upto 11 standards. According to him, he also worked as a Lecturer in History. His further contention is that the post of the School Inspector in Karnataka where he was working as such and that of the teacher were interchangeable. Hence the selection committee had taken into consideration his experience in both the capacities. These facts are not controverted before us and in any case today, he has the requisite experience of teaching as he has been teaching the 11th and the 12th class continuously for 12 years now, since 1981. It can, therefore, be said that at least as on date when his removal from the post of Principal is sought, he cannot be said to be disqualified on account of the lack of required teaching experience.

6. Since we find that it was the default on the part of the 2nd respondent, Director of Education in illegally approving the appointment of the first respondent in 1981 although he did not have the requisite academic qualifications as a result of which the 1st respondent has continued to hold the said post for the last 12 years now, it would be inadvisable to disturb him from the said post at this late stage particularly when he was not at fault when his selection was made. There is nothing on record to show that he had at that time projected his qualifications other than what he possessed. If, therefore, inspite of placing all his cards before the selection committee, the selection committee for some reason or the other had thought it fit to choose him for the post and the 2nd respondent had chosen to acquiesce in the appointment, it would be inequities to make him suffer for the same now. Illegality, if any, was committed by the selection committee and the 2nd respondent. They are alone to be blamed for the same.

7. Whatever may be the reasons which were responsible for the non-discovery of the want of qualifications of the 1st respondent for a long time, the fact remains that the Court was moved in the matter after a long lapse of about 9 years. The post of the Principal in a private school though aided, is not of such sensitive public importance that the Court should find itself impelled to interfere with the appointment by a writ of quo warranto even assuming that such a writ is maintainable. This is particularly so when the incumbent has been discharging his functions continuously for over a long period of 9 years when the court was moved and today about 13 years have elapsed. The infraction of the statutory rule regarding the qualifications of the incumbent pointed out in the present case is also not that grave taking into

consideration all other relevant facts. In the circumstances, we deem it unnecessary to go into the question as to whether a writ of quo warranto would lie in the present case or not, and further whether mere laches would disentitle the petitioners to such a writ.

8. However, we must make it clear that in the present case the 2nd respondent, Director of Education had committed a clear error of law in approving the academic qualifications of the 1st respondent when he was not so qualified. As pointed out above, the interpretation placed by him and the other respondents on the requisite educational qualifications was not correct and the appointments made on the basis of such misinterpretation are liable to be quashed as being illegal. Let this be noted for future guidance."

17. The similar view has been taken in the case of **Mrs. Rekha Chaturvedi v. University of Rajasthan and others reported in (1993)2 BLJR 854,** wherein the University invited applications vide advertisement dated 12.10.1983 for appointment on ten posts of Assistant Professors (Lecturers). The last date for submitting the application was 14.11.1983. Out of 112 applications received, the scrutiny committee of the University recommended 106 candidates on 25.04.1984 for being interviewed. The remaining 6 candidates were found un-eligible for the post. Out of 106 candidates so recommended, only 65 candidates appeared in the interview, out of which the scrutiny committee selected 8 candidates. Out of 8 candidates, 2 candidates were earmarked for reserved category post. Taking into consideration the dispute and the provisions contained under the Act of the University and statute framed thereunder, the Court has held as under:

"12. The contention that the required qualifications of the candidates should be examined with reference to the date of selection and not with reference to the last date for making applications has only to be stated to be rejected. The date of selection is invariably uncertain. In the absence of knowledge of such date the candidates who apply for the posts would be unable to state whether they are qualified for the posts in question or not, if they are yet to acquire the qualifications. Unless the advertisement mentions a fixed date with reference to which the qualifications are to be judged, whether the said date is of selection or otherwise, it would not be possible for the candidates who do not possess the requisite qualifications in praesenti even to make applications for the posts. The uncertainty of the date may also lead to a contrary consequence, viz., even those candidates who do not have the qualifications in praesenti and are likely to acquire them at an uncertain future date, may apply for the posts thus swelling the number of applications. But a still worse consequence may follow, in that it may leave open a scope for malpractices. The date of selection may be so fixed or manipulated as to entertain some applicants and reject others, arbitrarily. Hence, in the absence of a fixed date indicated in the advertisement/notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications. We have, therefore, no hesitation in holding that when the selection Committee in the present case, as argued by Shri Manoj Swarup, took into consideration the requisite qualifications as on the date of selection rather than on the last date of

preferring applications, it acted with patent illegality, and on this ground itself the selections in question are liable to be quashed. Reference in this connection may also be made to two recent decisions of this Court in A.P. Public Service Commission, Hyderabad & Anr. v. B. Sarat Chandra & Ors. (1990) 4 SLR 235 and The District Collector & Chairman, Vizianagaram (Social Welfare Residential School Society) Vidanagaram & Anr. v. M. Tripura Sundari Devi (1990) 4 SLR 237.

13. However, for the reasons which follow, we are not inclined to set aside the selections in spite of the said illegality. The selected candidates have been working in the respective posts since February 1985. We are now in January 1993. Almost eight years have elapsed. There is also no record before us to show as to how the Selection Committee had proceeded to weigh the respective merits of the candidates and to relax the minimum qualifications in favour of some in exercise of the discretionary powers vested in it under the University Ordinance. If the considerations which weighed with the Committee in relaxing the requisite qualifications were valid, 'it would result in injustice to those who have been selected. We, however, feel it necessary to emphasise and bring to the notice of the University that the illegal practices in the selection of candidates which have come to light and which seem to be followed usually at its end must stop forthwith. it is for this purpose that we lay down the following guidelines for the future selection process:

(a) The University must note that the qualifications it advertises for the posts should not be at variance with those prescribed by its ordinance/Statutes.

(b) The candidates selected must be qualified as on the last date for making applications for the posts in question, or on the date to be specifically mentioned in the advertisement/notification for the purpose. The qualifications acquired by the candidates after the said date should not be taken into consideration, as that would be arbitrary and result in discrimination. It must be remembered that when the advertisement/notification represents that the candidates must have the qualifications in question, with reference to the last date for making the applications or with reference to the specific date mentioned for the purpose, those who do not have such qualifications do not apply for the posts even though they are likely to acquire such qualifications and do acquire them after the said date. In the circumstances, many who would otherwise be entitled to be considered and may even be better then those who apply, can have a legitimate grievance since they are left out of consideration.

(c). When the University or its Selection Committee relaxes the minimum required qualifications, unless it is specifically stated in the advertisement/notification both that the qualifications will be relaxed and also the conditions on which they will be relaxed, the relaxation will be illegal.

(d) The University/Selection Committee must mention in its proceedings of selection the reasons for making relaxations, if any, in respect of each of the candidates in whose favour relaxation is made.

(e) The minutes of the meetings of the Selection Committee should be preserved for a sufficiently long time, and if the selection process is challenged until the challenge is finally disposed of. An adverse inference is liable to be drawn if the minutes are destroyed or a plea is taken that they are not available.

14. Although, therefore, for reasons stated above, we deem it

inadvisable to interfere in the selections made in the present case, we direct that the University and its Selection Committee should observe the above norms in all future selections."

18. In the case of ***M.S. Mudhol (Supra),*** at the time of initial appointment the 1st respondent was lacking requisite qualification for appointment. He continued to discharge his duty and obtained sufficient experience and qualification required for the appointment on the post of Principal. Taking into consideration the default on the part of the respondent-Director of Education in approving the appointment of the 1st respondent to the appeal, the Supreme Court held that due to illegal order of approval passed by the Director of Education, the teacher continued to hold the post of twelve years, therefore it would be inadvisable to disturb him from the said post at this late stage particularly when he was not at fault when his selection was made. It was also held that it is not projected that he produced otherwise qualification as he possessed. The selection committee for the some reason or the other had thought it fit to choose him for the post and ultimately appointed and thereafter, he continued to discharge his duty. Therefore, Hon'ble Supreme Court while holding that it is the Director of Education who had committed error in approving the academic qualification of the teacher, although he was not so qualified and acquired qualification while teaching in the institution, dismissed the appeal.

Here, in the present case pursuant to the selection proceeding the petitioner applied for appointment on the post of Part-time Teacher and disclosed the qualification which he was having and appointment was made thereafter. She continued to discharge her duties on the post of Lecturer and in the meantime she acquired Ph.D. degree which is the sufficient qualification for absorption prior to enforcement of the U.P. Higher Education Services Commissioner (Third Amendment) Act, 2006. She was absorbed vide order dated 29.5.2017 which has been cancelled vide the impugned order dated 20.8.2020 on the ground that at the time of initial appointment the petitioner was not having requisite qualification. In view of the fact that the petitioner continued to hold the post of Lecturer since long and was subsequently acquired the requisite qualification of Ph.D., her claim for absorption was considered in accordance with U.P. Higher Education Services Commissioner (Third Amendment) Act, 2006 and she continued to discharge her duties on the said post. In view of the above, the judgment rendered in the Case of **M.S. Mudhol (supra)** is fully applicable to the case of the present facts and circumstances of the case.

19. In regard to case of **Mrs. Rekha Chaturvedi (supra),** she was granted appointment in pursuance to an advertisement issued on 12.10.1983 on the post of Assistant Professor who was not having requisite qualification. The Hon'ble Supreme Court refused to set aside the selection in spite of the said illegality considering the fact that the selected candidates have been working in the respect post since February, 1985 and the matter came for consideration in January, 1993 at least 8 years were elapsed. It has further been recorded that there was no record before the Court to show as to how the selection committee had proceeded to weigh the respective merits of the candidates and to relax the minimum qualifications in favour of some in exercise

of discretionary powers vested in it under the University Ordinance. If the considerations which weighed with the Committee in relaxing the requisite qualifications were valid, it would result injustice to those who have been selected and thereafter held that it is necessary to emphasis and bring to the notice of the University that the illegal practices in the selection of candidates which have come to light and which seem to be followed and ultimately refused to interfere in the selection made by the selection committee.

The ratio of judgment in the case of **Mrs. Rekha Chaturvedi (supra)** is also fully applicable to the present facts and circumstances of the case. The petitioner was selected by the selection committee on the post of Part-time Teacher and continued to discharge her duties on the said post and was paid salary from the State Exchequer. Before the enforcement of Rules, he acquired requisite qualification and after due consideration of the claim of the petitioner he was absorbed in service as Lecturer in Education, therefore after lapse of almost 22 years the appointment on the post of Lecturer cannot be held to be illegal.

20. Considering in totality of facts and circumstances of the case as well as the law laid down by Hon'ble Supreme Court, the order impugned dated 20.08.2020 passed by respondent no.2 being not sustainable in law is set aside. The writ petition succeeds and is hereby **allowed.** However, the respondents are directed to permit the petitioner to discharge her duties on the post of Lecturer in Education treating her absorbed Lecturer and to pay her monthly salary month by month as and when became due, inasmuch as arrears of salary with effect from 20.8.2020 till date within a period of three months from the date of production of a certified copy of this order..

21. No order as to costs.

(2021)08ILR A771
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.08.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No 45 of 1996

Bhawani Prasad Pandey & Ors.
...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri S.K. Chaturvedi, Sri Ram Prakash Rai

Counsel for the Opposite Party:
G.A., Sri Rudra Kant Mishra

A. Indian Penal Code (45 of 1860) - Section 149 - Common object - existence of common object before the commencement of the fight is not necessary - It is enough if the common object is adopted by all the accused - Common object could develop co-instanti and being a question of fact it can also be inferred and deduced from the facts and circumstances of a case (Para 8)

Dispute was between complainant- Bhragunath Pandey and accused persons - accused-persons armed with lathi-danda and started altercation with the complainant- Bhragunath Pandey and his family members - Injured Sri Ram Pandey intervened in the matter - Sri Ram Pandey took the side of the complainant - On this, the accused persons started to assault him with lathi-danda - *Held* - accused adopted, common object and assaulted Sri Ram Pandey with lathi-danda in furtherance of the said common object - Section 149 applicable (Para 8)

B. Indian Penal Code (45 of 1860) - Section 308 - Attempt to commit culpable homicide - Proof - Necessary ingredient - Intention - intention or knowledge on the part of the accused to cause culpable homicide is required to be proved (Para 9)

Ocular version & medical evidence corroborate that injured Sri Ram Pandey suffered 14 injuries - nature of the injuries confirms that injuries caused by blows of lathi- danda - no reason to disbelieve the oral statements of injured witness and other eye witnesses - Although 14 injuries caused, except injury no.3 all injuries simple in nature - injury no.3 i.e. fracture of ulna bone of right forearm is on the non-vital part of the body - no statement in oral testimony of the doctor that these injuries either individually or collectively were dangerous to life - Conviction under Section 308 IPC set aside - accused found guilty for offence under Sections 147, 323/ 149 and 325/ 149 IPC (Para 10)

Allowed. (E-4)

List of Cases cited :

1. Shiv Ram Vs State 1998 Cri LJ 76

2. Amzad Ali Vs State (2003) 6 SCC 270

3. Bishan Singh & ors. Vs State AIR 2008 SC 131

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri S.K Chaturvedi, learned counsel for the appellants and Sri Rudra Kant Mishra, learned . A.G.A assisted by Sri S.B. Maurya appearing for State of U.P.

2. This criminal appeal has been filed against the judgment and order dated 09.01.1996 passed by the Additional Sessions Judge Gorakhpur in S.T. No. 240 of 1993 (*State vs. Bhawani Prasad & others)* Case Crime No.341 of 1992, P.S. Sahjanwa, District- Gorakhpur, convicting all the appellants (accused) under Section 147 IPC and sentencing them to undergo rigorous imprisonment for one years each and convicting under section 308\149 IPC and sentencing them to undergo rigorous imprisonment for three years each. Both the sentences have to run concurrently.

3. In brief, the facts are that the complainant Bhragunath Pandey gave an application dated 03.10.1992 at Police Station- Sahjanwa, District Gorakhpur alleging therein that today with his real brother Pramod Kumar Pandey and mother Savitri Devi, he went to his field to harvest his paddy crop. At about 10:00 a.m. Bhawani Prasad Pandey, Chunni Lal Yadav, Nand Lal Yadav, Sudarshan Yadav and Bhimal Yadav armed with lathi-danda came at the field and started restraining them from harvesting the crop complainant party said that they have sown it so they will harvest it. Meanwhile Sri Ram Pandey, Jai Prakash Pandey and Subhash Pandey also came there and said to Bhawani Prasad Pandey and his companions that why they are restraining from harvesting the crop, Bhragunath Pandey has sown it so he will harvest it. On this, all the above named persons started to abuse, chased the complainant and their companions to assault them. On the exhortation of Bhawani Prasad Pandey, all accused persons started to beat Sri Ram Pandey with lathi-danda due to which he suffered injuries on his head, legs, back and chest and he became unconscious. On the noise and seeing the condition of Sri Ram Pandey, the accused persons ran away from the spot. Sri Ram Pandey was taken to the hospital.

On the aforesaid application, a case bearing case crime no.327/92 under Section 147, 148, 323, 504, 308 IPC was registered at Police Station- Sahjanwa,

Gorakhpur. Injured Sri Ram Pandey was medically examined and put under treatment. The Investigating Officer visited the place of occurrence and prepared the site plan, recorded the statements of complainant, injured and other witnesses and after completion of investigation submitted the charge-sheet against accused persons namely Bhawani Prasad Pandey, Chunni Lal Yadav, Nand Lal Yadav, Sudarshan Yadav and Bhimal Yadav.

Learned trial court framed the charges against the aforesaid accused persons under Section 147, 308 read with Sections 149 and 325 read with Sections 149 IPC. Accused persons denied the charges and claimed for trial. The prosecution produced seven witnesses. Statements of the accused persons under Section 313 Cr.P.C. was recorded in which they denied the prosecution case and further stated that they have been falsely implicated due to enmity. No evidence in defence produced by them. The learned trial court, after hearing the arguments by the impugned judgment, has convicted all the accused (appellants).

4. As per medical report, Ex. Ka.4 injured Sri Ram Pandey was medically examined on 03.10.1992 at 12:45 p.m. at District Hospital, Gorakhpur by the emergency medical officer. The Doctor has noted following injuries on his body:-

i) lacerated wound 3.5cm X 0.5cm into scalp deep on right side of head, 7cm above right ear, bleeding present

ii) Contusion 8cm X 4cm on outer part of right forearm just below elbow joint reddish

iii) Multiple contused swelling in an area of 23cm X all around on right forearm, injury kept under observation, X-Ray advised

iv) Traumatic swelling 6cm X 6cm on right chest around right nipple

v) Contusion 10cm X 2cm on right upper back, reddish

vi) Contusion 12cm X 2cm on right upper back, 5cm below injury no.5

vii) Contusion 8cm X 2cm on lower back, reddish

viii) Contusion 12cm X 7cm on right buttock, reddish

ix) Multiple contusion in area of 14 cm X 13cm on left buttuck

x) Contusion 13cm X 2cm on inner and lower 1/3rd of thigh

xi) Contusion 8cm X 8cm multiple, on left leg middle part

xii) Lacerated wound 6cm X 1cm X bone deep in front of right leg upper part

xiii) Multiple abrasion 9cm X 1cm, front of right leg middle part, 1cm below injury no.12.

xiv) Lacerated wound 2cm X 1cm, left leg middle part.

In the opinion of the doctor, all injuries except injury no.3 were simple in nature, injury no.3 was kept under observation. All injuries were caused by hard and blunt objects and duration fresh. It is also mentioned in the medico legal report

that the patient is unable to stand and move. Admitted, ortho surgeon informed, police informed.

This medical report has been proved by Dr. Rama Shanker Misra (P.W.-6) who has also stated that these injuries could be caused on 03.10.1992 at 10:00 a.m. by lathi-danda.

Dr. R.A.L. Gupta P.W.3 in his examination in chief has stated that on 05.10.1992, the X-Ray of injured Sri Ram Pandey was conducted under his supervision. In the X-Ray of left forearm the fracture of ulna bone was detected. The witness has proved the X-ray report Ex.Ka.2 and X-Ray plate material Ex.1.

5. Bhragunath Pandey, P.W.1 is informant and also eye witness. He has fully corroborated the allegations made in the FIR and have stated that at the time of incident he alongwith his brother Pramod Kumar Pandey and mother Savitri Devi have gone to their field to harvest the paddy crop and the accused persons namely Bhawani Prasad Pandey, Chunni Lal Yadav, Nand Lal Yadav, Sudarshan Yadav and Bhimal Yadav armed with lathi-danda, came there and started restraining them from harvesting the crop. Meanwhile Jai Prakash Pandey, Sri Ram Pandey and Subhash Pandey also came there and said to the accused persons that complainant has sown the crop so they will harvest it, on this accused persons started abusing them and chased them to assault and brutally beaten Sri Ram Pandey with lathi-danda, resulting thereof he fell and became unconscious. He suffered the injuries on the head, back and chest, he was taken to hospital and was admitted in the hospital for treatment. Sri Ram Pandey (P.W.-2) is the injured and most important witness, he has also corroborated the prosecution case and stated that the incident is of 03.10.1992 at about 10:00 a.m. he was going to look his fields of Gram Bithaura then he saw that near the paddy field of Bhragunath Pandey, some altercation was going on with Bhragunath Pandey, his brother Pramod Pandey and his mother and Bhawani Prasad, Chunni Lal, Nand Lal, Sudarshan and Bhimal Yadav were restraining Bhragunath Pandey from harvesting the field. The witness said that Bhragunath Pandey has sown it so he will harvest it. On this the accused-persons started to abuse and chased to beat. On exhortation of Bhawani Prasad all accused persons started to assault him with lathi-danda. He suffered injuries and became unconscious and when he regain consciousness then he was told that he was being taken to hospital. Subhash Pandey and Jai Prakash Pandey also witnessed the occurrence. He was admitted in the District hospital, Gorakhpur where he was medically examined and X-Ray was also conducted. P.W.-4 Subhash Pandey is also an eye witness and this witness has also fully corroborated the prosecution version and supported the statement of other witnesses P.W.-1 Bhragunath Pandey and P.W.-2 Sri Ram Pandey. All these witnesses have been cross-examined at length by the defence but there is no major contradiction or discrepancy in their oral testimony. The ocular version also got support from the medical evidence on record which corroborate that injured Sri Ram Pandey has suffered 14 injuries on various parts of his body including multiple contusions. These injuries have been caused on the head, back, hand and chest. His X-ray report confirms that he has suffered one fracture of right ulna bone. The nature of the injuries itself confirms that these injuries have been caused by

blows of lathi- danda, it cannot be self inflicted or suffered in any other manner. So there is no reason to disbelieve the oral statements of injured witness and other eye witnesses.

6. The remaining witnesses are formal in nature, P.W.5 Jai Shankar Prasad the Investigating Officer has proved the steps taken by him during investigation and the papers prepared by him including the site plan and the charge-sheet. P.W.7 Head Constable Diwakar Mani Tiwari is the chick and G.D. writer who has proved the papers as exhibits Ka.5 and Ka.6.

7. The FIR has been promptly lodged and there is no confusion or discrepancy in the date, time and place of occurrence.

8. Learned counsel for the appellant contended that from prosecution case, it is clear that dispute was between complainant-Bhragunath Pandey and accused persons, so there was no reason to assault Sri Ram Pandey as he was not concerned with the subject matter and Section 149 IPC is not attracted. There was no common object to assault Sri Ram Pandey. I am not agreed with this contention of learned counsel for the appellants. As per prosecution version, accused-persons armed with lathi-danda came on the spot and started altercation with the complainant- Bhragunath Pandey and his family members. Injured Sri Ram Pandey and two other persons intervened in the matter and Sri Ram Pandey took the side of the complainant. On this, the accused persons started to assault him with lathi-danda.

It has been held in the case of ***Shiv Ram vs. State, 1998 Cri LJ 76 (SC)*** by the Hon'ble Apex Court that, *"the existence of common object before the commencement of the fight is not necessary. It is enough if the common object is adopted by all the accused."*

It has been further held in the case of ***Amzad Ali vs. State, (2003) 6 SCC 270*** *that, "it is incorrect to contend that prior formation of an unlawful assembly with a common object is a must and should have been found as a condition precedent before roping the accused within the fold of Section 149. Common object could develop co-instanti and being a question of fact it can also be inferred and deduced from the facts and circumstances of a case."*

Applying the aforesaid proposition of law on the facts of the present case, it is clear that accused adopted, common object and assaulted Sri Ram Pandey with *lathi-danda* in furtherance of the said common object. Hence Section 149 is fully applicable.

9. Learned counsel for the appellants further contended that all the injuries except one are simple in nature and the only grievous injury is on non-vital part of the body, hence no offence under Section 308 IPC is made out. This argument of the learned counsel has substance. Although 14 injuries have been caused to the injured but all injuries except injury no.3 are simple in nature and injury no.3- the fracture of ulna bone of right forearm is on the non-vital part of the body. Further there is no statement in oral testimony of the doctor that these injuries either individually or collectively were dangerous to life. Further P.W.-6 Dr. Rama Shanker Misra in his cross-examination has admitted that pulse rate and blood pressure is recorded in the injury report generally in serious condition and because he was not serious it was not recorded.

The Hon'ble Apex Court in the case of ***Bishan Singh and Ors vs. State, AIR 2008 SC 131*** has held as under:

"Before an accused can be held to be guilty under Section 308 IPC, it was necessary to arrive at a finding that the ingredients thereof, namely, requisite intention or knowledge was existing. There cannot be any doubt whatsoever that such an intention or knowledge on the part of the accused to cause culpable homicide is required to be proved. Six persons allegedly accosted the injured. They had previous enmity. Although over-act had been attributed against each of the accused who were having lahtis, only seven injuries had been caused and out of them only one of them was grievous, being a fracture of the arm, which was not the vital part of the body.

The accused, therefore, in our opinion, could not be said to have committed any offence under Section 308 IPC. The same would fall under Sections 323 and 325 thereof."

10. In view of the above, considering the entire material on record in this case, in the opinion of this Court, no offence under Section 308 IPC is made out, and the appellants-accused are liable to be held guilty for offence under Sections 147, 323/ 149 and 325/ 149 IPC and conviction of the appellants-accused is modified accordingly.

11. Considering the nature of the offence, the number of injuries and its nature and all other attending circumstances, it will be just and proper to sentence the accused-appellants to undergo imprisonment for one year each under Section 147 IPC, imprisonment of one year each under Section 323/149 IPC and imprisonment of one year and fine of Rs. 10,000/- each under Section 325/149 IPC. In default of payment of fine, each accused will serve three months simple imprisonment. All the sentences shall run concurrently. If the fine is deposited, the victim Sri Ram Pandey will get half of it.

12. The appeal stands ***partly allowed***, accordingly.

13. Lower court record along with copy of the judgment be transmitted to the trial court immediately.

(2021)08ILR A776
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.08.2021

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No 113 of 2000

Jameek ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
R.P. Shukla, R.N. Shukla, Rakesh Kumar Yadav, Vashu Deo Mishra

Counsel for the Opposite Party:
Govt. Advocate

Indian Penal Code (45 of 1860)- Sections 452 & 354 - House trespass and outraging modesty of woman - Probation of Offenders Act (20 of 1958) , Section 4 – Section 4 is applicable where a person is found guilty of committing an offence which is not punishable with death or imprisonment for life - Court may release such an accused on probation of good conduct on his furnishing a bond - Court in applying this provisions is required to consider the circumstances of the case,

character of the offender and nature of the offence before exercising its discretion – S. 4 does not create any distinction between the category of offenders and the provision of the said Section can be made applicable in any case where the offender is found guilty for committing an offence (Para 15,16)

Accused armed with banka, came to house of victim and wanted to molest and assault her to outrage her modesty, but she raised alarm, whereupon her nephew, husband and elder brother came on spot, after which accused abducted her four months old daughter – instant case was registered against the appellant about 28 years back and conviction was awarded on 21.01.2000 - conviction against the appellant neither involved life sentence nor punishable more than seven years imprisonment - out of 3 months awarded sentence applicant remain in detention of jail about 12 days - this is the first offence against the appellant- Benefit of S.4 of Probation of Offenders Act, 1958 granted (Para 17, 18)

Allowed (E-4)

List of Cases cited:

1. Smt. Devki Vs St. of Har 1979(3) SCC 760

2. St. of Maha Vs Natwar Lal Damodar Das Soni 1980 (4) SCC 669

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

1. The present appeal has been preferred against the judgement and order dated 21.01.2000 passed by 1st A.S.J., Lucknow in S.T. No.324 of 1995 whereby the appellant has been convicted and sentenced under Sections 452 and 354 IPC for three months rigorous imprisonment respectively.

2. Brief facts of the case are that the case emerged from the F.I.R. lodged by PW-1 Saiyra Bano stating that Mohd. Khalil, husband of first informant along with Smt. Saiyra Bano, PW-1 was present at his house situated in Village Khojey Kapurwa, P.S. Gudamba on 12.09.1993 in the morning, when the accused-appellant, Jameel of the same village armed with country made pistol entered into the house and started to quarrel with the husband of the first informant. When PW-1 objected to it and hearing noise, other members of the family rushed to the spot whereupon the accused fled away. PW-4, Mohd. Khalil made a complaint of this case against the appellant, Jameel and thereafter he went to work somewhere. It is the appellant who after sometime on the same day came back to the house of PW-1 armed with Banka and wanted to molest and assault the victim to outrage her modesty but she raised alarm, whereupon her nephew, husband and elder brother came on the spot. Seeing them, the accused abducted four months old daughter of Smt. Bano.

3. On this allegation, Smt. Bano lodged a written report as Ex-ka-1 at Police Station- Gudamba, District- Lucknow on 12.09.1993 at 8:15 pm where chik report as Ex-ka-2 was prepared on its basis and the case was registered in G.D. as Ex-ka-3 under Sections 452, 354, 364, 506 IPC as Case Crime No. 259 of 1993. This case entrusted to PW-6, Ram Narain Chaubey who investigated this case and during investigation, he visited place of occurrence and prepared a site plan as Ex-Ka-4. On the same date, he recorded the statement of Smt. Saiyra Bano, Rafiq Mohd., Safiq Mohd., Mohd. Khalil and other witnesses under Section 161 Cr.P.C. and arrested the accused on 14.09.1993 on Kursi Road and recovered from his possession of female child. Thereafter, the investigating officer prepared recovery memo as Ex-Ka-5 and in presence of the

witnesses, he also prepared the site plan of the recovery as Ex-Ka-6. The recovery of the female child was handed over in the custody of PW-1 through memo as Ex-Ka-7 and after completing the investigation, the charge-sheet as Ex-Ka-8 was submitted by the Investigating officer under Sections 452, 354, 364, 506 IPC against the accused-appellant.

4. Charge-sheet was submitted before the Magistrate Court and the case was committed to the 1st A.S.J., Lucknow where it is registered as S.T. No.324 of 1995. After committal, the trial court framed charges against the accused-appellant under Sections 452, 354, 364, 506 IPC. The accused-appellant denied the charges levelled against him and claimed to be tried.

5. In order to substantiate its case, the prosecution examined six witnesses namely PW-1, Smt. Saiyra Bano first informant of the alleged incident, PW-2 Rafiq Mohd. who reported himself as eye witness, PW-3 Safiq Mohd. who was also another eye-witness, PW-4 Khalil Mohd. husband of PW-1 was also eye-witness, PW-5 Babulal Maurya, Head Constable who took the chik report as Ex-Ka-2 and PW-6 Ram Narain Chaubey, Investigating Officer. Thus, the prosecution relied on the oral testimony of PW-1 to PW-6 and Ex-Ka-1 to Ex-Ka-7 as documentary evidence.

6. After closing the evidence, statement of the accused under Section 313 Cr.P.C. was recorded by the trail court explaining the entire evidence and other circumstances, in which the appellant denied the prosecution story in toto and the entire prosecution story was said to be wrong and concocted. In answer to the question no.6, he stated that PW-1 Smt. Saiyra Bano was his wife and the female child alleged to have been kidnapped by him was born to Smt. Saiyra Bano with his union. After birth of this baby, Smt. Bano started to live with her former husband and thereafter, there was a dispute between her and him over this baby. He further stated that the female child was living with him and subsequently she died.

7. In his defence, four defence witnesses who were also examined on behalf of the accused-appellant as DW-1 Mohd. Jaleel, DW-2 Munna, DW-3 Idris and DW-4 Shakeel Ahmad.

8. The trial court after hearing learned counsel for both the parties and appreciating the entire evidence oral as well as documentary found the accused-appellant guilty and convicted and sentenced him as aforesaid.

9. Feeling aggrieved and dissatisfied with the impugned judgement and order of conviction, the accused-appellant has preferred the present appeal.

10. I have heard learned counsel for both the parties and perused the material available on record.

11. Learned counsel for the accused-appellant assailing the verdict of conviction against the accused-appellant submits that PW-1 Smt. Bano solemnized marriage with the accused-appellant on the date of occurrence and she is legally wedded wife of the accused-appellant but she was wedding with Mohd. Khalil and the daughter was born with the union of the appellant. Learned counsel further submits that learned trial court on the basis of evidence, acquitted the appellant from charge under Sections 364, 506 IPC and as

such, the trial court has committed error in holding that the committed hostage and assault on PW-1 Bano to outrage her modesty.

12. During the course of argument, learned AGA states that it is the Court who may consider the benefit of Section 4 of the Probation of Offenders Act, 1958 to the accused-appellant and further submits that this is the first case against the accused-appellant. Previously, he is not convicted for any offence. Learned AGA further states that the benefit of Section 4 of the Probation of Offenders Act, 1958 could be extended to the accused-appellant on certain stipulations as specified in Section 4 of the Probation of Offenders Act, 1958.

13. The relevant provisions of the Probation of Offenders Act, 1958, viz. Section 3 and 4 are extracted hereunder:-

3. ***Power of court to release certain offenders after admonition***.- *"Where any person is found guilty of having committed an offence punishable under Section 379 or Section 380 or Section 381 or Section 404 or Section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal code, or any other law, and no previous conviction is proved against him and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4 release him after due admonition.*

Explanation.-For the purposes of this Section, previous conviction against a person shall include any previous order made against him under this Section or Section 4.

4. Power of Court to release certain offenders on probation of good conduct.- *(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be of good behaviour:*

Provided that the Court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the Court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond."

15. Section 4 of the Probation of Offenders Act, 1958 is applicable where a person is found guilty of committing an offence where punishment is neither life sentence nor death. The Court may release such an accused on probation of good conduct on his furnishing a bond as mentioned in the Section. The Court in

applying the provisions of this Section is also required to consider the circumstances of the case, character of the offender and nature of the offence before exercising its discretion.

16. A perusal of the aforesaid provisions of the Probation of Offenders Act, 1958 thus clearly indicate that Section 4 of the 1958 Act does not create any distinction between the category of offenders and the provision of the said Section can be made applicable in any case where the offender is found guilty for committing an offence which is not punishable with death or imprisonment for life. Incidentally certain exceptions have been indicated by the Hon'ble Supreme Court as in the case of ***Smt. Devki Versus State of Harayana reported in 1979, (3) SCC 760*** where the Hon'ble Supreme Court has held that benefit of Section 4 of 1958 Act could not be extended to a culprit who was found guilty of abducting a teenaged girl and forcing her to sexual submission with criminal motive. Similarly in the case reported in ***1980 (4) SCC 669 in Re: State of Maharashtra Versus Natwar Lal Damodar Das Soni*** the Hon'ble Supreme Court declined to extend the benefit of the Probation of Offenders Act, 1958 to an accused found guilty of gold smuggling.

17. Considering the above submissions advanced on behalf of the appellant, the instant case was registered against the appellant about 28 years back and conviction was awarded on 21.01.2000. The conviction against the appellant neither involved life sentence nor punishable more than seven years imprisonment and it is also submitted that out of 3 months awarded sentence he remain in detention of jail about 12 days. It is also stated that this is the first offence against the appellant. Further submission is that there are several contradictions and exaggeration made in the statement of the witnesses examined before the trial court. It is also submitted that there is no minimum sentence under Section 452, 354 IPC. So in the opinion of this Court, it would be appropriate to grant the benefit of Section 4 of the Probation of Offenders Act, 1958 to the accused-appellant.

18. Consequently, the instant appeal is **partly allowed** only on point of sentence instead sending him in jail. The accused-appellant shall get the benefit of Section 4 of the Probation of Offenders Act, 1958.

19. The accused-appellant is hereby directed to file a bond to the tune of Rs.20,000/- to the effect that he shall not commit any offence and shall maintain good behaviour and peace. If there is breach of any of the condition, he will undergo sentence as indicated by the trial court. The bond aforesaid be filed by the accused appellant within one month from the date of judgement. Since the appellant is on bail, so he need not surrender. Thus, the appeal is dismissed on point of conviction but partly allowed on point of sentence as aforesaid.

20. Office is directed to communicate this order to the learned trial court for necessary compliance.

21. Lower court record, if any, shall also be sent back to the district court concerned.

(2021)08ILR A780
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.07.2021

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No 242 of 2002

Devi Harijan & Anr. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:

Prem Singh, Sushil Kumar Singh

Counsel for the Opposite Party:
Govt. Advocate

(A) Indian Penal Code (45 of 1860) - Sections 307 &323 - Attempt to murder - Court has to see whether the act irrespective of its result was done with the intention or knowledge - intention or knowledge of the accused must be such as is necessary to commit murder - intention to cause death is essential element to attract the offence of attempt to murder. intention is to be gathered from all circumstances and no merely from the consequences that ensue - nature of weapon, motive of the crime, severity of the blow etc. are some of the relevant factors (Para 20)

Altercation took place between the accused and P.W.1 over pity matter regarding digging of some onion planted just outside the house of the injured P.W.2- Bansilal - this motive cannot be said to have persuaded the appellants to commit murder of the injured P.W.2-Bansilal - no evidence adduced to show that the injury received was grievous in nature - intention of the accused was only to inflict injury and that too on PW1 and not on PW2 - Conviction u/S. 307 cannot be sustained - Accused instead convicted u/s 324 IPC (Para 21, 22, 27)

Code Of Criminal Procedure, 1973 - Section 360 - Order to release on probation of good conduct or after admonition - Probation of Offenders Act (20 of 1958) , Section 4 - Power of court to release offenders on probation of good conduct - One of the accused died other appellants aged about 70 years & about 75 years of age - Appellant "first offender', hence benefit of Section 4 of the Probation of Offenders Act given to the appellant. (Para 28)

Allowed. (E-4)

List of Cases cited :

1. Sarju Prasad Vs St. of Bihar AIR 1965 SC 843

2. Hari Kishan & anr. Vs Sukhbir Singh & ors. 1988 AIR 2127

3. Ramesh Vs St. of U. P. AIR 1992 SC 664

4. Merambhai Punjabhai Khachar & ors. Vs St. of Guj. AIR 1996 SC 3236

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

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

2. The present criminal appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 has been filed against the judgment and order dated 8.2.2002 passed by II Additional Sessions Judge, Sultanpur in Sessions Trial No. 134 of 1994 arising out of Case Crime No. 209 of 1993, under Sections 324, 307 and 504 I.P.C., Police Station Lambhua, District Sultanpur, whereby the appellant no.1-Devi Harijan was convicted under Section 307 I.P.C. and sentenced to undergo five years rigorous imprisonment with a fine of Rs.2000/- and in default of payment to undergo three months additional imprisonment; and appellant no.2-Chauthi Harijan was convicted under Section 307/34 I.P.C. and sentenced to undergo five years rigorous imprisonment with a fine of Rs.2000/- and in default of payment to undergo three months additional imprisonment.

3. It transpires from the record that the instant appeal filed by appellant no.1-Devi Harijan has been abated vide order dated 17.04.2018 passed by Co-ordinate Bench of this Court.

4. The prosecution case, as per the written report, is that on 13.5.1993, at about 6:00 a.m., the cousin brother of the

informant, namely, Devi, was digging onion on the abadi land of the informant and the informant reached there and asked him not to dig his onion but he did not listen him and after abusing him, went to his house and threatened him that I will see you just now. Thereafter, he gone to home and returned with scissor along with appellant no.2-Chauthi with intention to kill him. By that time father of the informant had also reached on the spot, upon which appellant no.2-Chauthi exhorted to kill the informant and caught hold his father while exhorting and appellant no.1-Devi Harijan with intention to kill started hitting his father with scissor, as a consequence of which, his father suffered with lot of wounds from scissor and scissor broke inside the body of his father and his father fell down. On alarm being raised, Jhagai and several other persons of the village reached there and saw the incident and also mediated. Thereafter, the informant took his injured father to the police station, where his report was not lodged and he was asked to first get the medical examination of the injured, then, the report will be lodged. The injured was thereafter medically examined.

5. The injuries of P.W.2 Bansilal was medically examined by Dr. R.P. Singh (P.W.5) of Community Health Center, Lambhua, Sultanpur on 19.5.1993 at 10.20 a.m. Dr. Singh found following injuries on the person of injured Bansilal:-

"(1) Incised wound at Rt. side of the scalp 3cm x 0.5cm deep x scalp deep fresh bleeding from the wound is present. 11 cm above the Rt. ear margins are sharp fresh bleeding from the wound is present.

(2) Incised wound at Rt. side of the back of chest 1cm x .5cm x muscle deep margins are sharp fresh bleeding from the wound is present.

(3) Incised wound at Rt. side of the back corresponding to medial border of scapula 1cm x (sic) x muscle deep fresh bleeding is present".

6. P.W.5 Dr.R.P.Singh, in his statement has stated that the injuries could be caused by the scissor on the date and time of the incident. He had advised the injured Bansilal to get the x-ray of his chest be done. Whereupon the injured Bansilal did his x-ray of chest from Radiologist Dr. Subodh Kumar, District Hospital Sultanpur. PW 3 Dr. Subodh Kumar, in his statement has deposed that the x-ray of chest of injured Bansilal was done under his supervision, wherein it has been opined that two radio opaque, metallic triangular seen in chest wall at level of thoralei 2, 3 and 4th spin. It was also found that both christopher angles clear and no bone injury seen. The report of x-ray has been marked as Exhibit Ka 2.

7. It appears that after the incident the informant PW1 Pappu went along with his injured father to police station Lambhua for lodging the First Information Report but instead of lodging the First Information Report the Inspector told the informant PW1 Pappu to first get his father admitted in hospital then First Information Report could be lodged. As the First Information Report was not lodged even after hospitalizing the father of the complainant in Lambhua Hospital in a serious condition, hence, the informant Pappu P.W.1 had moved an application (Exhibit Ka1) before Superintendent of Police, Sultanpur on 18.5.1993, on which the Additional Superintendent of Police directed the Station Officer Lambhua Police Station on the date itself i.e. on 18.5.1993 to register a

case. In pursuance thereof, an F.I.R. (Exhibit Ka 4) was registered as Case Crime No. 209 of 1993 under Section 324, 307, 504 Indian Penal Code, Police Station Lambhua, District Sultanpur on 29.5.1993 at 15.30 hours.

8. It transpires from the impugned order passed by the trial court that the Investigating Officer, who made the site plan, was not produced in the witness box and the Investigating Officer, who is said to have proved the site plan, has stated that he was not present at the time of preparation of site plan. The trial court, after going through the record, found that the investigation of the case was partly conducted by two Investigating Officers. First of all, S.I. Rajnath Rai had conducted the investigation of the case and after his transfer, the rest of the investigation was conducted by S.I. Mangla Prasad Singh (P.W.4), who, in his statement, has stated that on 24.6.1993 both the accused/appellants namely Devi and Chauthi was arrested. He also stated that after the death of erstwhile Investigating Officer Rajnath Rai the investigation of the case was entrusted to him. He had proved the site plan prepared by the then Investigating Officer Rajnath Rai, chik First Information Report prepared by the then Head Moharrir Ram Surat Paswan and carbon copy of G.D. which was prepared in original. Finally, on 11.7.1993, he submitted the charge-sheet (Exhibit Ka 3) against the appellants.

9. The case was committed to the court of Sessions in usual manner. There charges under Section 307/34 and 506 Indian Penal Code were framed against the appellants, to which they pleaded not guilty and claimed to be tried. His defence was that of denial.

10. In the trial, the prosecution, apart from tendering and proving a large number of exhibits, namely, written report (Exhibit Ka.1), Xray report (Exhibit Ka.2), charge-sheet (Exhibit Ka. 3), Chik First Information Report (Exhibit ka 4), report of record keeper (Exhibit Ka.5), General Diary (Exhibit Ka.6) and site plan (Exhibit Ka.7) as well as the injury report of injured Banshi (Ext. Ka. 7A), examined as many as 5 witnesses, namely, P.W.1-Papu alias Umesh, who is the complainant, P.W.2-Banshi, who is the injured witness, P.W.3-Dr. Subodh Kumar, who has proved the x-ray report, P.W.4-S.I. Mangla Prasad Singh, who has proved the site plan and other documents relating to investigation and also filed charge-sheet, Chik report, report of record keeper and site plan and P.W.5- Dr. R.P. Singh, who has medically examined the injured P.W.2 Bansilal. In defence, no witness was examined. In the statement recorded under Section 313 Cr.P.C., the accused/appellants have denied the incident and pleaded that they have falsely been implicated in the instant case. The trial court believed the evidence adduced by the prosecution and passed the impugned order, referred in para no.2 hereinabove.

11. PW.1-Pappu alias Umesh is almost repeated the prosecution version as has been mentioned in the written report and has stated that Devi (appellant no.1) is his cousin brother and appellant no.2 is the uncle of co-accused Devi. The incident took place around more than one and a half year ago. In the morning at sunrise while he was brooming at his door, he saw that accused Devi was digging onion belonging to him which was planted in the abadi land in front of his house. He asked Devi not to dig onion. On that Devi abused him and threatened to see him then he went away

and immediately came back with scissor along with co-accused Chauthi. Chauthi exhorted to kill him. The father of the PW1 at that time came to rescue him at that moment the Chauthi caught hold his father from behind and accused Devi with an intent to kill has assaulted him with scissor around 1 inch scissor point was left in his back thereafter accused Devi again assaulted his father on his head upon receiving injury his father fell down Jhagai also saw this incident thereafter he took his father to Police Station Lambhua and then admitted him to Lambhua hospital where he was given treatment. Since the first Information Report was not being lodged by the police at Lambhua station therefore a written report was given to the Superintendent of Police after 4-5 days (exhibit Ka.1).

12. PW.2 Bansilal, who is injured witness, has also supported the statement of PW1 Pappu@Umesh and has stated that at about 6.00, in the morning, while he was at his own house, he heard noise and came outside his house. The accused Chauthi (appellant no.2) exhorted to kill Pappu@Umesh (P.W.1), whereupon in order to save his son he ran towards him, upon this, the accused Chauthi caught him from behind and accused Devi Harijjan assaulted him with scissor on his back which broke inside his back and thereafter he was hit by scissor twice he fell after receiving the injuries. This incident was seen by Jhangai. He was medically examined at Lambhua where he was admitted for more than one month. X-ray was also conducted.

13. P.W.5 Dr. R.P. Singh, in his statement, has deposed that deep injuries are possible to have come from scissor, however, no opinion has been given by him regarding the nature of the injury whether they are simple or grievous. PW6 Dr. subodh Kumar has done x-ray of the injured and has stated that in the x-ray, shadow of two multiple objects of triangular shaped has been seen, however, there is no bone injury. He has also proved the x-ray report and prints.

14. Learned Counsel for the appellants has submitted that the injury was caused by appellant no.1-Devi Harijan and appellant no.2-Chauthi Harijan has only caught hold the injured. He though admitted the manner of the injury inflicted upon the injured except the fact that the appellant no.1-Devi Harijan has caused the injury with intention to kill but he has stated that appellant no. 2 and the appellant no.1 had no prior meeting of mind. He submitted that the dispute erupted due to sudden provocation by the son of the injured Bansilal and upon this provocation, appellant no.1 went inside the house, took the scissor only just to teach PW1-Pappu alias Umesh a lesson, however, in between, all of a sudden, the injured Bansilal came on the spot. As per the prosecution case, injured was caught hold from behind by appellant no.2 at the initial stage. When the verbal hot talk is going on between appellant. No.1 and P.W.1-Umesh alias Pappu, injured Bansi was not even on the picture. There was no occasion to have any prior meeting of mind regarding causing injury to Bansilal by appellant no.1. If he had not stepped in to save his son, he would not have been injured, therefore, it could not be said that the appellant no.2 who caught hold of Bansi had any prior meeting of mind with the appellant no.1 or appellant no.2 could have any chance of prior meeting of mind to cause injury to the injured Bansilal. This contingency could not have been forseen neither by the

appellant no.1 nor by appellant no.2. Therefore common object to cause injury is missing.

15. Learned A.G.A. has opposed the appeal and has submitted that from perusal of the evidence of PW1-Pappu alias Umesh and PW2-Bansilal, the intention to commit the murder is clearly corroborated by the x-ray report, where two shadow of metallic triangular shaped objects have been found inside the body of injured Bansilal (P.W.2) and also corroborated by the statement of PW5-Dr.R.P. Singh.

16. On due consideration to the arguments advanced by the learned counsel for the appellant as well as learned AGA, particularly the submission of learned counsel for the appellants that he is not disputing the incident and the narration of facts as deposed by PW1-Pappu alias Umesh and PW2-Bansilal, except the fact that the injury has been inflicted with an intent to kill the injured P.W.2-Bansilal, I find force in submission of learned counsel for the appellant that there could not have been any intention to kill the injured PW2-Bansilal as the injured PW2-Bansilal was not even present while the verbal hot talk between the appellant no.1 and PW.1-Umesh alias Pappu was going on. PW2-Bansilal appeared at the place of occurrence to save PW1-Pappu alias Umesh. By that time, the appellant no.1-Devi Harijjan had already returned from home with scissor on the spot, therefore, it cannot be said that he brought the scissor to inflict any injury or to kill PW2-Bansilal rather the intent would have been to teach a lesson or cause grievous injuries to PW1-Pappu alias Umesh not PW2-Bansilal. Since, PW2-Bansilal steeped in to save PW1-Pappu alias Umesh, he was caught hold by the appellant no.2 from behind and on momentary provocation, three injuries were inflicted on the injured by the appellant no.1.

17. Needless to say that injuries inflicted on the persons of the injured Bansilal has been proved by PW1-Pappu alias Umesh and PW2-Bansilal by PW5-Dr. R.P. Singh, who has prepared the injury report and proved it by PW3-Dr. Subodh Kumar, who has prepared x-ray report and proved it. However, the intention to cause death of PW2-Bansilal has not been proved by the prosecution. As per own case of the prosecution, PW2-Bansilal was not even present at the place of occurrence. He came at the place of occurrence when appellant no.1 was already there with scissor and jumped into the fight to save his son. Therefore, it cannot be said that there was any intention of the appellants to commit murder of PW2-Bansilal.

18. From the perusal of the injury report and also the statements of PW5 -Dr. R.P. Singh and PW3-Dr. Subodh Kumar, it is not clear whether the injury is grievous. No opinion in this regard has been given by the PW5-Dr. Subodh Kumar, nor any attempt has been made by the prosecution to prove that the injury sustained by the injured P.W.2-Bansilal is grievous. Also, no record has been gathered by the prosecution from the hospital so as to ascertain as to how much time the PW2-Bansilal had spent in the hospital. Although PW2-Bansilal, in his statement, has stated that he remained admitted in Lambhua Hospital for about one month.

19. Looking to the injuries suffered by PW2-Bansilal and the statement of PW5-Dr. R.P. Singh, in which he has stated that bleeding in such wound stops after five to ten minutes, I find that the statement of

PW2-Bansilal that he remained admitted more than one month, seems to be improbable.

20. Learned counsel for the appellants has relied upon the judgements of Hon'ble Supreme Court in **Sarju Prasad vs. State of Bihar** : AIR 1965 SC 843 and **Hari Kishan and another vs Sukhbir Singh and others** :1988 AIR 2127, wherein it has been held that in a case under Section 307 Indian Penal Code, the Court has to see whether the act irrespective of its result was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary to commit murder. Without this ingredient being established there can be no offence of "attempt to murder". The intention is to be gathered from all circumstances and no merely from the consequences that ensue. The nature of weapon, motive of the crime, severity of the blow etc. are some of the relevant factors. The relevant part of **Hari Kishan and another Vs. Sukhbir Singh and others (supra)** is reproduced as under:-

"On the first question as to acquittal of the accused under s.3O7/149 IPC, some significant aspects may be borne in mind. Under s.307 IPC what the Court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge or the accused must be such as is necessary constitute' murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under s. 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used. motive for the crime,severity of the blow, the part of the body where the injury is inflicted are some of the factors that may be taken into consideration it,determine the intention. In this case, two parties in the course of a fight inflicted on each other injuries both serious and minor. The accused though armed with ballam never used the sharp edge of it."

21. In the instant case, the motive of the crime is not such rather altercation took place between the accused and P.W.1-Pappu alias Umesh for such a pity matter regarding digging of some onion planted just outside the house of the injured P.W.2-Bansilal. Therefore, this motive cannot be said to have persuaded the appellants to commit murder of the injured P.W.2-Bansilal. Severity of the blow is also relevant as no evidence has been adduced by the prosecution to show that the injury received was grievous in nature. Most importantly, the intention of the appellant no.1 was to assault PW1-Pappu alias Umesh and PW2-Bansilal was not even in the picture at that time. When P.W.2-Bansilal heard the noise/alarm, he came outside the house and when he saw that his son was in danger, he jumped into the fight to save his son and thus received injuries. Thus, from the consequence of the event, which took place in the presence of PW2-Bansilal at the spot, appears to be all of sudden and, definitely, appellant no.1 did not went inside his house but he returned with the scissor to make an assault on PW2-Bansilal rather the intention was to hit PW1-Pappu alias Umesh, therefore, it cannot be said that the appellant had the intention to commit murder of injured P.W.2.

22. From careful evaluation of evidence adduced by the prosecution and the material on record, I find that the intention of the accused/appellant no.1 was only to inflict the injury and that too on PW1-Pappu alias Umesh and not on PW2-Bansilal, therefore, it cannot be said that there was any common intention to commit murder. The weapon i.e. the scissor has also been recovered. The size and the shape of the scissor is also not known. In these circumstances, considering the time of attack, the fight which erupted for a trivial issue all of a sudden, as well as the severity of the blow, it is apparent that the accused persons committed the offence punishable under Section 324 alone.

23. Hon'ble Supreme Court in **Sarju Prasad Vs. State of Bihar (Supra)** has held as under:-

"In this state of the evidence we must hold that the prosecution has not established that the offence committed by the appellant falls squarely under Section 307, I. P. C. In our opinion, it amounts only to an offence under Section 324, I. P. C".

24. Thus, in order to attract punishable offence under Section 307 Indian Penal Code, the prosecution is required to prove the intention or knowledge to commit the murder and the actual act of trying to commit murder. The words "such intention" as described under Section 307 Indian Penal Code refers to the meaning "intention" referred under Section 300 Indian penal Code. Thus, intention to cause death, intention to cause such bodily injury which the offender knows it as likely to cause death. The intention to cause such bodily injury, which is sufficient in order to cross the ordinary course of nature to cause death. Therefore, the intention to cause death is essential element to attract the offence of attempt to murder.

25. In the case of **Ramesh Vs. State of U. P. : AIR 1992 SC Page 664**, where a single injury was found on the back of the injured, the appeal of accused-appellants who was tried along with two others was convicted u/s 307/34 IPC and sentenced to undergo rigorous imprisonment for four years, while the two others were acquitted, was partly allowed by the Apex Court. His conviction was altered into section 324 IPC and the sentence was reduced to the period already undergone with fine of Rs. 3000/-, which was to be paid to the complainant as compensation.

26 . In the case of **Merambhai Punjabhai Khachar and others Vs. State of Gujarat :** AIR 1996 SC Page 3236, there was an attempt to commit murder by fire arm and a pellet hit the victim, however, the Apex Court held that Section 307 IPC cannot be held to have been satisfied and the conviction was altered to Section 324 IPC.

27. In the instant case, as regards the injuries are concerned, there is no evidence on record to show that these injuries could have been fatal for life of the injured or that the injuries were caused by the appellants with intention to kill the injured. Thus, it clearly shows that there was no intention of the accused appellants to kill the injured. Thus, I am of the view that conviction of the appellants under Section 307 read with Section 34 IPC cannot be sustained. But, in fact, the appellants are liable to be convicted for the offence punishable under Section 324 IPC.

28. At this juncture, learned Counsel for the appellants has contended that the

appellant no.1-Devi alias Harijan died and his instant appeal has been abated, however, appellant no.2-Chauthi Harijjan is alive and is aged about 70 years presently, whereas the injured P.W.2-Bansilal is also alive and is aged about 75 years of age presently. He prays that appellant no.2-Chauthi Harijan has not committed any crime prior to the said incident and, therefore, he is "first offender', hence the benefit of Section 4 of the Probation of Offenders Act may be given to the appellant no.2.

29. Learned AGA, on the other hand, does not dispute the fact that the appellant no.2 is the first offender but he vehemently submitted that if the benefit of Section 4 of the Probation of Offenders Act be given to the appellant no.2, some restrictions may be provided so that appellant no.2 may not repeat such a crime in future.

30. As to whether the appellant no.2 is entitled to get the benefit of Section 4 of the Probation of Offenders Act or not, I deem it appropriate to reproduce **Section 4 of the Probation of Offenders Act**, which reads as under :-

"***4. Power of court to release certain offenders on probation of good conduct.-****(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:*

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to

impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

31. It is relevant to mention here that Section 360 Cr.P.C. also confers the powers on the Court to release the accused on probation for good conduct or after admonition.

32. For the reasons aforesaid, the appeal filed by the appellant no.2-Chauthi Harijan is **partly allowed**.

The conviction of appellant no. 2, namely, Chauthi Harijan under Section 307 read with Section 34 IPC and sentence awarded to him is set aside. However, appellant no.2 is found guilty for the offence punishable under Section 324 read with Section 34 IPC and is convicted thereunder.

He shall get benefit of Section 4 of Probation of Offenders Act.

He shall file two bonds to the tune of Rs.20,000/- each coupled with personal bonds to the effect that he shall not commit any offence and shall be of good behaviour and shall maintain peace during the period of one year. If he is in breach of any of the conditions, he shall subject himself to undergo one year rigorous imprisonment. The bonds aforesaid shall be filed by the accused/appellant no.2 within two months from the date of judgement. The time for submitting the bail bonds shall not be extended on any ground whatsoever.

33. Let a copy of this judgment along with original lower Court record be sent to the Court concerned for compliance forthwith.

(2021)08ILR A789
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2021

BEFORE

THE HON'BLE ANIL KUMAR OJHA, J.

Criminal Appeal No 461 of 1992

Smt. Kunwari & Ors. ...Appellants(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri R.B, Sahai, Sri Indra Deo Mishra, Sri Shri Ram (Rawat), Sri Vishnu Pandey (A.C.)

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

Indian Penal Code (45 of 1860) - Section 304B - Dowry death -No specific allegation against the appellant no. 2 regarding demand of dowry and harassment - PW2 specifically stated in his cross examination that appellant no. 2 used to oppose the alleged demand of dowry by husband - *Held* - prosecution failed to prove that soon before her death deceased was subjected to cruelty or harassment by appellant no. 2 in pursuance of demand of dowry - appellant no. 2 entitled to benefit of doubt - Appeal, allowed (Para 28, 29, 30, 31)

Allowed. (E-4)

List of Cases cited:

1. Sunil Bajaj Vs St. of M.P. 2000 (9) SCC 417

2. Kansraj Vs St. of Punj. 2000 (5) SCC 20

3. Sham Lal Vs St. of Har. AIR 1997 SC 1873

(Delivered by Hon'ble Anil Kumar Ojha, J.)

Heard Sri Indra Deo Mishra, learned counsel for the appellant no. 2, Sri Rupak Chaubey, learned A.G.A. for the State and perused the records.

2. The Chief Judicial Magistrate, Allahabad, submitted a report dated 13.07.2018 stating therein that appellant no.1 Smt. Kunwari Devi and appellant no.3 Ram Pratap, have died. So, vide order dated 11.04.2019 appeal against appellant no. 1 Smt. Kunwari Devi and appellant no. 3 Ram Pratap was abated.

Thus, the case of appellant no.2 Ram Autar has to be examined only.

3. Challenge in this criminal appeal is the judgment and order dated 20.02.1992 passed by 1st Additional Sessions Judge, Allahabad, in S.T. No. 361 of 1989 (State Vs Ram Baran and others), under Sections 147, 304B/201 I.P.C., P.S.- Naini, District- Allahabad, whereby the learned 1st Additional Sessions Judge, Allahabad, convicted the appellant no. 2 Ram Autar and sentenced him to undergo 7 years R.I., under Section 304-B read with Section 34 of the IPC.

4. Tersely put, the prosecution case is that complainant Mataru Lal lodged an F.I.R. on 25.02.1989 at 12.50 p.m, at P.S.- Naini, District- Allahabad, stating therein that Smt. Bitola, deceased, was his daughter. She was married with accused Ram Baran, two years before this incident. Accused Ram Baran, his father Khelari and brothers of Ram Baran accused Ram Pratap and Ram Autar were unhappy with the victim, because they were demanding a T.V. set in dowry. Some day before the incident, accused persons attempted to kill the victim by causing her burn injuries. The complainant took the victim, to his house and after treatment the victim recovered. Thereafter, accused persons Ram Baran and Khelari assured the complainant that no untoward incident will take place in future. Believing the assurance, he sent his daughter, the deceased to the house of her in-laws about one month before the alleged incident. On 25.02.1989 at about 8.30 a.m. the accused Ram Baran came to the house of the complainant and asked his son Raj Kumar whether the deceased has come to his house. He further told him that the deceased has run away with 3kg. Silver and Rs. 500/- in cash in the previous night. On this, the complainant and his family members searched the victim. They suspected that the accused persons might have killed the deceased. The complainant along with family members went to the village of accused persons and there they found the dead body of the victim Smt. Bitola in a well situated towards east of the village abadi. The complainant further stated in the complaint that accused persons had killed the deceased because he could not give T.V. set in dowry. Accused persons killed the deceased, threw her dead body into the well. At the time of incident the victim was nearly 20 years old.

5. On the written report submitted by complainant Mataru Lal, the case was registered at P.S. Naini, District Allahabad, in Crime No. 79 of 89, under Sections 147, 304-B, 201 IPC, against accused Ram Baran, Ram Pratap, Ram Autar, Khelari and Kunwari Devi, mother of Ram Baran.

6. Investigating officer started investigation and inquest of the deceased

Bitola Devi was done by Nayab Tehsildar, Karachana on 25.02.1989. Postmortem of the dead body of the deceased was conducted 27.03.1989 and statement of witnesses under section 161 Cr.P.C. was recorded.

After completion of the investigation, investigating officer filed charge sheet against accused-persons namely Ram Baran, Ram Autar, Ram Prasad and Smt. Kuwari.

7. The then Judicial Magistrate-IV, Allahabad, committed the case of accused persons to the court of sessions for trial. The then the 1st Additional Sessions Judge, Allahabad, on 16.01.1990 charged accused Ram Autar, Ram Pratap, Ram Baran and Smt. Kunwari, under Section 147, 304B read with section 149 IPC and 201 IPC. Accused persons denied the charges and claimed to be tried.

Prosecution was called to adduce the evidence.

8. Prosecution produced P.W. 1, Mataru Lal, father of the deceased, P.W. 2 Satya Narain Bharti, scribe of the FIR, P.W. 3 Dr. R.B. Singh, who conducted the autopsy on the dead body of the deceased, P.W. 4 Smt. Rania @ Ranno Devi, mother of the deceased Smt. Bitola Devi, P.W. 5 Raj Kumar, brother of the deceased Smt. Bitoal Devi, P.W. 6 S.I. B.D. Singh, P.W. 7 Latif Ullah, Nayab Tehsildar, P.W. 8 Constable Jai Ram Shukla and P.W. 9 Sri Nasir Kamal.

9. After conclusion of the evidence, statement of accused persons under section under Section 313 Cr.P.C. was recorded. Accused Ram Avtar denied the evidence and said that he has been falsely implicated.

10. After hearing the learned counsel for the prosecution and defence, learned lower court convicted the appellants Smt. Kunwari, Ram Autar and Ram Pratap under Section 304-B read with section 34 of the IPC and sentenced them to undergo 7 years R.I.

11. Aggrieved by the aforesaid judgment and order dated 20.02.1992 passed by 1st Additional Session Judge, Allahabad, appellants Kunwari, Ram Autar and Ram Pratap have preferred this appeal before this Hon'ble Court.

Appeal was admitted on 25.02.1992.

12. Learned counsel for the appellant no.2 Ram Autar submitted that appellant no.2 Ram Autar, is elder brother of husband of deceased Bitola Devi. There is no evidence of demand of dowry and harassment of the deceased against appellant. Appellant no. 2 was living separately. He has nothing to do with the alleged demand of T.V. set. He could be not beneficiary of T.V. set. There is no evidence against the appellant to convict him under section 304-B IPC. Hence, this appeal should be allowed and the appellant Ram Autar should be acquitted.

13. Per contra, learned A.G.A. countered the above submissions and contended that there is sufficient evidence of demand of dowry against appellant no. 2 Ram Avtar. This is the consistent case of the prosecution that all the appellants were living in one house although they were having two other houses also. The victim was done to death by the appellant no. 2 Ram Avtar along with other co-accused persons, therefore, appeal has no legs to stand and it may be dismissed.

14. Before dwelling in the merits of the appeal provisions of Section 304-B of I.P.C. need mention here which are as follows:

"304-B. Dowry death-(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.--For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

15. In ***Sunil Bajaj v. State of M.P. 2000 (9) SCC 417***, it has been held by Hon'ble Apex Court that in order to convict an accused for an offence under Section 304-B I.P.C., the following essentials must be satisfied:

(1) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances:

(2) such death must have occurred within 7 years of her marriage;

(3) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband;

(4) such cruelty or harassment must be for or in connection with demand of dowry.

It is only when the aforementioned ingredients are established by acceptable evidence such death shall be called "dowry death" and such husband or his relative shall be deemed to have caused her death."

16. Learned A.G.A. submitted that the death of deceased Bitola was due to bodily injury and otherwise than under normal circumstances, I agree with the aforesaid contention of the learned A.G.A.

17. PW3 Dr. R.B. Singh who conducted the post mortem over the dead body of the deceased Bitola found following injuries on her person:

1. Multiple abrasion on left side of face and contusion was present.

2. Ligature mark present on left side face upper 1/3rd beck, placed transversely 26cmx2cm in fractions under big area is abraded and contused.

Cloth was inserted in the mouth of the deceased, there was blood on the cloth.

In the opinion of the doctor, death was caused due to asphyxia which was result of injury no. 2. Injury no. 2 was sufficient in the ordinary course of nature to cause the death.

Thus, from the evidence of PW3 Dr. R. B. Singh, it is manifest that death of deceased Bitola was not natural, she died

due to bodily injury as mentioned in the post mortem report. Learned counsel for appellant no. 2 Ram Avtar did not dispute the above fact.

18. The deceased Bitola died within seven years of her marriage. PW1 Matru, PW4 Rania and PW5 Raj Kumar have given evidence to this effect. This fact was also not disputed by the learned counsel for the appellant no. 2.

19. Learned counsel for the appellant submitted that the appellant Ram Avtar has not demanded anything in dowry. He drew attention of the Court towards the page no. 6 of the paper book, which is a letter written by Ram Baran (husband of the deceased) wherein demand of Rs. 5000/-, Tape recorder, Transistor, Cycle, Utensils and some other house hold goods have been made.

Learned counsel for the appellant submitted that demand was made by the husband (Ram Baran) of the deceased only and appellant no. 2 Ram Avtar has nothing to do with the aforesaid demand.

20. PW1 Matru has admitted in his statement, at page no. 26 of the paper book, that two accused persons present in the court did not demand any dowry. He has further stated that except Ram Baran none has demanded dowry from him. Further he has stated that when his daughter comes to his house, she tells about the demand of dowry and beatings.

21. PW2 Satya Narayan has also stated in his cross-examination at page no. 31 of the paper book that Ram Baran used to demand dowry which was opposed by his brothers. He further stated that two accused persons present in the court opposed the demand of dowry. In the opinion of this witness, the deceased Bitola was done to death by her husband, her mother-in-law and her father-in-law. Accused persons present in the court were not involved in the murder of the deceased Bitola.

22. PW4 Smt. Rania @ Ranno Devi who is mother of the deceased Bitola has deposed in page no. 36 of the paper book that accused persons Ram Avtar, Pradeep and their mother did not demand any dowry from her.

23. PW5 Raj Kumar who is brother of the deceased Bitola has stated in his cross-examination at page no. 41 of the paper book that accused persons present in the court and their mother did not demand dowry from him or from his mother and father before him.

From the perusal of the letter sent by Ram Baran to his in-laws, which is at page no. 6 of the paper book, it is evident that only and only Ram Baran demanded dowry.

Moreover, there is general allegation of demand of dowry and harassment.

24. In case ***of Kansraj v. State of Punjab 2000 (5) SCC 207,*** the Hon'ble Apex Court has held in para no. 5 as follows:

"5.....In the light of the evidence in the case we find substance in the submission of the learned counsel for the defence that respondents 3 to 5 were roped in the case only on the ground of being close relations of respondent No.2, the husband of the deceased. For the fault of the husband, the in-

laws or the other relations cannot, in all cases, be held to be involved in the demand of dowry. In cases where such accusations are made, the overt acts attributed to persons other than husband are required to be proved beyond reasonable doubt. By mere conjectures and implications such relations cannot be held guilty for the offence relating to dowry deaths. A tendency has, however, developed for roping in all relations of the in-laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits. In their over enthusiasm and anxiety to seek conviction for maximum people, the parents of the deceased have been found to be making efforts for involving other relations which ultimately weaken the case of the prosecution even against the real accused as appears to have happened in the instant case."

25. From the perusal of the evidence of PW1 Matru, PW2 Satya Narayan, PW4 Rania & PW5 Raj Kumar, it is clear that there is no specific allegation with regard to demand of dowry or harassment in pursuance of aforesaid demand against appellant No. 2 Ram Avtar. He is the elder brother of the husband of the deceased Bitola so the dictum of Kans Raj (supra) is squarely applicable to the facts of the present case.

26. Learned counsel for the appellant submitted that there is no evidence with regard to soon before the death of deceased Bitola, she was subjected to cruelty or harassment by appellant no. 2 Ram Avtar in connection with demand of dowry.

In **Sham Lal v. State of Haryana AIR 1997 SC 1873**, the Hon'ble Apex Court has held as follows:

"11. It is imperative, for invoking the aforesaid legal presumption, to prove that "soon before her death" she was subjected to such cruelty or harassment. Here, what the prosecution achieved in proving at the most was that there was persisting dispute between the two sides regarding the dowry paid or to be paid, both in kind and in cash, and on account of the failure to meet the demand for dowry, Neelam Rani was taken by her parents to their house about one and a half years before her death. Further evidence is that an attempt was made to patch up between the two sides for which a panchayat was held in which it was resolved that she would go back to the nuptial home pursuant to which she was taken by the husband to his house. This happened about ten to fifteen days prior to the occurrence in this case. There is nothing on record to show that she was either treated with cruelty Or harassed with the demand for dowry during the period between her having been taken to the parental home and her tragic end.

12. In the absence of any such evidence it is not permissible to take recourse to the legal presumption envisaged in Section 113-B of the Evidence Act. That rule of evidence is prescribed in law to obviate the prosecution of the difficulty to further prove that the offence was perpetrated by the husband, as then it would be the burden of the accused to rebut the presumption."

27. So far as the facts of the present case are concerned, prosecution in the F.I.R., has alleged that on the assurance given by Ram Baran and his father, deceased Bitola was sent to her nuptial home before one month of the alleged

incident. PW1 Matru has also deposed about the aforesaid fact in the court.

28. During one month before the incident, there is no evidence on file that there was any communication between the deceased and the prosecution witnesses. The deceased was sent to her in-laws house on the assurance of good behaviour by her husband and father-in-law. After coming there to her in-laws house, there is no evidence on record so as to ascertain that the deceased was ill-treated by the appellant no. 2, hence the factum of soon before death is also not established in the present case.

29. Upshot of the above discussion is that the husband, mother-in-law and father-in-law of the deceased Bitola have already died, only appellant no. 2 Ram Avtar is surviving and contesting the appeal. He is the elder brother of the Ram Baran (husband of the deceased) and there is no specific allegation against the appellant no. 2 Ram Avtar regarding demand of dowry and harassment. The alleged letter demanding dowry was written by the husband of the deceased Ram Baran. PW2 Satya Narayan has specifically stated in his cross-examination that appellant no. 2 Ram Avtar used to oppose the alleged demand of dowry by husband (now deceased) of the deceased Bitola.

30. It is settled law of the Hon'ble Apex Court that in order to convict an accused for an offence under Section 304-B of I.P.C., prosecution is obliged to establish four ingredients beyond reasonable doubt. So far as the facts of the present case are concerned, prosecution has been able to establish that deceased Bitola died within seven years of her marriage, she died due to bodily injuries or other than normal circumstances but the prosecution has failed to prove the fact that soon before her death deceased Bitola was subjected to cruelty or harassment by appellant no. 2 Ram Avtar in pursuance of demand of dowry.

31. In view of the above facts and circumstances, I am of the considered opinion that appellant no. 2 is entitled to benefit of doubt, accordingly the appeal of the appellant no. 2 Ram Avtar succeeds and deserves to be allowed.

32. Appeal is accordingly, **allowed.**

33. The judgment and order dated order dated 20.02.1992 passed by 1st Additional Sessions Judge, Allahabad, in S.T. No. 361 of 1989 (State Vs Ram Baran and others), under Sections 147, 304B/201 I.P.C., P.S.- Naini, District- Allahabad, **qua the appellant no. 2 Ram Avtar is set-aside**. Appellant no. 2 is acquitted of the charges leveled against him. His bail bonds are canceled and sureties are discharged.

34. Copy of this judgment be certified to the court below for compliance. Lower court record be transmitted to the District Court, concerned.

(2021)08ILR A795
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.08.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE DINESH KUMAR SINGH, J.

Special Appeal Defective No. 244 of 2021
connected with
Special Appeal Defective No. 243 of 2021
and other connected cases

State of U.P. & Anr. ...Appellants
Versus
Aakash Verma & Ors. ...Respondents

Counsel for the Appellants:
C.S.C.

Counsel for the Respondents:
Lalta Prasad Misra

A. Service Law – Challenge to recruitment – Institutional exclusivity - Uttar Pradesh Police Ministerial, Accounts, Confidential Assistant Cadre Service (First Amendment) Rules, 2016- U.P. Police Ministerial, Accounts, Confidential Assistant Cadres Service (3rd Amendment) Rules, 2020.

When a candidate does not possess the essential qualification, but has only preferential qualification, it cannot be said that he/she is to be held eligible for appointment on the post for which a qualification is prescribed as an essential qualification. There is nothing in Rules, 2016 which stipulates that possession of higher qualification would presuppose acquisition of the essential qualification of possessing 'O' Level certificate from DOEACC/NIELIT. In absence of such a stipulation, the hypothesis that the higher qualification presupposes the acquisition of lower essential qualification cannot be accepted. (Para 29)

In absence of challenge to the Rules and the advertisement and having applied in pursuance of the advertisement, it was not open for the respondents to come before the Court with the prayer to hold them eligible for the aforesaid three posts as they possessed the preferential qualification, but not the essential qualification. (Para 29)

The recruitment must be completed as per the existing Rules. Rules, 2016 clearly stipulate the essential and preferential qualification. (Para 39)

B. Scope of Judicial Review - The prescription of qualification for a post, is a matter of recruitment policy. The State or the employer is empowered to prescribe the qualification as a condition of eligibility. The Court while exercising the function of judicial review, cannot expand upon ambit of prescribed qualification. (Para 31, 40)

Learned Single Judge has over stepped the power of judicial review while drawing equivalence of 'O' Level certificate in Computer Applications from DOEACC/NIELIT with B.Tech, B.Sc (CA) and BCA courses. The statutory rules not only prescribed the 'O' Level certificate in Computer Applications, but it also prescribed the institute from where the candidate should obtain the certificate as an essential qualification for the three posts in question. (Para 33)

Once the statutory Rules prescribe for having 'O' Level certificate from this particular institute, by exercising judicial review, the Court cannot substitute its own view to hold that the higher qualification would certainly include the 'O' Level certificate issued by DOEACC/NIELIT. It has been wrongly held that higher qualification held by the respondents would be inclusive of 'O' Level certificate and, therefore, the finding that the respondents meet the essential eligibility condition, is not correct. (Para 35)

Administrative order cannot supplant the statutory provisions and when a particular qualification is prescribed as essential qualification, the same cannot be supplanted by an administrative order without amending the rules. (Para 37)

C. Doctrine of Precedent - It is an established practice that if a Bench of same strength does not agree with the judgment rendered by another Bench, the matter should be referred to the Larger Bench. In the present case, the learned Single Judge without adverting to the judgments and orders passed by the earlier Benches dismissing the writ petitions, has allowed the writ petitions. (Para 38)

D. Doctrine of Estoppel - The respondents in their case filed writ petitions after the recruitment process was completed in the year 2019. There is no challenge to the statutory rules. The respondents had applied in pursuance of the advertisement dated 26.12.2016, therefore, they cannot be allowed later on to challenge the recruitment on the ground of institutional exclusivity. There is nothing wrong

on part of State in prescribing 'O' Level certificate from the premier institute i.e. NIELIT in statutory rules. (Para 40)

Special appeals allowed. (E-3)

Precedent followed:

1. Zahoor Ahmad Rather & ors. Vs Sheikh Imtiyaz Ahmad & ors., (2019) 2 SCC 404 (Para 10)

2. Deepak Singh & ors.Vs St. of U.P. & ors., 2020 (1) ALJ 596 (FB) (Para 12)

3. The Maharashtra Public Service Commission through its Secretary Vs Sandeep Shriram Warade & ors. (2019) 6 SCC 362 (Para 17)

4. Prakash Chandra Meena & ors. Vs St. of Rajasthan & ors., (2015) 8 SCC 484 (Para 17)

5. St. of Pun. & ors. Vs Anita & ors., (2015) 2 SCC 170 (Para 17)

6. P.M. Latha & anr. Vs St. of Kerala & ors. (2003) 3 SCC 541 (Para 17)

7. Deepak Sing & ors. Vs St. of U.P. & ors., 2020 (1) ALJ 596 (FB) (Para 17)

8. Writ Petition No. 20505 (SS) of 2020, Judgment and order dated 11.11.2020 passed by a coordinate Bench of this Court (Para 17)

9. Kartikey Vs St. of U.P. & ors., Judgment in Special Appeal No. 229 of 2016 (Para 17)

10. Mohd. Riazul Usman Gani & ors. Vs District and Sessions Judge, Nagpur & ors., (2000) 2 SCC 606 (Para 22)

11. St. of Haryana & anr. Vs Abdul Gaffar Khan & anr., (2006) 11 SCC 153 (Para 23)

12. Jyoti K.K. & ors. Vs Kerala Public Service Commission & ors., (2010) 15 SCC 596 (Para 24)

13. St. of U.K & ors. Vs Deep Chandra Tiwari & ors., (2013) 15 SCC 557 (Para 25)

14. Municipal Corporation of Greater Bombay & ors. Vs Thukral Anjali Deokumar & ors., (1989) 2 SCC 249 (Para 26)

15. B.L. Asawa Vs St. of Raj. & ors., (1982) 2 SCC 55 (Para 26)

16. Parmar Alpaben Sanabhai Vs St. of Guj., 2004 (4) LLN 919 (Para 26)

17. Shri Chaman Singh & anr. Vs Srimati Jaikaur, (1969) 2 SCC 429 (Para 27)

18. S.S. Grewal Vs St. of Pun. & ors., 1993 Supp. (3) SCC 234 (Para 27)

19. Zile Singh Vs St. of Haryana & ors., (2004) 8 SCC 1 (Para 27)

20. Securities and Exchange Board of India Vs Ajay Agarwal, (2010) 3 SCC 765 (Para 27)

21. St. of Pun. & ors. Vs Anita & ors., (2015) 2 SCC 170 (Para 30)

22. Secretary, Uttar Pradesh Subordinate Service & 2 ors. Vs Indra Prakash Patel, Special Appeal Defective No. 440 of 2021, decided on 07.07.2021 (Para 37)

Present Special Appeals arise out of judgment and order dated 26.03.2021, passed by learned Single Judge.

(Delivered by Hon'ble Ritu Raj Awasthi, J.
&
Hon'ble Dinesh Kumar Singh, J.)

Order on C.M. Application Nos.84026 of 2021, 84021 of 2021, 84029 of 2021 and 84034 of 2021

1. Heard.

2. These special appeals have been filed with a reported delay of 87 days as on the date of filing. Appeals are accompanied with applications for condonation of delay. Cause shown in the affidavits filed in support of the applications for condonation

of delay is sufficient. Even otherwise, considering the Supreme Court's order dated 27.04.2021, passed in Misc. Application No.665 of 2021 in SMW (C) No.3 of 2020; Cognizance for Extension of Limitation Vs. XXXX, we are satisfied that the delay in filing the appeals is liable to be condoned.

Accordingly, the applications for condonation of delay are ***allowed*** and the delay in filing the appeals is condoned.

3. ***Order on Memo of Special Appeal***

Batch of these four special appeals (Intra-court appeals) have been filed impugning the common judgement and order dated 26.3.2021 passed in Writ Petition Nos.20385 (SS) of 2019, 20505 (SS) of 2020, 24584 (SS) of 2019 and 20251 (SS) of 2019

Writ petitions were filed for direction to the Uttar Pradesh Police Recruitment and Promotion Board, (hereinafter referred to as "appellant Board') to treat the petitioners (respondents herein) qualified and eligible for appointment on the posts of Sub-Inspector (Confidential), Assistant Sub-Inspector (Ministerial) and Assistant Sub-Inspector (Accounts) and, further direction to consider the candidature of the petitioners-respondents for appointment on these posts while considering the degree/diploma possessed by the petitioners-respondents as equivalent to 'O' Level certificate issued by the DOEACC/NIELIT.

4. **Facts of Special Appeal (Defective) Nos.243 of 2021, 244 of 2021 and 246 of 2021, in brief, are as under:-**

(i) The appellants issued advertisement dated 26.12.2016 inviting applications from candidates to make recruitment to 136 posts of Sub-Inspector (Confidential), 303 posts of Assistant Sub-Inspector (Ministerial) and 170 posts of Assistant Sub-Inspector (Accounts). Last date of submission of application forms was 18.2.2017.

(ii) As per the advertisement, the following were the essential qualifications for three posts:-"

"(i) Assistant Sub-Inspector of Police (Ministerial):

(a) Bachelor Degree from a University established by law in India or equivalent qualification recognised by the Government.

(b) Hindi typing with speed of at least 25 words per minute and English Typing with speed of at least 30 words per minute (Uni-code based using in-script-key board or as prescribed by the Head of Department).

(c) Certificate of 'O' level in Computer from DOEACC/NIELIT Society.

(ii) Assistant Sub-Inspector of Police (Accounts):

(a) Bachelor Degree in Commerce or Post-Graduate Diploma in Accountancy from an University established by law in India or equivalent qualification recognised by the Government.

(b) Hindi Typing (Uni-code based using in-script-key board or as prescribed by the Head of Department) with speed of at least 15 words per minute.

(c) Certificate of 'O' level in Computer from DOEACC/NIELIT Society.

(iii) Sub-Inspector of Police (Confidential):

(a) Bachelor Degree from a University established by law in India or equivalent qualification recognised by the Government.

(b) Hindi Typing with speed of at least 25 words per minute and English

Typing with speed of at least 30 words per minute (Uni-code based using in-script-key board or as prescribed by the Head of Department).

(c) Hindi shorthand dictation with a speed of minimum 80 words per minute.

(d) Certificate of 'O' level in Computer from DOEACC/NIELIT Society."

(iii) It was further provided in the advertisement that following would be preferential qualifications for the aforesaid posts:-

"(a) Higher certification from DOEACC/NIELIT;

(b) Graduation in Law from any institute or college or university recognized by University Grants Commission;

(c) Candidate had to submit preferential qualification for at least two years in the Territorial Army;

(d) Possess of 'B' Certificate of National Cadet Corps."

(iv) The recruitment was to be made as per the provisions of Uttar Pradesh Police Ministerial, Accounts, Confidential Assistant Cadre Service (First Amendment) Rules, 2016 (herein after referred to as "Rules, 2016"). The online examination was held on 22.12.2018. The result of the examination was declared on 8.3.2019.

(v) According to the petitioners-respondents, they were declared successful in the said written examination. After written examination, the next stage was of document verification and physical standard test, the candidature of the petitioners-respondents was rejected at this stage as they did not possess the 'O' Level certificate issued by the DOEACC/NIELIT.

(vi) Vide order dated 23.9.2019, learned Single Judge has directed that the appointments made during the pendency of the writ petitions would be subject to the outcome of the writ petitions.

(vii) Final result of the successful candidates was declared on 11.7.2019 and 14.7.2019 and the recruitment process thereafter came to an end. The selected candidates have joined their respective posts and fresh advertisement has also been issued for filling up the vacancies of the next year and unfilled vacancies of the previous years and the recruitment process is going on.

5. **Facts of Special Appeal Defective No.245 of 2021**

In this appeal, the writ petition was filed on 11.10.2020 after more than one year and three months from the date of the result of the successful candidates was published by the Board. The following prayer was made in the aforesaid writ petition, which reads as under :-

"To issue a writ, order or direction in the nature of mandamus commanding the respondents to consider the candidature of the petitioners for appointment on the post of ASI-M, while treating the degrees possessed by the petitioners as equivalent to the O Level certificate issued by DOEACC/NIELIT, copies whereof are contained in Annexure No.12, Annexure No.13, Annexure No.15, Annexure No.16 and Annexure No.17 to this writ petition."

6. Learned Single Judge vide impugned judgement and order dated 26.3.2021 has allowed these writ petitions filed by the petitioners-respondents and directed the appellants to consider the candidature of the petitioners-respondents in the light of the observations made in the judgement and allow them to participate in the physical standard test and subsequent

selection process in pursuance of the advertisement dated 26.12.2016.

7. Learned Single Judge has formulated two questions for decision, which are as under:-

" 1. Whether it is permissible for the respondents to insist on 'O' Level certificate issued by DOEACC/NIELIT for appointment on the posts advertised?

2. Whether holding of basic educational qualification of Graduation can presuppose the acquisition of foundational knowledge in Computer if the syllabus of foundational knowledge of Computer is itself covered under the course of Graduation?

8. Learned Single Judge has held that insistence on 'O' Level certificate issued by the DOEACC/NIELIT is unreasonable and the candidature of a person cannot be rejected solely on the ground that he or she does not possess 'O' Level certificate issued by the DOEACC/NIELIT.

9. In response to question no.2, learned Single Judge has held that 'O' Level certificate issued by the DOEACC/NIELIT is a foundation course in Computer and to allow only such candidates to be appointed who have obtained training from a particular institute give rise to the institutional exclusivity having no reasonable basis for classification between the certificates issued by DOEACC/ NIELIT and other State established/recognized universities/ institution. It has also been held that syllabus of 'O' Level course is entirely covered under the syllabus of B.Tech, B.Sc, BCA etc. i.e. the degree/diploma course.

10. Learned Single Judge has distinguished the judgement in the case of ***Zahoor Ahmad Rather and others Vs. Sheikh Imtiyaz Ahmad and others,*** (2019) 2 SCC 404 on the ground that in Zahoor Ahmad's case, the required essential qualification was ITI certificate and the appellants in the said case were possessing the Diploma in Electrical Engineering/ Electronics and Communication and, therefore, it was held that in absence of a specific statutory rule under which holding of higher educational could presuppose the acquisition of lower qualification, the higher qualification of Diploma in Electrical Engineering/ Electronics and Communication could not be said to presuppose the required essential qualification of ITI certificate.

11. Learned Single Judge has further held that in the present case, syllabus of 'O' Level course, which is the essential qualification as per the advertisement, is included in B.Tech (Computer Science), B.Sc (Computer Science) BCA etc being a three or four years degree/diploma courses and, the candidate would not be required to possess 'O' Level course from DOEACC/NIELIT society, which is only a one year foundational course. It has been held that requirement of 'O' Level certificate even from the candidates having degree/diploma of B.Tech, B.Sc, BCA etc would be highly undesirable. It has been further held that requirement of 'O' Level course is proper only for candidates who possess bachelor degrees like B.A., B.Com etc.

12. Learned Single Judge has also distinguished the judgement of the Full Bench of this Court in the case of ***Deepak Singh and others Vs. State of U.P. and others,*** 2020 (1) ALJ 596 (FB) on the

ground that in the said case, there was a specific bar of excluding the candidates holding higher degree. It was further held that there was no material on record to show that qualification possessed by the petitioners therein was in same line of the progression. It has been further held that in the present case, the qualification possessed by the petitioners-respondents covers the syllabus of 'O' Level course.

13. Heard Mr. Uday Veer Singh, learned Additional Chief Standing Counsel for the appellants as well as Dr. L.P. Misra, assisted by Mr. Prafulla Tewari, Ms. Ishita Yadu and Mr. Manjeet Singh, learned counsel for the respondents.

14. Dr. Uday Veer Singh, learned Additional Chief Standing Counsel appearing for the appellants has submitted that Rule 10 of the Rules, 2016 provides certificate of 'O' Level in Computer from DOEACC/NIELIT as an essential qualification for direct recruitment on the post of Assistant Sub-Inspector (Ministerial) Assistant Sub-Inspector (Accounts) and Sub-Inspector (Confidential). The advertisement was issued in terms of the aforesaid Rules, 2016 prescribing essential qualification as stipulated in Rule 10 of the rules 2016. Respondents had neither challenged the aforesaid Rules prescribing the certificate of 'O' Level in Computer from DOEACC/NIELIT society as an essential qualification for appointment on the said posts nor they had challenged the advertisement. Once there is a statutory prescription regarding essential qualification of possessing 'O' Level certificate from a particular institute i.e. DOEACC/NIELIT society and in absence of challenge to the Rules, 2016 and the advertisement, the learned Single Judge has grossly erred in allowing the writ petitions vide impugned judgement.

15. He has further submitted that when Rule 10 of Rules, 2016 provides essential qualifications for the posts in question which include certificate of 'O' Level in Computer from DOEACC/NIELIT society and the said rule does not envisages any other qualification as equivalent to the said qualification of certificate of 'O' Level, the learned Single Judge has erred in holding that possessing the educational qualification of B.Tech, B.Sc or BCA etc. would deem knowledge of 'O' Level course and, therefore, the candidates possessing B.Tech, B.Sc , BCA etc. are held to be qualified for appointment on the posts in question.

16. Learned counsel for the appellants has further submitted that the statutory rules do not provide any other qualification equivalent to the prescribed qualification of 'O' Level certificate from DOEACC/NIELIT society as an alternate essential qualification for 'O' Level certificate from DOEACC/NIELIT society and the learned Single Judge by judicial interpretation, has incorrectly and wrongly held that possessing degree/diploma of B.Tech, B.Sc or BCA etc. would necessarily include knowledge of 'O' Level course. The learned Single Judge based on said incorrect interpretation, has wrongly held respondents to be eligible for appointment on the posts in question.

17. Learned counsel for the appellants has also submitted that the learned Single Judge failed to appreciate that the contents regarding the essential qualification as mentioned in the advertisement dated 11.4.2013 for recruitment on the post of Computer Operator Grade-I and

Programmer Grade-II are entirely different from the contents of the essential qualification as mentioned in the advertisement dated 26.12.2016 for three posts of Sub-Inspectors. He has further submitted that the committee formed to consider equivalence of the qualification for a different recruitment, does not have any relevance or bearing to the present recruitment in question inasmuch as the recruitment has been completed strictly in accordance with the statutory prescription and as well the advertisement for appointment on the said three posts. It has also been submitted that the impugned judgement and order is against the ratio of several judgments of the Supreme Court, Larger Bench of this Court and coordinate Benches of this Court, *inter alia*, judgments in *Zahoor Ahmad rather (supra),* ***The Maharashtra Public Service Commission through its Secretary vs. Sandeep Shriram Warade and others (2019)6 SCC 362, Prakash Chandra Meena and others Vs. State of Rajasthan and others (2015) 8 SCC 484, State of Punjab and others Vs. Anita and others, (2015) 2 SCC 170, P.M. Latha and another Vs. State of Kerala and others (2003) 3 SCC 541, Deepak Singh and others Vs. State of U.P. and others, 2020 (1) ALJ 596 (FB), Judgement and order dated 11.11.2020 passed by a coordinate Bench of this Court in Writ Petition No.20505 (SS) of 2020, Judgement in Special Appeal No.229 of 2016, Kartikey Vs. State of U.P. and others, and few other judgements.***

18. He has further submitted that the learned Single Judge has grossly erred in law in considering the third amendment brought in the Rules, 2016 known as "U.P. Police Ministerial, Accounts and Confidential Assistant Cadres Service (3rd Amendment) Rules, 2020" (hereinafter referred to as "Rules, 2020") which has been brought in after the recruitment process initiated in pursuance of the advertisement dated 26.12.2016 got completed. What should have been considered, is the existing Rules on the date of the advertisement and not the Rules, which have been enacted after the recruitment process got completed. It has been further submitted that the impugned judgement and order is against the principle of judicial propriety inasmuch as in respect of the same recruitment, coordinate Benches of this Court have dismissed the writ petitions filed by other similarly placed candidate being Writ A No.11683 of 2019, 11474 of 2019, 14530 of 2019 and Writ Petition No.20505 (SS) of 2020, vide judgement and orders dated 2.8.2019, 5.8.2019, 19.9.2019 and 11.11.2020 relying on the Full Bench judgement of this Court in the case of *Deepak Singh (supra)* and held that the amended rules are not retrospective. When the advertisement, selection and results have not been challenged, the writ petition would not be maintainable by the candidates who had applied in pursuance of the aforesaid advertisement. A coordinate Bench in its order dated 11.11.2020 passed in Writ Petition No.20505 (SS) of 2020 had held that once the petitioners had applied in pursuance of the advertisement without challenge to the advertisement, selection and results, the writ petition by them would not be maintainable.

19. It has been submitted that if the learned Single Judge was not in agreement with the judgement/orders passed by other coordinate Benches dismissing the writ petitions, learned Single Judge ought to have referred the matter for decision by the Larger Bench. However, in the present case, without even adverting to the

aforesaid judgements/orders passed by the coordinate Benches in writ petitions in respect of the same advertisement and same recruitment, it was improper to have allowed the writ petitions vide impugned judgement and order. It has been further submitted that the learned Single Judge has wrongly distinguished the judgement in the case of *Zahoor Ahmad (supra)* and the judgement of the Full Bench of this Court in the case of *Deepak Singh (supra).*

20. Sri L.P. Misra, learned counsel for the respondents has submitted that the finding recorded in the impugned judgment that the qualifications possessed by the respondents included the course of syllabus of 'O' Level certificate, has not been disputed by the appellants. He has further submitted that higher qualification possessed by the respondents are prescribed as preferential qualifications both in the statutory rules as well as in the advertisement. The preferential higher qualification prescribed in the statutory rules and, the advertisement is in the same stream/line of education and preferential qualification is inclusive of the course of study of essential qualification. He, therefore, submits that the learned Single Judge has correctly held that since the respondents possessed the preferential higher qualification, it would include the essential qualification of certificate of 'O' Level issued from DOEACC/NIELIT society.

21. He has further submitted that in respect of the recruitment of Computer Operator Grade-I and Programmer Grade-II by the U.P. Police Recruitment and Promotion Board, Lucknow initiated in pursuance of the advertisement dated 11.4.2013, prescribing 'O' Level certificate from DOEACC/NIELIT Society or its equivalent, Police Recruitment Board constituted an expert committee to examine the issue whether the diploma/degree holders in Computer Science would be treated as equivalent or not to the 'O' Level certificate issued from DOEACC/NIELIT society. Three members committee submitted its report dated 3.3.2014 stating that the Diploma/Degree courses of Computer Science were inclusive of 'O' Level certificate and are higher qualifications. Based on the said report, the candidates having Diploma/Degree qualifications in Computer Science/Computer Applications were considered for selection and were appointed as Computer Operator Grade-I and Programmer Grade-II. It has been further submitted that based on the expert committee report dated 3.3.2014, Rules, 2016 have been amended known as "U.P. Police Ministerial, Accounts and Confidential Assistant Cadres Service (Third Amendment) Rules, 2020" during the pendency of the writ petitions before the learned Single Judge. Now, under the amended rules, it is provided that the candidate must possess 'O' Level examination in Computer from NIELIT Society of the Government of India or a qualification recognized by the Government as equivalent thereto. He submits that the amended Rules, 2020 are clarificatory in nature and, therefore, essential qualification prescribed in Rules, 2016 is to be read as essential qualification prescribed under Rules, 2020.

22. He has further submitted that the respondents are possessing better qualification than the minimum essential qualification prescribed under the Rules and, therefore, they could not have been ousted from the consideration on the ground that they did not possess the

essential qualification as prescribed under the Rules. He has further submitted that the higher qualification cannot be a disadvantage to a candidate and appointment cannot be denied to a person on the ground of having higher qualification than the prescribed. in this regard, he has placed reliance on the judgement in the case of ***Mohd. Riazul Usman Gani and others Vs. District and Sessions Judge, Nagpur and others,*** (2000) 2 SCC 606 (Paragraphs 20 and 21).

23. He has further said that a candidate cannot be denied selection and appointment merely because of having a higher qualification unless the higher qualification is specifically excluded, or the higher qualification holders are barred from offering their candidature by statutory prescription. In support of his submission, he has placed reliance on the judgement in the case of ***State of Haryana and another Vs. Abdul Gaffar Khan and another,*** (2006) 11 SCC 153 (Paragraphs 5, 6 and 7).

24. He has also placed reliance on the judgement of the Supreme Court in the case of ***Jyoti K.K. and others Vs. Kerala Public Service Commission and others,*** (2010) 15 SCC 596 (Paragraphs 8 and 9) to submit that higher qualification possessed by the respondents is not only a higher qualification, but also inclusive of essential eligibility qualification prescribed under the Rules and, therefore, the learned Single Judge has rightly held the respondents to be eligible for consideration for appointment on three posts in question.

25. He has relied on the judgement of the Supreme Court in the case of ***State of Uttarakhand and others Vs. Deep Chandra Tiwari and others,*** (2013) 15 SCC 557 (Paragraph 11) to submit that the higher qualification possessed by the respondents being in the stream of Computer Science and Computer Applications is of the same stream including the course of study of 'O' Level certificate awarded by the DOEACC/NIELIT and, therefore, the respondents could not have been put at disadvantageous position for acquiring higher qualification. He has also placed reliance on the judgment of the Supreme Court in the case of *Kartikeya* (supra) to submit that there is a presumption of having lower qualification if one is having a higher qualification in the same stream. He has tried to distinguish the judgement in the case of *Zahoor Ahmad* (supra) and *Deepak Singh* (supra) and other judgements relied upon by the learned counsel for the appellants.

26. Ms. Ishita Yadu, learned counsel for the respondents in Special Appeal No.245 of 2021 has submitted that insistence of 'O' Level certificate issued exclusively by DOEACC/NIELIT amounts to institutional exclusivity, which is arbitrary, whimsical and violative of Article 14 of the Constitution of India having no rational nexus with the object sought to be achieved. In support of her submission, she has placed reliance on the judgements of the Supreme Court in the following cases:-

(i) ***Municipal Corporation of Greater Bombay and others Vs. Thukral Anjali Deokumar and others,*** *(1989) 2 SCC 249 (Paragraphs 17, 18, 19 and 20).*

(ii) ***B.L. Asawa Vs. State of Rajasthan and others,*** *(1982) 2 SCC 55 (Paragraph 10);*

(iii) ***Parmar Alpaben Sanabhai Vs. State of Gujarat****, 2004 (4) LLN 919 (Paragraph 22)*

27. She has further submitted that Rule 10 of Rules, 2016 were *de hors* the

fundamental rights enshrined under Articles 14 and 19 of the Constitution of India and, therefore, the third amendment has been brought in the aforesaid rules in the year 2020. It has been submitted that Rules, 2020 should be held to have retrospective operation as they have sought to rectify the defects in the Rules, 2016 bringing them within the Constitutional mandate of equality. In this regard, she has placed reliance on the following judgements:-

(i) ***Shri Chaman Singh and another Vs. Srimati Jaikaur****, (1969) 2 SCC 429 (Paragraphs 5 and 6)*

(ii) ***S.S. Grewal Vs. State of Punjab and others,*** *1993 Supp. (3) SCC 234, (Paragraph 9)*

(iii) ***Zile Singh Vs. State of Haryana and others,*** *(2004) 8 SCC 1 (Paragraphs 13 to 18 and 21)*

(iv) ***Securities and Exchange Board of India Vs. Ajay Agarwal,*** *(2010) 3 SCC 765 (Paragraph 40)*

28. We have considered the submissions advanced by the learned counsel for the parties and perused the record.

29. Respondents have neither challenged the statutory rules i.e Rules, 2016 prescribing 'O' Level certificate in Computer Application from DOEACC/NIELIT as an essential qualification nor they had challenged the advertisement dated 26.12.2016 in pursuance of which the recruitment for three posts have been completed. In absence of challenge to the Rules and the advertisement and having applied in pursuance of the advertisement, it was not open for the respondents to come before the Court with the prayer to hold them eligible for the aforesaid three posts as they possessed the preferential qualification, but not the essential qualification. Prayers in the writ petitions would clearly show that there was no challenge to the statutory prescription and the advertisement. At the threshold, the candidate must possess essential qualification and, if he/she possesses the essential qualification, then only the preferential qualification would be considered in case there are two or more candidates having essential qualification and have secured equal marks in examination/interview etc. When a candidate does not possess the essential qualification, but has only preferential qualification, it cannot be said that he/she is to be held eligible for appointment on the post for which a qualification is prescribed as an essential qualification. There is nothing in Rules, 2016 which stipulates that possession of higher qualification would presuppose acquisition of the essential qualification of possessing 'O' Level certificate from DOEACC/NIELIT. In absence of such a stipulation, the hypothesis that the higher qualification presupposes the acquisition of lower essential qualification cannot be accepted.

30. The Supreme Court in the case of ***State of Punjab and others Vs. Anita and others,*** (2015) 2 SCC 170 in paragraph 15 held as under :-

"15. It was sought to be asserted on the basis of the aforesaid observations, that since the private respondents possess higher qualifications, then the qualification of JBT/ETT, they should be treated as having fulfilled the qualification stipulated for the posts of JBT/ETT Teachers. It is not possible for us to accept the aforesaid submission of the learned counsel for the private respondents, because the statutory

rules which were taken into consideration by this Court while recording the aforesaid observations in Jyoti K.K. case [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596] , permitted the aforesaid course. The statutory rule, in the decision relied on by the learned counsel for the private respondents, is extracted hereunder: (SCC p. 598, para 6)

"6. Rule 10(a)(ii) reads as follows:

*''**10. (a)(ii)** Notwithstanding anything contained in these Rules or in the Special Rules, the qualifications recognised by executive orders or Standing Orders of Government as equivalent to a qualification specified for a post in the Special Rules and [**Ed.:** The matter between two asterisks has been emphasised in original as well.] such of those higher qualifications which presuppose the acquisition of the lower qualification prescribed for the post shall also be sufficient for the post [**Ed.:** The matter between two asterisks has been emphasised in original as well.] .'"(emphasis supplied)*

A perusal of the Rule clearly reveals that the possession of higher qualification would presuppose the acquisition of the lower qualification prescribed for the posts. Insofar as the present controversy is concerned, there is no similar statutory provision authorising the appointment of persons with higher qualifications."

It is relevant to mention here that the judgement in the case of *Jyoti K.K.* (supra), relied by Sri L.P. Misra, has been considered in the aforesaid judgement.

31. The prescription of qualification for a post, is a matter of recruitment policy. The State or the employer is empowered to prescribe the qualification as a condition of eligibility. The Court while exercising the function of judicial review, cannot expand upon ambit of prescribed qualification.

32. The Supreme Court in the case of *Zahoor Ahmad* (supra) has held that equivalence of qualification is not a matter, which can be determined by the Court in exercise of power of judicial review. It is for the State to determine whether a particular qualification should also be regarded as a qualification. It would be apt to extract paragraphs 26 and 27 of the aforesaid judgement, which read as under :-

"26. We are in respectful agreement with the interpretation which has been placed on the judgment in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] in the subsequent decision in Anita [State of Punjab v. Anita, (2015) 2 SCC 170 : (2015) 1 SCC (L&S) 329] . The decision in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] turned on the provisions of Rule 10(a)(ii). Absent such a rule, it would not be permissible to draw an inference that a higher qualification necessarily presupposes the acquisition of another, albeit lower, qualification. The prescription of qualifications for a post is a matter of recruitment policy. The State as the employer is entitled to prescribe the qualifications as a condition of eligibility. It is no part of the role or function of judicial review to expand upon the ambit of the prescribed qualifications. Similarly, equivalence of a qualification is not a matter which can be determined in exercise of the power of judicial review. Whether a particular qualification should or should not be regarded as equivalent is a matter for the State, as the recruiting authority, to determine. The decision in Jyoti K.K. [Jyoti

K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] turned on a specific statutory rule under which the holding of a higher qualification could presuppose the acquisition of a lower qualification. The absence of such a rule in the present case makes a crucial difference to the ultimate outcome. In this view of the matter, the Division Bench [Imtiyaz Ahmad v. Zahoor Ahmad Rather, LPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the High Court was justified in reversing the judgment [Zahoor Ahmad Rather v. State of J&K, 2017 SCC OnLine J&K 936] of the learned Single Judge and in coming to the conclusion that the appellants did not meet the prescribed qualifications. We find no error in the decision [Imtiyaz Ahmad v. Zahoor Ahmad Rather, LPA (SW) No. 135 of 2017, decided on 12-10-2017 (J&K)] of the Division Bench.

27. While prescribing the qualifications for a post, the State, as employer, may legitimately bear in mind several features including the nature of the job, the aptitudes requisite for the efficient discharge of duties, the functionality of a qualification and the content of the course of studies which leads up to the acquisition of a qualification. The State is entrusted with the authority to assess the needs of its public services. Exigencies of administration, it is trite law, fall within the domain of administrative decision-making. The State as a public employer may well take into account social perspectives that require the creation of job opportunities across the societal structure. All these are essentially matters of policy. Judicial review must tread warily. That is why the decision in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] must be understood in the context of a specific statutory rule under which the holding of a higher qualification which presupposes the acquisition of a lower qualification was considered to be sufficient for the post. It was in the context of specific rule that the decision in Jyoti K.K. [Jyoti K.K. v. Kerala Public Service Commission, (2010) 15 SCC 596 : (2013) 3 SCC (L&S) 664] turned."

33. We are of the view that the learned Single Judge has over stepped the power of judicial review while drawing equivalence of 'O' Level certificate in Computer Applications from DOEACC/NIELIT with B.Tech, B.Sc (CA) and BCA courses. The statutory rules not only prescribed the 'O' Level certificate in Computer Applications, but it also prescribed the institute from where the candidate should obtain the certificate as an essential qualification for the three posts in question.

34. DOEACC now known as "National Institute of Electronics and Information Technology" is an autonomous scientific society under the administrative control of the Ministry of Electronics and Information Technology, Government of India. It was set up to carry out human resource development and related activities in the area of information, electronics and communication technologies. DOEACC/NIELIT is engaged both formal and non-formal education in the area of information, electronics and communication technology besides development of industry-oriented quality education and training programs in the state-of-the-arts areas. It has endeavored to establish standards to be the country's premier institution for examination and certification in the field of information, electronics and communication technology. It is also one of the National Examination

Body, which accredits institutes/ organizations for conducting courses in Information Technology in the non-formal sector. It has 43 centers located all over India having its Headquarter at New Delhi. Over the last two decades, NIELIT has acquired very good expertise in Information Technology training, through its wide repertoire of courses, ranging from 'O' Level (Foundation), 'A' Level (Advanced Diploma), 'B' Level (MCA equivalent) and 'C' Level (M.Tech level). Thus, it is the premier institute providing quality education and training in the area of information, electronics and communication technology.

35. Once the statutory Rules prescribe for having 'O' Level certificate from this particular institute, by exercising judicial review, the Court cannot substitute its own view to hold that the higher qualification would certainly include the 'O' Level certificate issued by DOEACC/NIELIT. We, therefore, hold that the learned Single Judge has wrongly held that higher qualification held by the respondents would be inclusive of 'O' Level certificate and, therefore, the finding of the learned Single Judge that the respondents meet the essential eligibility condition, is not correct.

36. Full Bench of this Court in the case of *Deepak Singh* (supra) has specifically held that 'O' Level certificate granted by NIELIT is not equivalent to Post Graduate Diploma in Computer Application and presumption cannot be drawn to hold that the holder of Post Graduate Diploma in Computer Application, would necessarily possess the qualification as prescribed for 'O' Level Diploma accorded by NIELIT.

37. A Division Bench of this Court in ***Special Appeal Defective No.440 of 2021, Secretary, Uttar Pradesh Subordinate Service and 2 others Vs. Indra Prakash Patel,*** decided on 7.7.2021, where the rule prescribed one of the essential qualification as CCC Certificate in Computer operation awarded by the DOEACC society for the post of Cane Supervisor and, the candidate was having B.Tech (Agriculture) having computer one of the subject in two semesters, was held to be not eligible as he did not meet the essential eligibility condition. It was also held that the administrative order cannot supplant the statutory provisions and when a particular qualification is prescribed as essential qualification, the same cannot be supplanted by an administrative order without amending the rules. Paragraph 11 of the aforesaid judgement is reproduced as under:-

"11. As per the letters aforesaid, a candidate was made eligible, if he had undertaken computer science subject at the level of High School or Intermediate. It was also if one is having a diploma or degree in computer science. The petitioner / non-appellant was not having computer science subject at the level of High School / Intermediate or diploma or degree in computer science. The petitioner / non appellant is not having computer science at the level of High School or Intermediate. It is not having diploma or degree of computer science thus he was not eligible even by the Government Orders. At this stage it is necessary to observe that the administrative order referred to above i.e. 3/6.5.2016 and 23.9.2016 cannot be read in conflict to the Rules of 2015. The Rule of 2015, as amended require CCC Certificate of computer science. It could not have been nullified by an administrative order. It is

settled law that an administrative order can supplement the statutory provisions but cannot supplanted it. The administrative order referred to above and quoted has supplanted the statutory provisions. It was not in the domain of the administration to issue order dehors the statutory provisions. Thus, even the administrative order could not have been read to the benefit of candidate going dehors the Rules. Learned Single Judge, however, placed reliance on the administrative orders ignoring the statutory provisions. Learned Single Judge extended the benefits to the petitioner even going contrary to the administrative order. The petitioner / non appellant was not having subject of computer science at the level of High School or Intermediate. He was not otherwise in possession of diploma or degree in computer science. He was having computer subject in two semesters of B. Tech. (Agriculture) course. It does not suffice the condition given even in the administrative order and otherwise it could not have been read in conflict with the statutory provisions. Accordingly, we find substance in the appeal and accordingly the judgement of learned Single Judge dated 20.1.2020, is set aside."

38. We also find that the learned Single Judge has not adverted to the judgements/orders of the three coordinate Benches, which have dismissed the writ petitions of the similar candidates in respect of the same recruitment started with advertisement dated 26.12.2016. It is an established practice that if a Bench of same strength does not agree with the judgement rendered by another Bench, the mater should be referred to the Larger Bench. In the present case, the learned Single Judge without adverting to the judgements and orders passed by the earlier Benches dismissing the writ petitions, has allowed the writ petitions.

39. We do not find any force in the submission of Sri L.P. Misra, learned counsel for the respondents that the third amendment in the year 2020 in the Rules, 2016, is clarificatory in nature. The recruitment must be completed as per the existing Rules. Rules, 2016 clearly stipulate the essential and preferential qualification. None of the respondents had 'O' Level certificate issued from DOEACC/NIELIT and, therefore, they were not found eligible for appointment on the three posts, subject matter of advertisement dated 26.12.2016. Rules, 2020 have no retrospective operation and, cannot be made applicable to the recruitment process initiated in pursuance of the advertisement prescribing the essential qualification of having 'O' Level certificate from DOEACC/NIELIT as per the existing Rules, 2016.

40. So far as the submission of Ms. Ishita Yadu, learned counsel for respondents in Special Appeal No.245 of 2021 is concerned, it is relevant to note here that the respondents in her case filed writ petition after the recruitment process was completed in the year 2019. There is no challenge to the statutory rules. The respondents had applied in pursuance of the advertisement dated 26.12.2016, therefore, they cannot be allowed later on to challenge the recruitment on the ground of institutional exclusivity. The State has prescribed 'O' Level certificate from the premier institute i.e. NIELIT in statutory rules and, therefore, we do not find any wrong in such a prescription. We are of the view that the writ petition filed by the respondents of Special Appeal No.245 of 2021 after the recruitment process

completed, was not maintainable even otherwise.

41. For the reasons stated above, we ***allow*** the special appeals and set aside the impugned judgement and order dated 26.3.2021 passed by the learned Single Judge and dismiss the writ petitions filed by respondents.

(2021)08ILR A810
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.08.2021

BEFORE

THE HON'BLE ABDUL MOIN, J.

Service Single No. 8702 of 2017

Prafulla Kumar Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Israr Ahmad Ansari, Girish Kumar Pandey, Nirankar Nath Jaiswal, Prashant Jaiswal, Sharad Pathak

Counsel for the Respondents:
C.S.C., Chandra Bhushan, Rakesh Kumar Tripathi

A. Service Law – Education – Seniority - Regulations of the Intermediate Education Act, 1921- Regulation 3(1), 3(2) of Chapter II; **Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982- Section 33-F - Long standing seniority should not be allowed to be disturbed after a passage of reasonable period of time.** (Para 7)

Petitioner was initially appointed on the post of Lecturer (Bio) on ad hoc basis on 25.07.1991. He has been regularized through an order dated 03/30.12.2001 w.e.f. 30.12.2000 in terms of S. 33-F of 1982 Act. The respondent No. 5 had been appointed as Lecturer (English) by the Selection Board on a substantive post on 01.08.1996. Thus, the substantive appointment of the petitioner is 30.12.2000 while that of respondent No. 5 is 01.08.1996. Admittedly, the rules governing the seniority namely Regulation 3 of Chapter II of 1921 Act provides that the seniority of teachers in a grade shall be determined on the basis of their substantive appointment in that grade. (Para 19)

Right since 1997 till 2015, respondent No. 5 never agitated for assignment of his seniority over and above the petitioner, meaning thereby, the seniority of the petitioner over and above respondent No. 5 continued without any dispute for a period of 18 years and long standing seniority was sought to be unsettled by respondent No. 5 by submitting his objections in the year 2015, which was unsettled through the impugned order dated 25.03.2017. It has been indicated that respondent no. 5 was agitating for his seniority since long but no date of such objections or representations are indicated. The only objection indicated in the order of the writ Court dated 20.12.2016, filed by the respondent No. 5, is 09.09.2015. (Para 15, 23, 24)

A long standing seniority should not be disturbed after a reasonable period of time. In the present case, repeated seniority lists have been issued over a period of 1997 till 2012 and it is only in the year 2015 that respondent No. 5 chose to raise his objections against the seniority assigned to the petitioner which validly could not have been entertained by the competent authority at such a belated stage. (Para 29)

B. Principle of acquiescence and waiver - Once the seniority lists were issued in the years 1997, 2005, 2006 and subsequently on 08.11.2012, respondent No. 5 not having raised any challenge to the seniority lists of the year 1997, 2005 and 11.12.2006 despite being shown as junior to the petitioner, could not do a volte-face and file his objections against the seniority list dated 08.11.2012 in the year 2015. (Para 8)

Once repeatedly seniority lists have been issued since 1997 by the competent authority assigning seniority to the petitioner over and above

respondent No. 5 and in terms of Regulation 3(2) read with Regulation 3(1) of Chapter II of 1921 Act, the seniority list was prepared and revised every year and respondent No. 5 never agitated about the same right till 2015 then considering the principle of acquiescence and estoppel by conduct, respondent No. 5 would be precluded to claim the relief as has been granted to him by means of the impugned order. (Para 20, 32)

Doctrine of estoppel by election - A person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. (Para 33)

C. Merely because the writ Court required the competent authority or the Committee to look into the matter, the same would not amount to revival of a stale claim of respondent No. 5 for re-assignment of the seniority. (Para 11, 30)

When a belated representation in regard to a 'stale' or 'dead' issue/dispute is considered and decided, in compliance with a direction by the Court/Tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the 'dead' issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a Court's direction. Neither a Court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches. (Para 31)

Writ petition allowed. (E-3)

Precedent followed:

1. Malcom Lawrence Cecil D'Souza Vs U.O.I., (1976) 1 SCC 599 (Para 7)

2. K.R. Mudgal Vs R.P. Singh, (1986) 4 SCC 531 (Para 7)

3. Shiba Shankar Mohapatra & ors. Vs St. of Oris. & ors., (2010) 12 SCC 471 (Para 7)

4. Rajendra Pratap Singh Yadav Vs St. of U.P. & ors., (2011) 7 SCC 743 (Para 7)

5. Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420 (Para 8)

6. U.O.I. & ors. Vs M.K. Sarkar, (2010) 2 SCC 59 (Para 11)

Precedent distinguished:

1. St. of Oris. & anr. Vs Mamata Mohanty, 2011 AIR SCW 1332 (Para 15)

2. Joint Director of Education, Azamgarh Mandal & anr. Vs Udai Raj Vishwakarma & anr., 2007 (3) ALJ 33 (Para 15)

3. Shitala Prasad Shukla Vs St. of U.P. & ors., AIR 1986 SC 1859 (Para 15)

4. Dr. Anupama Mehrotra Vs The Hon'ble Chancellor Mahatma Jyotiba Phule Rohilkhand University & ors., Writ A No. 17904 of 2018, decided on 01.08.2019 (Para 15)

Present petition assails order dated 25.03.2017 by which the seniority of the petitioner has been re-assigned below the respondent no. 5.

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Sri Upendra Nath Mishra, learned Senior Advocate, assisted by Sri Neel Kamal Mishra, learned counsel for the petitioner, Sri Pankaj Kumar Patel, learned Additional Chief Standing Counsel for respondent nos. 1 to 4, Sri Rakesh Kumar Tripathi, learned counsel for respondent no.5 and Sri Chandra Bhushan, learned counsel for respondent no.6.

2. Instant writ petition has been filed by the petitioner praying for the following reliefs:-

"i. Issue a writ, order or direction in nature of certiorari by quashing the impugned order dated 25.03.2017 passed by the opposite party no.3 contained in Annexure No.1 to this writ petition.

ii. Issue a writ, order or direction in nature of mandamus commanding the opposite parties not to implement the impugned order dated 25.03.2017.

iii. Issue any other appropriate writ, order or direction in favour of the petitioner as the Hon'ble Court may deem fit in the circumstances of the case.

iv. Award the cost of the petition to the petitioner."

3. The case set forth by the petitioner is that he was initially appointed on the post of Lecturer (Bio) on adhoc basis on 25.07.1991 on account of a vacancy having arisen due to promotion of one Sri Sripal Mishra, who was working as Bio Teacher. The appointment was made in pursuance to a proposal of the Committee of Management and the same was approved by the District Inspector of Schools vide order dated 13.07.1991. A copy of the appointment order is Annexure-2 to the writ petition while the copy of the approval order is part of Annexure-3 to the writ petition. Subsequently, Sri Sripal Mishra retired and a resolution was passed for regularization of the petitioner on 25.07.1995 by the Committee of Management and the same was sent to the District Inspector of Schools for his approval. After long lapse of time the services of the petitioner were regularized through an order dated 03/30.12.2001 w.e.f. 30.12.2000 by the order issued by the Joint Director of Education, Lucknow. The regularization order was passed under the provisions of Section 33-F of the Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 (hereinafter referred to as the '1982 Act'). Copy of the order dated 03/30.12.2001 is Annexure-5 to the writ petition. Prior to regularization of the petitioner, private respondent no.5, Sri Jai Ram, was appointed as a Lecturer (English).

4. A seniority list dated 25.07.1997 was issued by the management in which the name of the petitioner finds place at serial no.17 vis-a-vis respondent no.5 whose name finds place at serial no.21. Subsequent thereto, another seniority list dated 02.12.2005 was issued in which the name of the petitioner finds place at serial no.9 vis-a-vis respondent no.5 whose name finds place at serial no.13. The petitioner claims that a seniority list dated 11.12.2006 was issued in which the name of the petitioner finds place at serial no.6 vis-a-vis respondent no.5 whose name finds place at serial no.7. Subsequent thereto, another seniority list dated 08.11.2012 was issued in which the name of the petitioner found place at serial no.5 vis-a-vis respondent no.5 whose name finds place at serial no.8. It is also contended that both the petitioner as well as private respondent no.5 signed the said seniority lists dated 11.12.2006 and 08.11.2012. Copies of the said seniority lists have been filed cumulatively as Annexure-6 to the writ petition. It is claimed that sometimes in the year 2015, respondent no.5 preferred a representation to the official respondents raising a dispute about the assignment of the seniority to the petitioner over respondent no.5 by contending that as the petitioner had been regularized in service as Lecturer through an order dated 03/30.12.2001 w.e.f. 30.12.2000 while respondent no.5 had been appointed as Lecturer (English) on 25.01.1996, as such, he was senior to the petitioner and thus prayed for re-assignment of the seniority. When the

official respondents did not do anything in the matter, the private respondent filed Writ Petition No.29967 (SS) of 2016 in re: Jairam vs. State of U.P. and others contending that against the seniority list of teachers for Lecturer grade the petitioner (respondent no.5 herein) had raised objection vide his letter dated 09.09.2015 and the District Inspector of Schools being the competent authority, passed an order dated 19.10.2015 directing the management to modify the seniority list but the directions have not been complied with by the management. The District Inspector of Schools has also written to the Principal to refer the matter for consideration by the Regional Level Committee headed by the Joint Director of Education but he is also sitting over the matter. Considering this, the writ Court vide judgment and order dated 20.12.2016 directed the Committee or whosoever is competent, to consider the issue within specified time provided there is no legal impediment in this regard.

5. It transpires that respondent no.3 called upon the petitioner to submit his reply pertaining to the seniority which was submitted by the petitioner vide his reply dated 07.02.2017, a copy of which is Annexure-7 to the writ petition, whereby various issues had been raised more particularly pertaining to various seniority lists having been issued and respondent no.5 having never objected to the same and thus it was prayed that no such seniority dispute can be agitated by respondent no.5 after such a long lapse of time. It was also contended in the reply that respondent no.5 has failed to raise any dispute or objection to the assignment of the seniority of the petitioner over respondent no.5 for a long period of time and consequently now the respondent no.5 would be precluded from raising such an issue having acquiesced to the seniority of the petitioner over and above respondent no.5 over several years.

6. Subsequent thereto, respondent no.3 vide his order dated 25.03.2017 was of the view that as respondent no.5 has been appointed prior to the petitioner on 25.01.1996 vis-a-vis the petitioner who had been regularized vide order dated 03/30.12.2001 w.e.f. 30.12.2000 as such considering the rules governing the seniority, it is respondent no.5 who is to be assigned seniority over the petitioner and consequently proceeded to fix the seniority of respondent no.5, Sri Jairam, over the petitioner through the impugned order dated 25.03.2017. Being aggrieved with the aforesaid order, present petition has been filed.

7. Sri Upendra Nath Mishra, learned Senior Advocate, argues that once repeatedly seniority lists were issued right since the year 1997 in which the petitioner was assigned seniority over and above private respondent no.5 consequently there was no occasion for respondent no.5 to have preferred his objections against the seniority list in the year 2015 and for the same to have been entertained by the District Inspector of Schools and subsequently under the garb of the order passed by the writ Court, the impugned order re-assigning the seniority and assigning seniority to respondent no.5 over and above the petitioner could not have been passed. It is also contended that the impugned order has been passed on 25.03.2017 i.e. after a period of 20 years from the issue of the first seniority list dated 25.07.1997 and it being a settled proposition of law that long standing seniority should not be allowed to be disturbed after a passage of reasonable period of time. In this regard, reliance has

been placed on the judgments of the Apex Court, which are as follows:-

(i) Malcom Lawrence Cecil D'Souza vs. Union of India - (1976) 1 SCC 599;

(ii) K.R. Mudgal vs. R.P. Singh - (1986) 4 SCC 531;

(iii) Shiba Shankar Mohapatra and others vs. State of Orissa and others - (2010) 12 SCC 471, and

(iv) Rajendra Pratap Singh Yadav vs. State of U.P. and others - (2011) 7 SCC 743.

8. Learned Senior Advocate also argues that once the seniority lists were issued in the years 1997, 2005, 2006 and subsequently on 08.11.2012, respondent no.5 not having raised any challenge to the seniority lists of the year 1997, 2005 and 11.12.2006 despite being shown as junior to the petitioner, could not do a volte-face and file his objections against the seniority list dated 08.11.2012 in the year 2015 as the principle of acquiescence and waiver would be applicable. In this regard, reliance has been placed on the judgment of the Apex Court in the case of **Cauvery Coffee Traders, Mangalore vs. Hornor Resources (International) Company Limited - (2011) 10 SCC 420.**

9. Learned counsel for the petitioner also argues that the objections filed by respondent no.5 in the year 2015 against the seniority list dated 08.11.2012 could not have been entertained by the competent authority inasmuch as Regulation 3(1)(f) of Chapter II of the Regulations of the Intermediate Education Act, 1921 (hereinafter referred to as the '1921 Act') specifically provide that any teacher being aggrieved from the decision of the Committee of Management under sub-clause (e) of the 1921 Act may prefer an appeal to the Inspector within 15 days from the date of communication of such decision to such teacher and that once the seniority list dated 08.11.2012 was issued and respondent no.5 had signed upon the same in acknowledgment of the assignment of the seniority of the petitioner over and above respondent no.5 consequently no such objection could have been entertained by the District Inspector of Schools which were preferred by respondent no.5 in the year 2015 as the mandatory period of 15 days had already lapsed and thus the competent authority proceeded in colourable exercise of power under the garb of the order passed by the writ Court in issuing the order dated 25.03.2017 re-assigning and lowering the seniority of the petitioner vis-a-vis respondent no.5.

10. The further argument is that even if the order of the writ Court dated 20.12.2016 is seen which has been made the basis for re-assigning the seniority of the petitioner vis-a-vis respondent no.5 then the same could not have been made the basis of re-assigning the seniority inasmuch as the writ Court had specifically observed while disposing off the writ petition that in case there is no legal impediment then the issue of seniority be considered by the Committee of Management while the legal impediment, as per Regulation 3(1)(f) of 1921 Act would be non-entertaining of any objections beyond the period of 15 days while the objections were filed by respondent no.5 after almost three years from the date of issue of the seniority list dated 08.11.2012.

11. In this regard, learned counsel for the petitioner contends that even if the writ Court directed the competent authority to

decide the objections filed by respondent no.5 or required the Committee of Management to consider the issue of seniority, merely because the issue was decided the same could not allow revival of a dead or stale issue by the competent authority keeping in view the law laid down by the Apex Court in the case of **Union of India and others vs. M.K. Sarkar - (2010) 2 SCC 59.**

12. Sri Upendra Nath Mishra, learned Senior Advocate, also argues that Regulation 3(2) of 1921 Act provides for revision of the seniority list every year. Further a mandate is there before the Committee of Management in terms of Regulation 3(1) of 1921 Act that the Committee of Management of the Institution shall cause a seniority list of teachers to be prepared in accordance with certain provisions, meaning thereby that once the seniority list is to be revised every year and has to be prepared by the Committee of Management and respondent no.5 having entered service on 25.01.1996 as such he would have been well aware of the seniority list is to be prepared invariably every year and thus once the seniority lists, as have been referred to by the petitioner, were issued and the petitioner was assigned seniority over and above respondent no.5 and no objections were raised by respondent no.5 to the assignment of the seniority of the petitioner over and above respondent no.5 for a period right since 1996 till 2015 as such it would be deemed that respondent no.5 was never aggrieved with the assignment of the seniority of the petitioner over and above respondent no.5 for a long period of 19 years and thus after 19 years no such plea for re-assignment of the seniority can validly be raised.

13. On the other hand, Sri Rakesh Kumar Tripathi, learned counsel appearing for respondent no.5, argues that admittedly the respondent no.5 was appointed on 25.01.1996 as Lecturer (English) while the services of the petitioner had been regularized vide order dated 03/30.12.2001 w.e.f. 30.12.2000 i.e. the date of substantive appointment of the petitioner is subsequent to the respondent no.5 and as such keeping in view Regulation 3(1)(b) of Chapter II of 1921 Act, it is respondent no.5 who would be senior to the petitioner. He argues that considering this aspect of the matter, upon the seniority list dated 08.11.2012 being issued, which the petitioner signed and only then he came to know that the petitioner has been indicated as senior to respondent no.5 and thus being aggrieved the respondent no.5 submitted a representation to the competent authority for correct fixation of the seniority as per Rules but yet when nothing was done in the matter, he was constrained to file Writ Petition No.29967 (SS) of 2016 and this Court vide order dated 20.12.2016 required the Committee or the competent authority to look into the matter pertaining to the grievance of the petitioner (respondent no.5 herein) for seniority. In pursuance thereof and after due opportunity of hearing to both the petitioner as well as respondent no.5 that the order dated 25.03.2017 has been passed by respondent no.3 whereby the seniority of the petitioner has been lowered and respondent no.5 has correctly been assigned the seniority as per the date of substantive appointment over and above the petitioner. He further contends that the said order is fully in consonance with the rules for assignment of the seniority and as such there is no illegality in the same.

14. Sri Tripathi also argues that respondent no.5 always agitated before the

competent authority for fixation of the seniority as per law but when no heed was paid by the official respondents it was only then that the writ petition was filed in the year 2016 and that the order passed by the competent authority is perfectly legal and valid in the eyes of law.

15. As regards the delay which has been caused in the respondent no.5 in raising the issue of seniority, Sri Tripathi reiterates his argument that respondent no.5 always agitated for fixation of his seniority as per law and thus the question of delay will not arise. In this regard, Sri Tripathi has placed reliance on the following judgments:-

(i) Shitala Prasad Shukla vs. State of U.P. and others - AIR 1986 SC 1859;

(ii) Joint Director of Education, Azamgarh Mandal and another vs. Udai Raj Vishwakarma and another - 2007 (3) ALJ 33;

(iii) State of Orissa and another vs. Mamata Mohanty - 2011 AIR SCW 1332, and

(iv) An unreported Division Bench judgment of Allahabad High Court in the case of **Dr. Anupma Mehrotra vs. The Hon'ble Chancellor Mahatma Jyotiba Phule Rohilkhand University and 9 others in Writ A No.17904 of 2018** decided on 01.08.2019, as affirmed by the Apex Court.

16. Sri Pankaj Patel, learned Additional Chief Standing Counsel has argued that the order re-assigning the seniority to respondent no.5 over and above the petitioner is in accordance with rules and does not call for any interference by this Court.

17. Sri Chandra Bhushan, learned counsel appearing for respondent no.6, has adopted the arguments of Sri Rakesh Kumar Tripathi, learned counsel for respondent no.5.

18. Heard learned counsel for the parties and perused the records.

19. From perusal of the records, it is apparent that the petitioner was initially appointed on the post of Lecturer (Bio) on adhoc basis on 25.07.1991. He has been regularized through an order dated 03/30.12.2001 w.e.f. 30.12.2000 in terms of Section 33-F of 1982 Act. The respondent no.5 had been appointed as Lecturer (English) by the Selection Board on a substantive post on 01.08.1996. Thus, the substantive appointment of the petitioner is 30.12.2000 while that of respondent no.5 is 01.08.1996. Admittedly, the rules governing the seniority namely Regulation 3 of Chapter II of 1921 Act provides that the seniority of teachers in a grade shall be determined on the basis of their substantive appointment in that grade. For the sake of convenience, Regulation 3 of Chapter II of 1921 Act is reproduced below:-

3. (1) The Committee of Management of every institution shall cause a seniority list of teachers to be prepared in accordance with the following provisions-

(a) The seniority list shall be prepared separately for each grade of teachers whether permanent or temporary, on any substantive post;

(b) Seniority of teachers in a grade shall be determined on the basis of their substantive appointment in that grade. If two or more teachers were so appointed

on the same date, seniority shall be determined on the basis of age;

[(bb) Where two or more teachers working in a grade are promoted to the next higher grade on the same date, their seniority inter se shall be determined on the basis of the length of their service to be reckoned from the date of their substantive appointment in the grade from which they are promoted :

Provided that if such length of service is equal, seniority shall be determined on the basis of age.]

(c) A teacher in a higher grade shall be deemed to be senior to a teacher in the lower grade irrespective of the length of service;

(d) If a teacher who is placed under suspension is reinstated on his original post his original seniority in the grade shall not be affected;

(e) Every dispute about the seniority of the teacher shall be referred to the Committee of Management which shall decide the same giving reasons for the decision;

[(द्धि उपखण्ड ङ के अधीन प्रबन्ध समिति के विनिश्चय से व्यथित कोई अध्यापक ऐसा विनिश्चय ऐसे अध्यापक को सूचित किये जाने के दिनांक से 15 दिन के भीतर सम्बन्धित क्षेत्रीय उप0 शिक्षा निदेशक को अपील कर सकता है, और अपील पर सम्बन्धित पक्षों को सुनवाई का अवसर देने के उपरान्त उप शिक्षा निदेशक अपना निर्णय कारण सहित देगा, जो अन्तिम होगा और प्रबन्ध समिति द्वारा कार्यान्वित किया जायेगा।,

रुहद्ध यदि एक ग्रेड़ में कार्यरत दो या अधिक अध्यापक किसी एक ही तिथि पर पदोन्नति किए जाएं तो उनकी ज्येष्ठता का आधार उस ग्रेड़ का सेवाकाल होगा, जिसमें वे कार्यरत थे, परन्तु यदि सेवाकाल बराबर है, तो पदोन्नति को दशा में आयु के आधार पर ज्येष्ठता निर्धारित की जायेगी।

(2) The seniority list shall be revised every year and the provisions of Clause (1) shall mutatis mutandis apply to such revision.

20. A perusal of Regulation 3 of Chapter II of 1921 Act would indicate that as per Rule 3(1)(b), seniority of teachers in a grade has to be determined on the basis of their substantive appointment in that grade, meaning thereby that a teacher appointed substantively at an earlier point of time would have a higher seniority vis-a-vis a teacher appointed at a later point of time. Likewise, Regulation 3(2) of Chapter II of 1921 Act provides that the seniority list shall be revised **every year** and the provisions of Clause (1) shall mutatis mutandis apply to such revision. Regulation 3(1) of Chapter II of 1921 Act requires the Committee of Management of every institution to prepare a seniority list of teachers in accordance with the provisions of Regulation 3 of Chapter II of 1921 Act. Thus, when Regulation 3(2) of Chapter II of 1921 Act is read in accordance with Regulation 3(1) of Chapter II of 1921 Act, it is apparent that a seniority list of teachers has to be prepared every year.

21. Now, the question would be that once as per rules it is date of substantive appointment in a grade which determines the seniority of teachers as to what is the infirmity in the impugned order dated 25.03.2017 passed by respondent no.3 by which the seniority of the petitioner has been **re-assigned** below the respondent no.5 on the basis of the date of substantive appointment of both, the petitioner and the respondent no.5?

22. The Court consciously uses the word "re-assigned" inasmuch as the seniority lists had been issued by the official respondents on 25.07.1997, 02.12.2005, 11.12.2006 and 08.11.2012, wherein the petitioner has always been assigned the seniority over and above the

respondent no.5 i.e. at serial no.17, 9, 6 and 5 vis-a-vis respondent no.5 who was assigned seniority at serial no.21, 13, 7 and 8 respectively. There is another seniority list of the year 2016-2017 at page 33 of the writ petition wherein the petitioner finds place at serial no.3 vis-a-vis respondent no.5 who is figured at serial no.5 and thus with the issue of impugned order dated 25.03.2017 re-assignment of the seniority has taken place.

23. From perusal of the aforesaid, it is apparent that the petitioner has been assigned seniority over and above respondent no.5 since the year 1997 which situation prevailed till the issue of seniority list dated 08.11.2012 and subsequent thereto in the year 2016-2017 (which incidentally has not been argued by either of the parties). The only dispute pertaining to seniority has been raised by respondent no.5 in the year 2015 as would be apparent from perusal of the order passed in Writ Petition No.29967 (SS) of 2016, which was filed by respondent no.5-Jairam. For the sake of convenience, the order dated 20.12.2016 is reproduced below:-

"Heard.

The seniority list of teachers in Lecturer Grade of the respondent educational institution, was issued by the Committee of Management, regarding which the petitioner raised objections vide his letter dated 9.9.2015, whereupon, the D.I.O.S. who is the competent authority to decide the appeal against such seniority list as per relevant regulations on the subject, passed an order dated 19.10.2015 directing the Management to modify the seniority list as per the directions contained therein. The said order was complied by the Management. However, it seems that the petitioner was not satisfied even then and informed the D.I.O.S. accordingly, whereupon, the D.I.O.S. wrote a letter to the Principal to refer the matter alongwith all relevant informations and documents for consideration by the Regional Level Committee headed by the concerned Joint Director.

If the facts as stated are correct, and the matter is pending for consideration before the Regional Level Committee as aforesaid and if there is no legal impediment in this regard, let the same be considered by the said Committee on whosoever is competent, within a period of two months from the date of production of a certified copy of this order.

With the above observations/ directions this with petition is disposed of."

24. From perusal of the aforesaid order, it is apparent that respondent no.5 had contended before the writ Court by filing Writ Petition No.29967 (SS) of 2016 that against the seniority, he had raised his objections vide letter dated 09.09.2015 on which the District Inspector of Schools had passed an order dated 19.10.2015 directing the management to modify the seniority list which order has not been complied with by the management. Thereafter, the District Inspector of Schools had written a letter to the Principal to refer the matter to the Regional Level Committee but to no avail. The writ Court vide order dated 20.12.2016 was of the view that if the facts as stated are correct and if the matter is pending for consideration before the Regional Level Committee and **if there is no legal impediment** the same was required to be considered by the Committee or whosoever is competent within a specified time. In pursuance thereof, a notice was issued to both the parties and thereafter respondent no.3 has proceeded to re-assign the seniority and placed respondent no.5 over

and above the petitioner vide order dated 25.03.2017. Thus, right since 1997 till 2015, respondent no.5 never agitated for assignment of his seniority over and above the petitioner, meaning thereby, the seniority of the petitioner over and above respondent no.5 continued without any dispute for a period of 18 years and long standing seniority was sought to be unsettled by respondent no.5 by submitting his objections in the year 2015, which was unsettled through the impugned order dated 25.03.2017. Here, it would be relevant to mention that in paragraphs 9 and 16 of the counter affidavit filed by respondent no.5, it has been indicated that he was agitating for his seniority since 'early' (long) but no date of such objections or representations are indicated. The only objection indicated in the order of the writ Court dated 20.12.2016, filed by the respondent no.5, is 09.09.2015.

25. In this regard, the Court may consider the law laid down by the Apex Court in the case of **K.R. Mudgal (supra)** wherein the Apex Court has held as under:-

"7. The respondents in the writ petition raised a preliminary objection to the writ petition stating that the writ petition was liable to be dismissed on the ground of laches. Although the learned Single Judge and the Division Bench have not disposed of the above writ petition on the ground of delay, we feel that in the circumstances of this case the writ petition should have been rejected on the ground of delay alone. The first draft seniority list of the Assistants was issued in the year 1958 and it was duly circulated amongst all the concerned officials. In that list the writ petitioners had been shown below the respondents. No objections were received from the petitioners against the seniority list. Subsequently, the seniority lists were again issued in 1961 and 1965 but again no objections were raised by the writ petitioners, to the seniority list of 1961, but only the petitioner No. 6 in the writ petition represented against the seniority list of 1965. We have already mentioned that the 1968 seniority list in which the writ petitioners had been shown above the respondents had been issued on a misunderstanding of the Office Memorandum of 1959 on the assumption that the 1949 Office Memorandum was not applicable to them. The June 1975 seniority list was prepared having regard to the decision in Ravi Varma's case (supra) and the decision of the High Court of Andhra Pradesh in the writ petitions filed by respondent Nos. 7 and 36 and thus the mistake that had crept into the 1968 list was rectified. Thus the list was finalised in January, 1976. The petitioners who filed the writ petition should have in the ordinary course questioned the principle on the basis of which the seniority lists were being issued from time to time from the year 1958 and the promotions which were being made on the basis of the said lists within a reasonable time. ***For the first time they filed the writ petition in the High Court in the year 1976 nearly 18 years after the first draft seniority list was published in the year 1958. Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the Government servants created by the writ petitions filed after several years as in this case. It is essential that any one who feels aggrieved by the seniority assigned to him should approach the court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the Government servants there would also be administrative complications and difficulties.***

Unfortunately in this case even after nearly 32 years the dispute regarding the appointement of some of the respondents to the writ petition is still lingering in this Court. In these circumstances we consider that the High Court was wrong in rejecting the preliminary objection raised on behalf of the respondents to the writ petition on the ground of laches. The facts of this case are more or less similar to the facts in R.S. Makashi & Ors.v. I.M. Menon & Ors., [1982] 2 S.C.R. 69. In the said decision this Court observed at page 100 thus:

"In these circumstances, we consider that the High Court was wrong in over-ruling the preliminary objection raised by the respondents before it, that the writ petition should be dismissed on the preliminary ground of delay and laches, inasmuch as it seeks to disrupt the vested rights regarding the seniority, rank and promotions which had accrued to a large number of respondents during the period of eight years that had intervened between the passing of the impugned Resolution and the institution of the writ petition. We would accordingly hold that the challenge raised by the petitioners against the seniority principles laid down in the Government Resolution of March 22, ought to have been rejected by the High Court on the ground of delay and laches and the writ petition in so far as it related to the prayer for quashing the said Government Resolution should have been dismissed."

8. We are in respectful agreement with the above observation.

9. We may also refer here to the weighty observations made by a Constitution Bench of this Court in Malcom Lawrence Cecil D'Souza v. Union of India & Ors., [1975] Supp. S.C.R. 409 at page 413-414 which are as follows:

"Although security of service cannot be used as a shield against administrative action for lapse of a public servant, by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult to doubt to guarantee such security in all its varied aspects. It should at least be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."

10. We feel that in the circumstances of this case, we should not embark upon on and enquiry into the merits of the case and that the writ petition should be dismissed on the ground of laches alone."

26. Likewise, the Apex Court in the case of **Shiba Shankar Mohapatra (supra)** has held as under:-

"18. The question of entertaining the petition disputing the long standing seniority filed at a belated stage is no more res integra. A Constitution Bench of this Court, in Ramchandra Shanker Deodhar & Ors. v. State of Maharashtra & Ors. AIR 1974 SC 259, considered the effect of delay in challenging the promotion and seniority list and held that any claim for seniority at a belated stage should be rejected inasmuch as it seeks to disturb the vested rights of other persons regarding seniority, rank and promotion which have

accrued to them during the intervening period. A party should approach the Court just after accrual of the cause of complaint. While deciding the said case, this Court placed reliance upon its earlier judgments, particularly in Tilokchand Motichand v. H.B. Munshi, AIR 1970 SC 898, wherein it has been observed that the principle, on which the Court proceeds in refusing relief to the petitioner on the ground of laches or delay, is that the rights, which have accrued to others by reason of delay in filing the writ petition should not be allowed to be disturbed unless there is a reasonable explanation for delay. The Court further observed as under:-

"A party claiming fundamental rights must move the Court before others' rights come out into existence. The action of the Courts cannot harm innocent parties if their rights emerge by reason of delay on the part of person moving the court."

19. This Court also placed reliance upon its earlier judgment of the Constitution Bench in R.N. Bose v. Union of India & Ors. AIR 1970 SC 470, wherein it has been observed as under:-

"It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be defeated after the number of years."

20. In R.S. Makashi v. I.M. Menon & Ors. AIR 1982 SC 101, this Court considered all aspects of limitation, delay and laches in filing the writ petition in respect of inter se seniority of the employees. The Court referred to its earlier judgment in State of Madhya Pradesh & Anr. v. Bhailal Bhai etc. etc., AIR 1964 SC 1006, wherein it has been observed that the maximum period fixed by the Legislature as the time within which the relief by a suit in a Civil Court must be brought, may ordinarily be taken to be a reasonable standard by which delay in seeking the remedy under Article 226 of the Constitution can be measured. The Court observed as under:-

"We must administer justice in accordance with law and principle of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set-aside after the lapse of a number of years..... The petitioners have not furnished any valid explanation whatever for the inordinate delay on their part in approaching the Court with the challenge against the seniority principles laid down in the Government Resolution of 1968... We would accordingly hold that the challenge raised by the petitioners against the seniority principles laid down in the Government Resolution of March 2, 1968 ought to have been rejected by the High Court on the ground of delay and laches and the writ petition, in so far as it related to the prayer for quashing the said Government resolution, should have been dismissed." (Emphasis added)

21. The issue of challenging the seniority list, which continued to be in existence for a long time, was again considered by this Court in K.R. Mudgal & Ors. v. R.P. Singh & Ors. AIR 1986 SC 2086. The Court held as under:-

"A government servant who is appointed to any post ordinarily should at least after a period of 3-4 years of his appointment be allowed to attend to the duties attached to his post peacefully and without any sense of insecurity.....

Satisfactory service conditions postulate that there shall be no sense of uncertainty amongst the Government servants created by writ petitions filed after several years as in this case. It is essential that any one who feels aggrieved by the seniority assigned to him, should approach the Court as early as possible otherwise in addition to creation of sense of insecurity in the mind of Government servants, there shall also be administrative complication and difficulties.... In these circumstances we consider that the High Court was wrong in rejecting the preliminary objection raised on behalf of the respondents to the writ petition on the ground of laches." (Emphasis added)

22. While deciding the case, this Court placed reliance upon its earlier judgment in Malcom Lawrance Cecil D'Souza v. Union of India & Ors. AIR 1975 SC 1269, wherein it had been observed as under:-

"Although security of service cannot be used as a shield against the administrative action for lapse of a public servant, by and large one of the essential requirement of contentment and efficiency in public service is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in a seniority list after having been settled for once should not be liable to be re-opened after lapse of many years in the instance of a party who has itself intervening party chosen to keep quiet. Raking up old matters like seniority after a long time is likely to resort in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time." (Emphasis added)

23. In B.S. Bajwa v. State of Punjab & Ors. AIR 1999 SC 1510, this Court while deciding the similar issue re-iterated the same view, observing as under:-

"It is well settled that in service matters, the question of seniority should not be re-opened in such situations after the lapse of reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This along was sufficient to decline interference under Article 226 and to reject the writ petition". (Emphasis added)

24. In Dayaram Asanand v. State of Maharashtra & Ors. AIR 1984 SC 850, while re-iterating the similar view this Court held that in absence of satisfactory explanation for inordinate delay of 8-9 years in questioning under Article 226 of the Constitution, the validity of the seniority and promotion assigned to other employee could not be entertained.

25. In P.S. Sadasivaswamy v. State of Tamil Nadu AIR 1975 SC 2271, this Court considered the case where the petition was filed after lapse of 14 years challenging the promotion. However, this Court held that aggrieved person must approach the Court expeditiously for relief and it is not permissible to put forward stale claim. The Court observed as under :-

"A person aggrieved by an order promoting a junior over his head should approach the Court at least within 6 months or at the most a year of such promotion."

The Court further observed that it was not that there was any period of limitation for the Courts to exercise their powers under Article 226 nor was it that there could never be a case where the Courts cannot interfere in a matter after

certain length of time. It would be a sound and wise exercise of jurisdiction for the Courts to refuse to exercise their extra ordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who standby and allow things to happen and then approach the Court to put forward stale claim and try to unsettle settled matters.

26. A similar view has been re-iterated by this Court in Smt. Sudama Devi vs. Commissioner & Ors. (1983) 2 SCC 1; State of U.P. vs. Raj Bahadur Singh & Anr. (1998) 8 SCC 685; and Northern Indian Glass Industries vs. Jaswant Singh & Ors. (2003) 1 SCC 335.

27. In Dinkar Anna Patil & Anr. vs. State of Maharashtra, AIR 1999 SC 152, this Court held that delay and laches in challenging the seniority is always fatal, but in case the party satisfies the Court regarding delay, the case may be considered.

28. In K.A. Abdul Majeed vs. State of Kerala & Ors. (2001) 6 SCC 292, this Court held that seniority assigned to any employee could not be challenged after a lapse of seven years on the ground that his initial appointment had been irregular, though even on merit it was found that seniority of the petitioner therein had correctly been fixed.

29. It is settled law that fence-sitters cannot be allowed to raise the dispute or challenge the validity of the order after its conclusion. No party can claim the relief as a matter of right as one of the grounds for refusing relief is that the person approaching the Court is guilty of delay and the laches. The Court exercising public law jurisdiction does not encourage agitation of stale claims where the right of third parties crystallises in the interregnum. (vide Aflatoon & Ors. vs. Lt. Governor, Delhi & Ors. AIR 1974 SC 2077; State of Mysore vs. V.K. Kangan & Ors., AIR 1975 SC 2190; Municipal Council, Ahmednagar & Anr. vs Shah Hyder Beig & Ors., AIR 2000 SC 671; Inder Jit Gupta vs. Union of India & Ors. (2001) 6 SCC 637; Shiv Dass vs. Union of India & Ors., AIR 2007 SC 1330; Regional Manager, A.P.SRTC vs. N. Satyanarayana & Ors. (2008) 1 SCC 210; and City and Industrial Development Corporation vs. Dosu Aardeshir Bhiwandiwala & Ors. (2009) 1 SCC 168).

30. Thus, in view of the above, the settled legal proposition that emerges is that once the seniority had been fixed and it remains in existence for a reasonable period, any challenge to the same should not be entertained. In K.R. Mudgal (supra), this Court has laid down, in crystal clear words that a seniority list which remains in existence for 3 to 4 years unchallenged, should not be disturbed. Thus, 3-4 years is a reasonable period for challenging the seniority and in case someone agitates the issue of seniority beyond this period, he has to explain the delay and laches in approaching the adjudicatory forum, by furnishing satisfactory explanation."

27. Likewise, the Constitution Bench of the Apex Court in the case of **Malcom Lawrence Cecil D'Souza (supra)** has held as under:-

"8. The matte r can also be looked at from another angle. The seniority of the petitioner qua respondents 4 to 26 was determined as long ago as 1956 in accordance with 1952 Rules. The said seniority was reiterated in the seniority list issued in 1958. The present writ petition was filed in 1971. The petitioner, in our opinion, cannot be allowed to challenge the seniority list after lapse of so many years. *The fact that a*

seniority list was issued in 1971 in pursuance of the decision of this Court in Karnik's case (supra) would not clothe the petitioner with a fresh right to challenge, the fixation of his seniority qua respondents 4 to 26 as the seniority list of 1971 merely reflected the seniority of the petitioner qua those respondents as already determined in 1956. Satisfactory service conditions postulate that there should be no sense of uncertainty amongst public servants because of stale claims made after lapse of 14 or 15 years. It is essential that any one who feels aggrieved with an administrative decision affecting one's seniority should act with due diligence and promptitude and not sleep over the matter. No satisfactory explanation has been furnished by the petitioner before us for the inordinate delay-in approaching the court. It is no doubt true that he made a representation against the seniority list issued in 1956 and 1958 but that representation was rejected in 1961. No cogent ground has been shown as to why the petitioner became quiescent and took no diligent steps to obtain redress.

9. Although security of service cannot be used as a shield against administrative action for lapse of a public servant, by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible, to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."

28. Likewise, the Apex Court in the case of **Rajendra Pratap Singh Yadav (supra)** has held as under:-

"45. We deem it appropriate to reiterate that in service jurisprudence there is immense sanctity of a final seniority list. The seniority list once published cannot be disturbed at the behest of person who chose not to challenge it for four years. *The sanctity of the seniority list must be maintained unless there are very compelling reasons to do so in order to do substantial justice. This is imperative to avoid avoidable litigation and unrest and chaos in the services."*

29. When the facts of the instant case are tested at the touchstone of law laid down by the Apex Court in the cases of **K.R. Mudgal (supra), Shiba Shankar Mohapatra (supra), Malcom Lawrence Cecil D'Souza (supra)** and Rajendra Pratap Singh Yadav (supra), the irresistible conclusion is that a long standing seniority should not be disturbed after a reasonable period of time. In the present case, as already indicated above, repeated seniority lists have been issued over a period of 1997 till 2012 and it is only in the year 2015 that respondent no.5 chose to raise his objections against the seniority assigned to the petitioner which validly could not have been entertained by the competent authority at such a belated stage.

30. Another aspect of the matter would be that once the writ Court's order dated 20.12.2016 passed in the case of respondent no.5 required the Committee or the competent authority to look into the

matter even then the writ Court had put a caveat of the matter to be considered if there is no legal impediment. The legal impediment, in view of the Court, would be the long passage of time that has lapsed since the issue of the first seniority list in July 1997 wherein the petitioner was assigned the seniority over and above the respondent no.5 till the year 2015 when respondent no.5 chose to raise his objections against the seniority of the petitioner vis-a-vis respondent no.5. In view of this caveat and objections in this regard having been specifically raised by the petitioner in his reply dated 07.02.2017 in reply to the notice dated 19.01.2017 issued by respondent no.3 for the purpose of considering the seniority that respondent no.5 was raising objections against the seniority after 17 years, this aspect of the matter should have been gone into by respondent no.3 while proceeding to re-assign the seniority but strangely this aspect of the matter on the point of delay has conveniently been brushed aside and shoved under the carpet by respondent no.3 by proceeding to pass the order dated 25.03.2017, which itself vitiates the impugned order. Merely because the writ Court required the competent authority or the Committee to look into the matter, the same would not amount to revival of a stale claim of respondent no.5 for re-assignment of the seniority.

31. In this regard, the Apex Court in the case of **M.K. Sarkar (supra)** has held as under:-

"When a belated representation in regard to a `stale' or `dead' issue/dispute is considered and decided, in compliance with a direction by the Court/Tribunal to do so, the date of such decision can not be considered as furnishing a fresh cause of action for reviving the `dead' issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches."

32. Another aspect of the matter would be that once repeatedly seniority lists have been issued by the competent authority assigning seniority to the petitioner over and above respondent no.5 and in terms of Regulation 3(2) read with Regulation 3(1) of Chapter II of 1921 Act, the seniority list was to be prepared and revised every year and in pursuance thereof, repeated seniority lists were issued since the year 1997 in which the petitioner was shown as senior to respondent no.5 and respondent no.5 never agitated about the same right till 2015 then considering the principle of acquiescence and estoppel by conduct, respondent no.5 would be precluded to claim the relief as has been granted to him by means of the impugned order.

33. In this regard, the Court may consider the judgment of the Apex Court in the case of **Cauvery Coffee Traders (supra)** wherein the Apex Court has held as under:-

"35. Thus, it is evident that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or

equitable estoppel), which is a rule in equity. ***By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."***

34. As regards the judgment cited on behalf of respondent no.5 in the case of **Udai Raj Vishwakarma (supra),** the same was a case pertaining to the validity of adhoc appointment of the petitioner dehors the rules. In the present case the validity of appointment of neither the petitioner nor respondent no.5 is in dispute and hence the said judgment would not be applicable in the present case.

35. As regards the judgment in the case of **Mamta Mohanty (supra),** in the said case the Apex Court had held that where an order is bad since its inception it does not get sanctified at a later stage.

In the present case the issue is not pertaining to the correct assignment of the seniority as per rules governing the seniority but the time when such objections should have been raised by respondent no.5. As already indicated above, it is settled proposition of law that claims pertaining to assignment of the seniority should be raised within a reasonable period of time while in the present case the respondent no.5 has raised the claim, despite issue of various seniority lists in the interregnum period, after approximately 18 years and thus the judgment of **Mamta Mohanty (supra)** would not be applicable in the present case.

36. In the case of **Shitala Prasad Shukla (supra)**, though the dispute was pertaining to seniority and the District Inspector of Schools had held certain persons to be senior to the appellant Shitala Prasad Shukla which order had been affirmed by the High Court yet from the said judgment it nowhere comes out that various seniority lists had been issued and no objections had been raised by the persons claiming seniority over Shitala Prasad Shukla or that the objections were raised belatedly.

In the present case the impugned order has been challenged primarily on the ground of there being gross laches in raising the issue of re-assignment of the seniority after long lapse of time and various seniority lists have been issued and thus even the judgment of **Shitala Prasad Shukla (supra)** would not be applicable in the present case.

37. As regards unreported judgment of the Division Bench of this Court in the case of **Dr. Anupma Mehrotra (supra)**, suffice to state that from perusal of the said judgment, it is apparent that a tentative list has been issued on 02.04.1996 which was incorrectly issued against which despite the petitioner having submitted his objections a final seniority list was issued on 27.07.1996 and upon the petitioner raising a dispute, no decision was taken. It does not come out that any seniority list had been issued prior to 1996 while in the present case repeated seniority lists have been issued showing the petitioner as senior to respondent no.5. Even the grounds of laches which were raised in the case of **Dr. Anupma Mehrotra (supra)** were considered by the Division Bench by indicating that the petitioner had raised the dispute of seniority before the competent authority **within time** while in the present case, as already discussed above, respondent no.5 chose to raise the dispute of his seniority over and above the

petitioner after lapse of 18 years from the date of issue of seniority list in the year 1997. Thus, the judgment of **Dr. Anupma Mehrotra (supra)** would have no applicability in the present case.

38. Keeping in view the aforesaid discussions, the impugned order dated 25.03.2017 cannot be said to be legally sustainable in the eyes of law. Accordingly, the writ petition is **allowed**. A writ of certiorari is issued quashing the order dated 25.03.2017 passed by respondent no.3, a copy of which is Annexure-1 to the writ petition.

39. Consequences to follow.

(2021)08ILR A827
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ C No. 2008 of 2021

Smt. Divya Sahani ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Suresh Chandra Mishra, Sri Alok Tripathi

Counsel for the Respondents:
C.S.C., Sri Shravan Kumar Tripathi

Electricity - Electricity Supply Code, 2005 - Clause 4.4 - Electricity disconnection on the sole ground that property/flat is subject matter of dispute in Civil Suit - *Held* - Clause 4.4 nowhere prohibits the grant of electricity connection merely on the ground that there is a pending dispute in respect of property where the electricity connection is sought to be supplied - electricity connection does not confer title - Note-3 of Annexure 4.1 of the Code provides that electricity connection shall not be treated as a proof of ownership of the premises - Respondent ordered to grant electricity connection to the applicant at his premises (Para 7)

Allowed.(E-4)

(Delivered by Hon'ble Pankaj Naqvi, J.
&
Hon'ble Piyush Agrawal, J.)

Heard Sri Suresh Chandra, learned counsel for the petitioner, Sri Shravan Kumar Tripathi for respondent no. 2 and the learned standing counsel.

This writ petition has been filed, seeking a writ of mandamus, commanding the respondents to supply an electricity connection in the name of the petitioner at Flat No. MS-4, Second Floor, Pandav Nagar, Meerut.

1. The petitioner claims to have a registered gift deed dated 17.12.2018 in her favour from her mother in respect of property situate at Flat No. MS-4, 2nd Floor, Pandav Nagar, Meerut. The petitioner applied for electricity connection at the above premises after ensuring due compliance and was accordingly granted electricity connection on 24.8.2020. It appears that on an objection raised by her maternal grand mother Sheela Kalra wife of Late Amarnath Kalra that as the aforesaid property is a subject matter of dispute in Civil Suit No. 333/2020 before the Civil Judge (SD), Meerut, respondent no. 2 proceeded to disconnect the power connection on 31.8.2020. The complainant (Sheela Kalra) is reported to be no more.

2. The sole ground for disconnection is the mere pendency of the above suit.

3. Learned counsel for the Power Corporation in order to defend the impugned action took refuge under Clause 4.4 of the Electricity Supply Code, 2005.

4. The U.P. Electricity Supply Code, 2005 is a compilation of certain obligations of the licensee vis-a-vis the consumers and specifies the set of practices to provide efficient, cost-effective and consumer friendly service to the consumers inter alia dealing with procedure for new connection and for enhancement or reduction of load. Chapter IV of the Code relates to procedure for grant of supply, Clause 4.1 enumerates the obligations on the licensees to supply electricity.

5. Clause 4.4 provides the procedure for processing of an application for supply of electricity which is extracted hereinbelow:-

4.4 Processing of Application for Supply:

(a) Application for new connections, in prescribed form (Annexure 4.1) and complete in all respects and accompanied by the prescribed Registration-cum-processing fee, shall be filed in duplicate in the office, specified by the Licensee, along with -attested true copies of the following documents:

(i) Proof of ownership of the premises in the form of registered sale deed or partition deed or succession or heir ship certificate or deed of last will or Proof of occupancy such as valid power of attorney or latest rent paid receipt or valid lease deed or indemnity form as per Annexure 4.2. Order Copy of appropriate court, in case of litigation regarding ownership of the premises, has to be enclosed.

(ii) Approval / permission / NOC of the local authority, if required under any law / statute.

(iii) In case of a partnership firm, partnership deed.

(iv) In case of a Limited Company, Memorandum, articles of Association, Certificate of incorporation and list of Director's / certified addresses.

(v) Work completion and Test certificate, on the prescribed format (Annexure 4.4), given by the licensed electrical contractor can be submitted later but prior to commencement of supply.

(vi) Owner's consent for getting new supply connection. (Annexure 4.3).

(vii) Connections to Jhuggi / huntments / Patri / Shopkeepers shall be given as temporary connection only and shall be engaged through prepaid meters only and the prospective consumer has has to provide Aadhar Card / Pan Card / Ration / Voter ID Card / Driving Licence / Bank Account of Nationalized Bank only (one of these). All the papers issued in regard to this connection will boldly display that the same is a temporary connection and is not a proof of ownership of the said premises.

The conditions mentioned above in sub-clauses (I) to (v) shall not be applicable for the connections released and requested under this sub-clause;

Provided that, these temporary connections shall be up to 2 KW only; it shall be the responsibility of the licensee to ensure electrical safety in such case.

6. Clause 4.4(a)(i) insists on a proof of ownership of the premises in the form of registered sale deed or partition deed or some document of title or a proof of

occupancy so that the applicant can maintain an application for grant of a new connection. The additional requirement under the same clause is that in the event there is a pending dispute with regard to the ownership of the premises in a court of law, a document evidencing such dispute be also furnished. Sub-clause (ii) to sub-clause (vi) also provide certain other conditions which are to be complied with by the applicant but presently we are not concerned with them.

7. We after carefully reading the provisions of Clause - 4.4 are of the firm view that nowhere it prohibits the grant of electricity connection to an applicant merely on the ground that there is a pending dispute in respect of property where the electricity connection is sought to be supplied and rightly so as the supply of electricity to the occupant of a house is fundamentally important to live with dignity under Article 21 of the Constitution else it would be a mere animal existence. If we accept the contention of the Power Corporation, the obvious consequence would be that electricity supply would stand disrupted for the reason that a case relating to property is pending in a court of law. This is neither the legislative intent under the Electricity Act, 2003 nor under the Code as electricity connection does not confer title which fact is also fortified by Note-3 of Annexure 4.1 of the Code which provides that electricity connection shall not be treated as a proof of ownership of the premises. More so it is not the case of Power Corporation that there are any previous outstanding dues in respect of the said premises.

8. We, in view of above, are of the considered view that the impugned disconnection of electricity supply is dehors the law.

9. The writ petition is **allowed.** A mandamus is issued to the respondent concerned to grant electricity connection to the applicant at his premises as indicated above forthwith, subject to other statutory compliance, if any, in accordance with law.

(2021)08ILR A829
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE ANIL KUMAR OJHA.J.

Writ C No. 4138 of 2021

Smt. Ram Murti Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Salilendu Kumar Upadhyay

Counsel for the Respondents:
C.S.C.

U.P. Panchayat Raj Act (26 of 1947) - Section 110 - U.P. Panchayat Raj (Maintenance of Family Registers) Rules (1970) , Rule 6 - Inclusion of names in register - Competent authority – Assistant Development Officer - any person whose name is not included in the family register may apply to the Assistant Development Officer (Panchayat) for the inclusion of his name - if the Assistant Development Officer (Panchayat) is satisfied, after such enquiry as he thinks fit; that the applicant is entitled to be registered in the register, he may direct to include the name of the applicant in the family register - thereupon the Secretary of the Gram Sabha shall include the name of the applicant accordingly - District Magistrate has no power to issue amended family members certificate (Para 16)

Allowed. (E-4)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Anil Kumar Ojha, J.)

1. Heard Sri Salilendu Kumar Upadhyay, learned counsel for the petitioner and Sri Nitin Kumar Agarwal, learned standing counsel for the State respondent nos. 1 to 4.

2. With the consent of learned counsel for the petitioner and the learned standing counsel this writ petition is being disposed of without calling for a counter affidavit.

Facts

3. Briefly stated facts of the present case are that the petitioner is the wife of late Sri Radhey Shyam. A copy of page No.168 of family register of Village Panchayat - Dostpur, Tehsil - Karhal, District - Mainpuri, has been appended as Annexure 10 to the writ petition which shows that the name of the petitioner and six others were initially recorded in the family register. Subsequently, the office of the District Magistrate issued a certificate No.1495, dated 04.03.2020 titled as "Sansodhit Parivari Jan Praman Patra" by which he included the respondent nos. 5, 6 and 7 alongwith the petitioner and her family members. Accordingly, the names of the respondent nos. 5, 6 and 7 were entered in the family register by the Village Development Officer vide entry dated 18.03.2020. Aggrieved with the aforesaid entry made in the family register relating to the petitioners family, the petitioner has filed the present writ petition praying for the following relief :-

"(A) Issue a writ order or direction in the nature of certiorari quashing the family certificate dated 04.03.2020 (Annexure No.9 to the writ petition) issued by second respondent.

(B) Issue a writ order or direction in the nature of certiorari quashing the amended entry in family register dated 18.03.2020 (Annexure No.10 to this writ petition) made by respondent no.4."

Submissions

4. Learned counsel for the petitioner submits that order dated 04.03.2020, passed by the office of the District Magistrate, Mainpuri, and the consequential entries made in the family register by the Additional Village Development Officer, dated 18.03.2020 are wholly without authority of law inasmuch as the provisions of the U.P. Panchayat Raj (Maintenance of Family Registers) Rules, 1970, do not empower the District Magistrate to pass such an order.

5. Learned standing counsel has filed today a short counter affidavit on behalf of the respondent no.2 which runs in four paragraphs. In paragraph 3 of the short counter affidavit the respondent no.2 has stated as under :-

"That in this regard it is submitted that the case of the petitioner is respondent no.2 has issued the family certificate dated 04.03.2020, whereas in this regard it is submitted that the respondent no.2 has not issued any kind of family certificate in favour of any person annexed as Annexure No.9 of the writ petition.

In this regard it is submitted that the heading of that certificate is amended family relation certificate, which has been issued by In-charge Officer/Deputy Collector only to this extent that it relates

to a matter of Rs. 5000/-. Apart from this if any dispute arises it shall be suo-moto deemed to be cancelled, therefore, contention of the petitioner is apparently absolutely incorrect."

Discussion and Findings

6. On 23.03.2021, this Court passed an order in which the aforesaid Rules, 1970, was specifically referred and it was observed that prima facie the order of the District Magistrate, Mainpuri dated 04.03.2020, appears to be without jurisdiction and yet the respondent no.2 in the aforesaid short counter affidavit dated 26.03.2021 has not disclosed his source of power to issue the amended family members certificate.

7. The U.P. Panchayat Raj (Maintenance of Family Registers) Rules, 1970, reads as under :-

*"**1. Short title and commencement.** (1) These rules may be called the Uttar Pradesh Panchayat Raj (Maintenance of Family Registers) Rules, 1970.*

(2) They shall come into force with effect from the date of their publication in the Gazette.

***2. Form and preparation of family register.-** A family register in Form 'A' shall be prepared containing familywise the names and particulars of all persons ordinarily residing in the village pertaining to the Gram Sabha. Ordinarily on page shall be allotted to each family in the register. There, shall be separae section in the register for families belonging to the Scheduled Castes. The register shall be prepared in Hindi in Devanagari script.*

COMMENT

***Family Register - Maintenance of** - Rule 2 is mandatory Panchayats to maintain a Family Register containing family-wise names and particulars of all persons ordinarily residing in the village which popularly known as kutumb Register. [Krishna Dutt Mishra v. State of u., au D986 at 1017 (LB)].*

***3. General conditions for registration in the register.-** Every person who has been ordinarily resident within the area of the Gram Sabha shall be entitled to be registered in the family register.*

***Explanation.-** A person shall be deemed to be ordinarily resident in a village if he has been ordinarily residing in such village or is in possession of a dwelling house therein ready for occupation.*

***4. Quarterly entries in the family register-** At the beginning of each quarter commencing from April in each year, the Secretary of a Gram Sabha shall make necessary changes in the family register consequent upon births and death, if any, occurring in the previous quarter in each family. Such changes shall be laid before the next meeting of the Gram Panchayat for information.*

COMMENT

***Family Register-Necessary changes in-** Necessary changes in Family Register to be made by the Secretary of Gram Sabha consequent upon birth and death if any. Such changes shall be laid before next meeting of Gram Panchayat for its information. [Kristna Dutt Mishra v. State of U.P., 2005 (2) SCD 986 at 1017 (LB)].*

***5. Correction of any existing entry.-** The Assistant Development Officer (Panchayat) may, on an application made to him in this behalf, order the correction*

of any existing entry in the family register and the Secretary of the Gram Sabha shall then correct the register accordingly.

COMMENTS

Maintenance of family register- *Rule 5 provides for coercion and inclusion of names. As such family register shall be under constant surveillance of the Gram Panchayat. [Krishna Dutt Mishra v. State of U.P, 2005 (2) SCD 986 at 1017 (LB)].*

Safe custody of family register.- *The Secretary of the Gram Panchayat shall be responsible for safe custody of family register. [Krishna Dutt Mishra v. State of U.P., 2005 (2) SCD 986 at 1017 (LB)].*

6. Inclusion of names in the register-(1) Any person whose name is not included in the family register may apply to the Assistant Development Officer (Panchayat) for the inclusion of his name therein.

(2). The Assistant Development Officer (Panchayat) shall, if satisfied, after such enquiry, as he think fit that the applicant is entitled to be registered in the register direct that the name of the applicant, be included therein and the Secretary of the Gram Sabha shall include the name accordingly.

[6-A. Any person aggrieved by an order made under Rule 5 or Rule 6 may, within 30 days from the date of such order prefer an appeal to the Sub-Divisional Officer whose decision shall be final]

7. Custody and preservation of the register.-*(1) The Secretary of the Gram Sabha shall be responsible for the sage custody of the family register.*

(2) Every person shall have right to inspect the register and to get attested copy of any entry or extract therefrom in such manner and on payment of such fees, if any, as may be specified in Rules 73 of the U.P. Panchayat Raj Rules.

8. It is well settled that if the statute provides to do a thing in a particular manner, then that thing has to be done in that very manner, vide **Taylor Vs. Taylor, (1876) 1 Ch.D. 426; Nazir Ahmed Vs. King Emperor, AIR 1936 PC 253; Deep Chand Vs. State of Rajasthan, AIR 1961 SC 1527; Haresh Dayaram Thakur Vs. State of Maharashtra & Ors., (2000) 6 SCC 179; Dhanajaya Reddy Vs. State of Karnataka etc. etc., (2001) 4 SCC 9; Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala & Ors., (2002) 1 SCC 633 as well as this Court in Atar Singh Vs. State of U.P. And others, 2013(1)ADJ43, Bankey Lal and another Vs. Deputy Director of Consolidation and others,2013(5)ADJ51, Phoolpati Vs. State of U.P. And others, 2014 2 AWC1291All, Paras and another Vs.and others, 2013(8)ADJ253,Ram Pratap vs. Deputy Director of Consolidation and others 2013 (6)ADJ 457, Rambali and others vs. State of U.P. and Others 2013 (2) ADJ 91.**

9. Rule 6 A provides for appeal. The appeal is creation of the Statute and once the power of appeal has been conferred upon the Sub Divisional Officer, that authority alone could exercise that power. The District Magistrate has no authority to pass an order as he is not even the Appellate Authority under the Rules 1970. The impugned order dated 04.03.2020, passed by the District Magistrate amounts to transgression of power.

10. In **Surjit Ghosh vs. United Commercial Bank, AIR 1995 SC 1053,** the Apex Court observed as under:-

"5. .....It is true that when an authority higher than the disciplinary authority itself imposes the punishment, the

order of punishment suffers from no illegality when no appeal is provided to such authority. However, when an appeal is provided to the higher authority concerned against the order of the disciplinary authority or of a lower authority and the higher authority passes an order of punishment, the employee concerned is deprived of the remedy of appeal which is a substantive right given to him by the Rules/Regulations. An employee cannot be deprived of his substantive right. What is further, when there is a provision of appeal against the order of the disciplinary authority and when the appellate or the higher authority against whose order there is no appeal, exercises the powers of the disciplinary authority in a given case, it results in discrimination against the employee concerned. This is particularly so when there are no guidelines in the Rules/Regulations as to when the higher authority or the appellate authority should exercise the powers of the disciplinary authority. The higher or appellate authority may choose to exercise the power of the disciplinary authority in some cases while not doing so in other cases. In such cases, the right of the employee depends upon the choice of the higher/appellate authority which patently results in discrimination between an employee and employee. Surely, such a situation cannot savour of legality. Hence we are of the view that the contention advanced on behalf of the respondent-Bank that when an appellate authority chooses to exercise the power of disciplinary authority, it should be held that there is no right of appeal provided under the Regulations cannot be accepted. The result, therefore, is that the present order of dismissal suffers from an inherent defect and has to be set aside."

11. Similar view dealing with the transgression of power has been taken by the Apex Court in **Amar Nath Chowdhury vs. Braithwaite and Company Ltd. and Ors., (2002) 2 SCC 290 and in Civil Appeal No. 1217 of 2011 Brij Bihari Singh vs. Bihar State Financial Corporation decided on 20.11.2015.**

12. For the purposes of controversy involved in the present writ petition Rules 6 and 6A are relevant. Perusal of Rule 6 would reveal that any person whose name is not included in the family register may apply to the Assistant Development Officer (Panchayat) for the inclusion of his name and if the Assistant Development Officer (Panchayat) is satisfied, after such enquiry as he thinks fit; that the applicant is entitled to be registered in the register, he may direct to include the name of the applicant in the family register and thereupon the Secretary of the Gram Sabha shall include the name of the applicant accordingly. Rule 6-A provides for appeal within 30 days from the date of the order, before the Sub-Divisional Officer whose decision shall be final.

13. Facts of the present case clearly reveal that neither the respondent Nos. 5, 6 & 7 have moved an application before the Competent Authority i.e. the Additional Development Officer (Panchayat) for inclusion of their name in the family register nor the Assistant Development Officer (Panchayat) has passed any order for inclusion of their name after due inquiry as required under Rule 6 of the Rules. Under the circumstances the impugned order dated 04.03.2020, passed by the District Magistrate, Mainpuri, is wholly without jurisdiction. Therefore, it can not be sustained. Consequently, the consequential order dated 18.03.2020, passed by the Village Development

Officer, incorporating the names of the respondent nos. 5, 6 & 7, can also not be sustained. Therefore, both the orders i.e. the order dated 04.03.2020 passed by the office of the District Magistrate and the order dated 18.03.2020 making entries of inclusion of names of the respondent nos. 5, 6 & 7 in the family register by the Village Development Officer, Village Panchayat - Dostpur, are without authority of law and are, therefore, quashed.

14. Liberty is granted to the respondent nos. 5, 6 & 7 to move an application in accordance with law before the Assistant Development Officer (Panchayat). If such an application is filed by the respondent nos. 5, 6 & 7 within three weeks, then the Assistant Development Officer (Panchayat) shall consider the application of the respondent Nos. 5, 6 & 7 for inclusion of their names and after due inquiry, pass an appropriate order, in accordance with law, expeditiously, preferably within next six weeks, after affording reasonable opportunity of hearing to all the parties concerned and without being influenced by any of the observations made in this order.

15. It is made clear that we have not expressed any opinion on merits of the case of the petitioner for the respondent nos. 5, 6 & 7.

16. The writ petition is accordingly **allowed** to the extent indicated above.

(2021)08ILR A834
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.06.2021

BEFORE

THE HON'BLE SANJAY YADAV, A.C.J.

THE HON'BLE PRAKASH PADIA, J.

Writ C No. 7652 of 2021

M/s. R.K. Road Lines Pvt. Ltd. ...Petitioner
Versus
Uttar Pradesh Cooperative Federation Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bipin Lal Srivastava, Sri Liaqat Ali Siddiqui, Sri Vinayak Verma, Sri S.K. Verma (Senior Adv.)

Counsel for the Respondents:
C.S.C., Sri Liaqat Ali Siddiqui

Constitution of India - Art.226, Art.226 - Writ petition - Mandamus - to enforce contractual rights against State - maintainability - where the rights are purely of a private character, no mandamus can be claimed, even if the relief is sought against the State or any of its instrumentality - pre-condition for the issuance of a writ of mandamus is a public duty - In a dispute, which is purely contractual in nature, there is no public duty element, to issue a writ of mandamus - Exception - where the amount is admitted & there is no disputed question of fact requiring adjudication of detailed evidence & interpretation of the terms of the contract, is an exception to general principle (Para 12, 22, 24)

Petitioner awarded contract for carrying & handling fertilizers - After completion of work, petitioner gave application submitting detail bills - no payment made - claims strongly disputed - Held - payments in respect of which petitioner raised claims pertain to contractual & commercial obligations - pleadings & material on record, do not indicate that it is a public law remedy which the petitioners are seeking to invoke so as to persuade Court to exercise its discretionary jurisdiction

Dismissed. (E-4)

List of Cases cited:

1. Ms. Biotech System Vs St. of U.P. & ors. Writ C No.13388 of 2020

2. M/s Satish Chandra Vs St. of U.P. & ors. 2006 (2) ALJ 122 (DB)

3.The Chairman Railway Board & ors. Vs Mrs. Chadrima & ors. JT 2000 (1) SC 426

4. Radhakrishna Agarwal & ors. Vs St.of Bihar & ors. (1977) 3 SCC 457

5. Hindustan Petroleum Corp. Ltd. & ors. Vs Dolly Das (1999) 4 SCC 450

6. Kerala State Electricity Board & ors. Vs Kurien E. Kalathil & ors. (2000) 6 SCC 293

7. Joshi Technologies International Inc. Vs U.O.I. & ors. (2015) 7 SCC 728

8. L.I.C. of India & ors. Vs Asha Goel (Smt.) & anr. (2001) 2 SCC 160

9. M/s Lalloo Ji Rajiv Chandra & Sons Vs Meladhikari Prayagraj Mela Authority & ors. 2019 ADJ Online 0081

(Delivered by Hon'ble Prakash Padia, J.)

1. The matter is taken up through video conferencing.

2. Heard Sri S.K. Verma, learned Senior Advocate assisted by Sri Bipin Lal Srivastava and Sri Vinayak Verma, learned counsel for petitioner. Learned Standing Counsel accepted notice on behalf of respondent Nos.2 & 4 and Sri Liaqat Ali Siddiqui, learned counsel for respondent Nos.1 & 3.

3. The petitioner has preferred the present petition under Article 226 of the Constitution of India with the following prayers:-

"A. issue a suitable writ, order or direction in the nature of mandamus directing the respondent No.2 to pay the amount of Rs.15,96,674.75/- with an interest at the rate of 12% calculated from 01.12.2018 an also may be pleased to direct to return of the security money to the petitioner forthwith.

B. issue any other suitable order or direction, which this Hon'ble Court may deem just and proper in the facts and circumstances of the case and in the interest of justice."

4. Facts in brief as contained in the petition are that the petitioner was awarded a contract for carrying and handling fertilizers for the period between 01.04.2017 to 31.03.2018. After completion of the aforesaid work, on 30.03.2018 the petitioner gave application for payment and on 22.12.2018 he also gave an application submitting detail bills. When no payment was made, the petitioner submitted a reminder on 08.01.2019. On 10.01.2019, Executive Director (Fertilizer) wrote a letter to District Manager PCF, Budaun for stop payment due to an inquiry pending against the petitioner. Thereafter on 26.02.2019 the petitioner moved an application to the Managing Director, Uttar Pradesh Cooperative Federation Lucknow for relase of amount mentioned in the Bill and also with regard to the security money, he stated that it may be returned after inquiry. On 29.11.2019 the petitioner filed application before the District Manager PCF Badaun stating therein that S.S.P. Badaun had given report in his favour and prayed for payment of the bill amount. On 03.12.2019, District Magistrate, Baduan wrote a letter to the Regional Manager, Uttar Pradesh, State Warehouse Corporation, Regional Office Bareilly regarding non-involvement of the petitioner in any crime. The petitioner also submitted an application to the District Manager PCF

informing him regarding his innocence and payment of bills and also informed the Managing Director PCF Lucknow. On this, Deputy General Manager (Fertilizer) sought information from District Manager PCF Badaun regarding his innocence. Thereafter on 06.05.2020, the District Manager P.C.F. Badaun informed the Deputy General Manager (Fertilizer)that the petitioner is exonerated from all the accusations and the petitioner was entitled for payment but till date no payment has been made. Hence the present writ petition.

5. It is argued by Sri S.K. Verma, learned Senior Advocate that the petitioner is entitled for the amount of contract namely 15,96,674.75/- along with interest @ 12% as well as the security money deposited by him. He relied upon a letter dated 06.05.2020 written by District Manager, P.C.F. Budanun to Deputy General Manager (Fertlizer) U.P. Co-operative Federation Ltd. Lucknow, copy of which is appended as Annexure 12 to the petition. In view of the same, it is argued that since the claim set up by the him has been admitted by the District Manager P.C.F. Budanun, therefore, he is entitled for reimbursement of the amount as claimed by him. The aforesaid letter dated 06.05.2020 is reproduced below:-

यू०पी०कोऑपरेटिव फेडरेशन लि०,जिला कार्यालय बदायूँ

पत्रांकः- पी०सी०एफ०/उर्व०/लेखा/2020-21 दिनांक- 06.05.2020

सेवा में,

श्रीमान उप महा प्रबन्धक (उर्वरक)

उ०प्र० कोऑपरेटिव फेडरेशन लि०

स्टेशन रोड, लखनऊ

विषयः- मैसर्स- आर०के० रोडलाइन्स इंन्द्रा चौक बदायूँ के लम्बित बिलों का भुगतान करने के संबंध में।

महोदय,

आप अपने पत्रांक पी०सी०एफ०/2019-20/14734 दिनांक 24.02.2020 का संदर्भ ग्रहण करने का कष्ट करें, जो मैसर्स आर०के० रोडलाइन्स परिवहन ठेकेदार द्वारा फरवरी 18 से नवंबर 2018 तक किए गए परिवहन एवं हैडलिंग कार्य के चौदह बिलों की धनराशि 1596674.75 के लम्बित भुगतान के विषयक है। बदायूं उर्वरक अनियमितता प्रकरण में भंडार नायक जगतपाल एवं परिवहन ठेकेदारों के विरूद्ध थाना सिविल लाइन्स में FIR NO-003 दि० 02.01.2019 को दर्ज कराई गयी थी, तदउपरान्त श्री मान कार्यकारी निदेशक उर्वरक ने अपने पत्र संख्या-पी०सी०एफ०/उर्वरक/2018-19/17574-75 दि० 10.01.2019 के द्वारा ठेकेदारो के भुगतान पर रोक लगा दी थी।

उक्त प्रकरण में आपको अवगत कराना है कि वरिष्ठ पुलिस अधीक्षक बदायूं ने जिलाधिकारी बदायूं को भेजी अपनी आख्या दि० 30.11.2019 को अवगत कराया है कि विवेचना से परिवहन ठेकेदार मैसर्स-आर०के०रोडलाइन्स 14- कदीर मार्केट इन्द्रा चौक बदायूं के विरूद्ध कोई साक्ष्य नहीं है। आख्या उर्वरक गवन प्रकरण में उक्त फर्म का नाम नहीं है। उक्त फर्म द्वारा किए गए कार्य अवधि में फर्म पर कोई चालान पेंडिंग या अन्य बकाया नहीं है। साक्ष्य हेतु बरिष्ठ पुलिस अधीक्षक महोदय बदायूं के पत्र दि० 30.11.2019 की छायाप्रति साथ में संलग्न है।

अतः आप से अनुरोध है कि मैसर्स आर०के० रोडलाइन्स, इन्द्रा चौक,बदायूं द्वारा किए गए परिवहन एवं हैडलिंग कार्य के अवशेष बिलों के भुगतान के संबंध में मुख्यालय स्तर से आवश्यक दिशा निर्देश देने का कष्ट करें।

भवदीय

जिला प्रबन्धक

पी०सी०एफ०
बदायूँ
प्रतिलिपि सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित
1. क्षेत्रीय प्रबन्धक, पी०सी०एफ०, बरेली को इस निवेदन के साथ कि उक्त भुगतान हेतु अपनी संस्तुति आख्या मुख्यालय प्रेषित करने हेतु।
जिला प्रबन्धक"

6. Learned counsel for the petitioner in support of his case relied upon following judgments :-

1. Writ C No.13388 of 2020 (Ms. Biotech System Vs. State of U.P. and 4 others)

2. M/s Satish Chandra Vs. State of U.P. and two others reported in 2006 (2) ALJ 122 (DB)

3. The Chairman Railway Board & others Vs. Mrs. Chadrima Das and others reported in JT 2000 (1) SC 426.

7. The principle relief sought is with regard to payment of contractual amounts in terms of agreements said to have been executed between the parties. Learned counsel appearing for respondents has raised objections with regard to the maintainability of the writ petition on the ground that the petitioner seeks to enforce certain contractual rights and obligations for which the appropriate remedy is to approach the civil court.

8. Insofar as the preliminary objection regarding maintainability of the writ petition is concerned, learned counsel for the petitioner contended that there is no absolute bar to the maintainability of the writ petition even in contractual matters where there are disputed question of fact or even where monetary claim are sought to be raised.

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

10. The pleadings in the writ petition and the material on record clearly indicate that the petitioner had executed agreement with the respondents for completion of certain civil works. The petitioner claims to have completed the work as per the terms of the agreement and submitted his bills as per specification for which his claims have not been paid to him. The law with regard to the maintainability of a writ petition in contractual matters is fairly well settled, and it has been consistently held that although there is no absolute bar to the maintainability of a writ petition in such matters, the discretionary jurisdiction under Article 226 of the Constitution of India, may be refused in case of money claims arising out of purely contractual obligations where there are serious disputed questions of fact with regard to the claims sought to be raised.

11. The remedy under Article 226 of the Constitution, has been held, to be available in a limited sphere only when the contracting party is able to demonstrate that the remedy it seeks to invoke is a public law remedy, in contradistinction to a private law remedy under a contract.

12. The legal position in this regard is that where the rights, which are sought to be agitated, are purely of a private character, no mandamus can be claimed, and even if the relief is sought against the State or any of its instrumentality the pre-condition for the issuance of a writ of mandamus is a public duty. In a dispute, which is purely contractual in nature, there

being no public duty element, to issue a writ of mandamus.

13. The question as to whether jurisdiction of the High Court under Article 226 of the Constitution would be open to resolve disputes arising out of the contracts between the State and the citizen was considered by the Hon'ble Supreme Court in the case of ***Radhakrishna Agarwal and others vs. State of Bihar and others reported in (1977) 3 SCC 457*** and drawing a distinction with the case of a contract entered into by the State in exercise of a statutory power, it was held that in cases where the contract entered into between a State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract, the remedy of Article 226 would not be open for such complaints and no writ or order can be issued under Article 226 in such cases to compel the authorities to remedy the breach of contract by the State. The Supreme Court took note of the three types of cases pertaining to breach of alleged obligation by the State or its agents, as referred to in the judgment of the High Court against which the appeals were before it. The three types were stated as follows :-

"(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and

(iii) Where the contract entered into between the State, and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State."

14. In respect of cases of the third category where questions purely of alleged breach of contract were involved, it was observed by the Apex Court as under :-

"15. It then, very rightly, held that the cases now before us should be placed in the third category where questions of pure alleged breaches of contract are involved. It held, upon the strength of Umakant Saran v. The State of Bihar and Lekhraj Satramdas v. Deputy Custodian-cum-Managing Officer and B.K.Sinha v. State of Bihar that no writ or order can issue under Article 226 of the Constitution in such cases "to compel the authorities to remedy a breach of contract pure and simple".

17. Learned counsel contends that in the cases before us breaches of public duty are involved. The submission made before us is that, whenever a State or its agents or officers deal with the citizen, either when making a transaction or, after making it, acting in exercise of powers under the terms of a contract between the parties, there is a dealing between the State and the citizen which involves performance of "certain legal and public duties." If we were to accept this very wide proposition every case of a breach of contract by the State or its agents or its officers would call for interference under Article 226 of the Constitution. We do not consider this to be a sound proposition at all."

15. The question of maintainability of a writ petition under Article 226 in the case of a money claim again came up for consideration in the case of ***Hindustan Petroleum Corporation Limited and others Vs. Dolly Das reported in (1999) 4 SCC 450*** and it was held that for invoking the writ jurisdiction, involvement of any constitutional or statutory right was essential and in the absence of a statutory right, the remedy under Article 226 could not be availed to claim any money in respect of breach of contract, tort or otherwise. It was reiterated that in absence of any constitutional or statutory rights being involved, a writ proceeding would not lie to enforce a contractual obligation even if it is sought to be enforced against the State or its authorities.

16. The maintainability of writ petition under Article 226 in disputes relating to terms of contract with a statutory body fell for consideration in the case of ***Kerala State Electricity Board and other Vs. Kurien E. Kalathil and others reported in (2000) 6 SCC 293*** and it was held by the Hon'ble Supreme Court that the writ court would not ordinarily be the proper forum for resolution of disputes relating to terms of contract with a statutory body and disputes arising from contractual or commercial activities must be settled according to ordinary principles of law of contract. The observations made in the judgement in this regard are as follows :-

"10...The interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract? If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. We are also unable to agree with the observation of the High Court that since the obligations imposed by the contract on the contracting parties come within the purview of the Contract Act, that would not make the contract statutory. Clearly, the High Court fell into an error in coming to the conclusion that the contract in question was statutory in nature.

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not of itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in

arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition."

17. The nature of the prerogative remedy of a mandatory order as the normal means for enforcing performance of public duties by public authorities has been considered in Administrative Law by H.W.R. Wade & C.F. Forsyth (Administrative Law, Tenth Edition, H.W.R. Wade & C.F. Forsyth), and a distinction has been drawn between public duties enforceable by a mandatory order, which are usually statutory, and duties arising merely from contract. It has been stated thus :-

"A distinction which needs to be clarified is that between public duties enforceable by a mandatory order, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by a mandatory order, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies."

18. We may also gainfully refer to the judgment in the case of ***Joshi Technologies International Inc. vs. Union of India and others (2015) 7 SCC 728*** wherein the legal position in this regard has been taken note of and summarized in the following terms :-

"69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, "normally", the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action

of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes."

19. The question of maintainability of the writ petition under Article 226 for enforcement of a contractual right again came up again in the case of ***Life Insurance Corporation of India and others vs. Asha Goel (Smt.) and another reported in (2001) 2 SCC 160,*** and it was held that pros and cons of fact-situation should be carefully weighed and the determination of the question as to when a claim can be enforced in writ jurisdiction would depend on consideration of several factors like, whether the writ petitioner is merely attempting to enforce his contractual rights or the case raises important questions of law and constitutional issues, the nature of dispute raised; the nature of enquiry necessary for determination of the dispute etc. It was held that the matter would be required to be considered in the facts and circumstances of each case. The observations made in the judgement in this regard are as follows :-

"10. Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to the discretion of the High Court. Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. The determination of the question depends on consideration of several factors like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire

into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution, is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to by pass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Court have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligation; the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligation particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts. We may notice a few such cases: Mohd. Hanif v. State of Assam (1969) 2 SCC 782; Banchhanidhi Rath v. State of Orissa (1972) 4 SCC 781; Rukmanibai Gupta v. Collector, Jabalpur (1980) 4 SCC 556; Food Corpn. of India v. Jagannath Dutta 1993 Supp (3) SCC 635 and State of H.P. v. Raja Mahendra Pal (1999) 4 SCC 43."

20. Taking a similar view where a contractual right was sought to be enforced by filing a writ petition, this Court in the case ***M/s Lalloo Ji Rajiv Chandra And Sons vs. Meladhikari Prayagraj Mela Authority and others reported in 2019 ADJ Online 0081,*** reiterated the legal position that in a case of non statutory contract, the remedy available to the contractor, if he is aggrieved by non-payment, would be either to file a civil suit or if there is an arbitration agreement between the parties, to invoke the terms of the agreement. The writ petition was dismissed with the following observations :-

"10. In the present case there is nothing to held that the contract is a statutory contract. The remedy of the contractor, if he is aggrieved by non-payment, would be to either file an ordinary civil suit or if there is an arbitration agreement between the parties, to invoke the terms of the agreement.

11. In our view, it will not either be appropriate or proper for the Court under Article 226 of the Constitution to entertain a petition of this nature. The grant of relief of this nature would virtually amount to a money decree. The petitioner is at liberty to take recourse to the remedies available by raising such a claim either invoking an arbitration clause (if it exists in the contract between the parties) or if there is no provision for arbitration, to move the competent civil court with a money claim."

21. The general principles which may be culled out from the aforementioned judgments is that in a case where the contract entered into between the State and the person aggrieved is of a non-statutory character and the relationship is governed purely in terms of a contract between the parties, in such situations the contractual obligations are matters of private law and a writ would not lie to enforce a civil liability arising purely out of a contract. The proper remedy in such cases would be to file a civil suit for claiming damages, injunctions or specific performance or such appropriate reliefs in a civil court. Pure contractual

obligation in the absence of any statutory complexion would not be enforceable through a writ.

22. The remedy under Article 226 of the Constitution being an extraordinary remedy, it is not intended to be used for the purpose of declaring private rights of the parties. In the case of enforcement of contractual rights and liabilities the normal remedy of filing a civil suit being available to the aggrieved party, this Court may not exercise its prerogative writ jurisdiction to enforce such contractual obligations.

23. Insofar as the cases cited by the learned counsel for the petitioner is concerned in the case of ***The Chairman Railway Board (supra)*** is concerned, in the aforesaid case a Bangladeshi woman was subjected to rape in Railway Yatri Niwas Howrah. A writ petition was filed before the High Court for compensation by an advocate. The question raised before the Hon'ble Supreme Court that whether an advocate has locus standi to file petition or not. It was held by the Apex Court that the petition fled by the Advocate in the facts and circumstances of the case is maintainable. Insofar as the case of ***Satish Chandra (supra)*** is concerned, in this case, amount payable towards work done was admitted by the concerned authority. In the aforesaid circumstances, it was held by a Division Bench of this Court that the directions for payment can be issued in the writ jurisdiction. In the present case, the ratio of this judgement will also not help the petitioner, since in the present case amount payable towards work done by the petitioner was not admitted by the authorities. Insofar as the judgment in the case of ***Ms. Biotech System (supra)*** is concerned, after adjudicating the issue in great detail, the Division Bench of this Court was pleased to decline to exercise extra-ordinary jurisdiction under Article 226 of the Constitution of India as not maintainable in the matter.

24. We may, therefore, add that it cannot be held in absolute terms that a writ petition is not maintainable in all contractual matters seeking enforcement of obligations on part of the State or its authorities. The limitation in exercising powers under Article 226 in contractual matters is essentially a self-imposed restriction. A case where the amount is admitted and there is no disputed question of fact requiring adjudication of detailed evidence and interpretation of the terms of the contract, may be an exception to the aforementioned general principle.

25. In the present case, the claims sought to be set up by the petitioner has been strongly disputed. The payments in respect of which the petitioner have raised their claims pertain to contractual and commercial obligations, and the pleadings and the material which are on record, do not in any manner indicate that it is a public law remedy which the petitioners are seeking to invoke so as to persuade this Court to exercise its discretionary jurisdiction.

26. In view of the foregoing discussions, and keeping in view the facts of the case at hand, we are not inclined to exercise our extraordinary jurisdiction under Article 226 of the Constitution.

27. The writ petitions is accordingly dismissed.

(2021)08ILR A845
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 14162 of 2021

Durvin Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjeev Kumar Pandey

Counsel for the Respondents:
C.S.C.

Fair Price Shop - National Food Security Act, 2013 - Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 - Constitution of India, Art. 226 - Locus standi of complainant - complainant has no Locus standi to maintain writ petition against order of the licensing authority or appellate court reinstating fair shop dealership - Remedy to card holder - Irregularities committed by the fair price shop dealer in distribution of essential commodities An inquiry can be initiated on the complaint - card holder-complainant may tender/lead evidence against the dealer & in support of his complaint in the enquiry - but card-holder cannot decide the quantum of punishment to be imposed on a defaulting fair price shop dealer - card-holder can be granted compensation or allowance for denial of the entitlements under the Act of 2013

Dismissed. (E-4)

List of Cases cited:

1. Ashfaq Vs State of U.P. & ors. 2008(4) ADJ 416

2.Sriram Prasad & anr .Vs St.of U.P. & ors. 2016 (6) ADJ 122

3.Dharam Raj Vs St. of U.P. & ors. 2010 (2) AWC 1878 (LB)

4.Gram Vikash Sewa Samiti Vs St. of U.P. & ors. Writ C No. 19941 of 2018

5. Nazuk Vs St. of U.P. & ors. 2019 (12) ADJ 832

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Complaints were made by the petitioner against the respondent No.4-fair price shop dealer of village Nagla Bhagat, Tehsil and District Etah, alleging malpractices in distribution of essential commodities on various dates. An enquiry was caused to be conducted into the aforesaid complaints. The enquiry report indicted the fair price shop dealer on certain charges, which led to the termination of his fair price shop licence. The fair price shop licence of the respondent No.4 was cancelled by order dated 24.07.2020. The fair price shop dealer took the order of cancellation in appeal before the appellate authority. The Deputy Commissioner (Food and Civil Supplies), Aligarh Division, Aligarh by order dated 08.03.2021 passed in Appeal No. 00354 of 2020 (Computerized Case No. C202018000000354(Anar Singh Vs. State of U.P. and others) has reversed the order of termination dated 24.07.2020 and reinstated the respondent no. 4 as the fair price shop dealer.

2. The petitioner is aggrieved by the order dated 08.03.2021 passed by the Deputy Commissioner (Food and Civil Supplies), Aligarh Division, Aligarh in the aforesaid appeal. The petitioner is the complainant.

3. Learned Standing Counsel for the respondent-State contested the locus standi of the petitioner to maintain the writ petition. He relied on judgements handed down by this Court in the case of ***Ashfaq Vs. State of U.P. and others,*** reported at ***2008(4) ADJ 416*** and in the case of ***Sriram Prasad and another Vs. State of U.P. and others,*** reported at ***2016 (6) ADJ 122*** and in the case of ***Dharam Raj Vs. State of U.P. and others,*** reported at ***2010 (2) AWC 1878 (LB)*** and ***Gram Vikash Sewa Samiti Vs. State of U.P. and Others*** passed in ***Writ C No. 19941 of 2018 and Nazuk Vs. State of U.P. and others,*** reported at ***2019 (12) ADJ 832.*** The writ petition is not maintainable. Various provisions of the National Food Security Act, 2013 are also relied upon.

4. Heard the learned counsel for the parties.

5. The locus standi of the petitioner who was the complainant to maintain a instant writ petition against an order of the licensing authority or appellate court, has been dealt with in a judgment passed by this Court in the case of ***Gram Vikash Sewa Samiti Vs. State of U.P. and Others in Writ C No. 19941 of 2018*** entered on 30.08.2019. The judgement shall be reproduced in the succeeding paragraphs.

6. The statutory proceedings against the respondent no. 4 have run their course and arrived at a terminus. The question now arises whether the petitioner, who is a complainant, can continue the litigation any further and is entitled to maintain and prosecute the instant writ petition.

7. Complainant is very often a card holder and beneficiary of the welfare schemes. Malpractices indulged by the fair price shop dealers directly and adversely impact such complainant. He is an aggrieved party. The right to obtain food-grains and essential commodities at controlled prices and the entitlements to the benefits of various distribution schemes are vested in the card holders by the National Food Security Act, 2013 (hereinafter referred to as the 'Act of 2013') and the Rules framed there-under. Irregularities committed by the fair price shop dealer in distribution of essential commodities leads to denial of statutory rights. The card holder and his family members come within the meaning of aggrieved persons as defined in the Act of 2013. Such card holder being aggrieved person is entitled to get his complaint verified against the defaulting fair price shop dealers. An inquiry can be initiated on the complaint. The card holder-complainant may tender evidence in the enquiry.

8. The assertion of the right by a complainant ensures transparency in the distribution of food-grains and enforces accountability in the functioning of the fair price shop dealer. The right of a card holder and other aggrieved persons to complain against denial of essential commodities/food-grains under beneficent schemes covered by the Act of 2013 is recognized by the legislature. However, there are limits. The right of the complainant to prosecute his complaint does not extend to persecute the fair price shop dealer. The complainant cannot prolong the litigation endlessly.

9. The fair price shop has a certain purpose to fulfill. The fair price shop dealer has definite rights, which he can assert.

10. The fair price shop dealership is the agency through which the food-grains and essential commodities are distributed to

the cardholders. It is the instrument through which the National Food Security Act, 2013 is implemented. The fair price shop is a pivot in the distribution chain of essential commodities.

11. The fair price shop dealer has to be held accountable but not made vulnerable. In the former case, the purpose of appointment of a fair price shop dealer will be fortified in the latter event it will be frustrated.

12. An unscrupulous complainant can exploit a fair price shop dealer with the threat of interminable litigation and the reality of endless prosecution of complaints. Such a situation would impede the functioning of a fair price shop dealership and cause disruption in supply of essential commodities.

13. Clearly red lines have to be drawn. The courts have to distinguish a bona-fide complainant from a professional blackmailer, a deprived card holder from a chronic litigant. Conduct is the key to the distinction. Litigation is not the sport of the complainant and the courts cannot be made the play-field.

14. Once the complainant has been verified, the inquiry set on foot of such complaint has to be completed. In case such inquiry returns an indictment of the conduct of the fair price shop dealer, the license holder is required to be noticed by the license authority. The complainant certainly has a right to lead evidence against the dealer and in support of his complaint in the enquiry process.

15. After the licensing authority issues a notice to the license holder, the law will take its course. It becomes a lis between the two contracting parties namely, the fair price shop licence and the State. The complainant cannot be a party to the lis as it is not a party to the contract. Action has to be taken against the license holder in terms of the contract, the provisions of the Control Order and Government Orders regulating the field. The licensee has full liberty to assert his rights in the aforesaid proceedings. The licensee can refute the charges laid out against him. He can carry any adverse order in appeal as per law. The complainant is ousted from the proceedings after the conclusion of the inquiry. The complainant can have no say in the quantum of punishment or nature of penalty which is imposed by the licensing authority upon the fair price shop licence holder. The complainant or the card-holder has no privity of contract with the State or the fair price shop dealer. In this view also the complainant cannot be permitted to exercise rights, beyond the limits set out earlier in the judgement. Any further enlargement of the rights of the complainant would fetter the contractual choices of the parties to the contract and interfere in the efficiency of the public distribution system.

16. It would be apposite to fortify the above findings with some cases in point.

17. This Court in the case of ***Dharm Raj (supra)*** while non suiting a complainant to prosecute a writ petition against a dealer, recognized the right of a complainant to be a witness in an enquiry against the fair price shop dealer but declined to accept his locus to prosecute a writ petition against such dealer:

"15. In ***Jasbhai Motibhai Desat v. Roshan Kumar Hazi Bashir Ahmad and Ors.*** *reported at* ***AIR 1976 SC 578,*** *the*

Apex Court has held that only a person who is aggrieved by an order, can maintain a writ petition. The expression "aggrieved person" has been explained by the Apex Court observing that such a person must show that he has a more particular or peculiar interest of his own beyond that of the general public in seeing that the law is properly administered. In the said case, a cinema hall owner had challenged the sanction of setting up of a rival cinema hall in the town contending that it would adversely affect monopolistic commercial interest, causing pecuniary harm and loss of business from competition. The Hon'ble Apex Court observed as under:

Such harm or loss is not wrongful in the eye of law because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Judicially, harm of this description is called damnum sine injuria. The term injuria being here used in its true sense reason why law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large. In the light of the above discussion, it is demonstratively clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully effect his title to something. He has not been subjected to legal wrong. He has suffered no grievance. He has no legal peg for a justiciable claim to hang on. Therefore, he is not a "person aggrieved" to challenge the ground of the no objection certificate."

In ***Northern Plastics Ltd. v. Hindustan Photo Films Mfg Co. Ltd. and Ors.*** *reported at (1997) 4 SCC 452, the Hon'ble Supreme Court again considered the meaning of "person aggrieved" and "locus of a rival Government undertaking" and held that a rival businessman cannot maintain a writ petition on the ground that its business prospects would be adversely affected.*

16. The view taken by us that the petitioner is not a person aggrieved, thus he has no locus standi to file the present writ petition thereby challenging the order dated 16.3.2009 passed by Sub-Divisional Magistrate, Jaisinghpur, district Sultanpur is also supported by the decision of this Court in the case of Suresh Singh v. Commissioner Moradabad Division, reported at 1993 (1) AWC 601, where it was held that in an inquiry under Section 95(g) of the U.P. Panchayat Raj Act, 1947, the complainant who was Up-Pradhan could be a witness in an inquiry but had no locus standi to approach this Court against the order of the State authorities, for the reasons that none of his personal statutory right are affected.

17. As such the petitioner has no focus standi to file the present writ petition under Article 226 of the Constitution of India. Even otherwise having regard to the facts and circumstances of the case, we are not inclined to exercise our discretionary jurisdiction under Article 226 of the Constitution of India."

18. The aforesaid view also finds support from various authorities of this Court including the case of ***Sriram Prasad (supra)*** where this Court while considering the locus standi of the petitioner held as under:

"13. In the case of R. v. London Country Keepers of the peace of Justice, (1890) 25 Qbd 357, the Court held:

"A person who cannot succeed in getting a conviction against another may be annoyed by the said findings. He may also feel that what he thought to be a breach of law was wrongly held to be not a breach of law by the Magistrate. He thus may be said to be a person annoyed but not a person aggrieved, entitle to prefer an appeal against such order."

14. The petitioner complainant shall have an opportunity during the course of regular enquiry to lead oral and documentary evidence if provided under the rules, but would have no locus to assail the final order passed by the authority on the complaint".

19. There is another critical aspect to this issue. The card holders have been vested with entitlements under the National Food Security Act, 2013. The Act of 2013 is a comprehensive scheme and provides for a complete machinery to enforce the rights and entitlements of the cardholders. The card-holders, who are denied their entitlements can assert their rights under the National Food Security Act, 2013. The card holders have adequate and efficacious remedies under the Act of 2013. The authorities under the National Food Security Act, 2013, in the State of U.P. have been created with the promulgation of The Food Security (Assistance to State Governments) Rules, 2015. Some of the relevant provisions of the Act of 2013 and the Rules which have a direct bearing on the rights and remedies of the card holders are extracted hereunder:

20. Chapter II of the Act of 2013, defines the rights and creates the entitlements in favour of the card-holders. The provisions are detailed below:

"3. ***Right to receive foodgrains at subsidised prices by persons belonging to eligible households under Targeted Public Distribution System.-(1)*** *Every person belonging to priority households, identified under sub-section (1) of section 10, shall be entitled to receive five kilograms of foodgrains per person per month at subsidised prices specified in Schedule I from the State Government under the Targeted Public Distribution System:*

Provided that the households covered under Antyodaya Anna Yojanab shall, to such extent as may be specified by the Central Government for each State in the said scheme, be entitled to thirty-five kilograms of foodgrains per household per month at the prices specified in Schedule I:

Provided further that if annual allocation of foodgrains to any State under the Act is less than the average annual offtake of foodgrains for last three years under normal Targeted Public Distribution System, the same shall be protected at prices as may be determined by the Central Government and the State shall be allocated foodgrains as specified in Schedule IV.

Explanation.*-- For the purpose of this section, the "Antyodaya Anna Yojana" means, the scheme by the said name launched by the Central Government on the 25th day of December, 2000; and as modified from time to time.*

(2) The entitlements of the persons belonging to the eligible households referred to in sub-section (1) at subsidised prices shall extend up to seventy-five per cent. of the rural population and up to fifty per cent. of the urban population.

(3) Subject to sub-section (1), the State Government may provide to the persons belonging to eligible households, wheat flour in lieu of the entitled quantity

of foodgrains in accordance with such guidelines as may be specified by the Central Government.

4. Nutritional support to pregnant women and lactating mothers.- *Subject to such schemes as may be framed by the Central Government, every pregnant woman and lactating mother shall be entitled to--*

(a) meal, free of charge, during pregnancy and six months after the child birth, through the local anganwadi, so as to meet the nutritional standards specified in Schedule II; and

(b) maternity benefit of not less than rupees six thousand, in such instalments as may be prescribed by the Central Government:

Provided that all pregnant women and lactating mothers in regular employment with the Central Government or State Governments or Public Sector Undertakings or those who are in receipt of similar benefits under any law for the time being in force shall not be entitled to benefits specified in clause (b).

5. Nutritional support to children.-*(1) Subject to the provisions contained in clause (b), every child up to the age of fourteen years shall have the following entitlements for his nutritional needs, namely:--*

(a) in the case of children in the age group of six months to six years, age appropriate meal, free of charge, through the local anganwadi so as to meet the nutritional standards specified in Schedule II: Provided that for children below the age of six months, exclusive breast feeding shall be promoted;

(b) in the case of children, up to class VIII or within the age group of six to fourteen years, whichever is applicable, one mid-day meal, free of charge, everyday, except on school holidays, in all schools run by local bodies, Government and Government aided schools, so as to meet the nutritional standards specified in Schedule II.

(2) Every school, referred to in clause (b) of sub-section (1), and anganwadi shall have facilities for cooking meals, drinking water and sanitation:

Provided that in urban areas facilities of centralised kitchens for cooking meals may be used, wherever required, as per the guidelines issued by the Central Government.

6. Prevention and management of child malnutrition.-*The State Government shall, through the local anganwadi, identify and provide meals, free of charge, to children who suffer from malnutrition, so as to meet the nutritional standards specified in Schedule II.*

7.Implement of schemes for realisation of entitlements.-*The State Governments shall implement schemes covering entitlements under sections 4, 5 and section 6 in accordance with the guidelines, including cost sharing, between the Central Government and the State Governments in such manner as may be prescribed by the Central Government.*

21. Section 8 of the Act of 2013 provides for food security allowance to persons who have for any reason are denied their entitlement of food grains under the enactment. The Act of 2013 in this manner appropriately compensates the cardholders for denial of food grains. The grievance of the ration card holder is adequately redressed by the aforesaid provision. As a sequitor the provision also limits the rights of a card holder to prolong litigation and maintain the writ petition. This provision being relevant is extracted below:

8. Right to receive food security allowance in certain cases.-*In case of non-supply of the entitled quantities of foodgrains or meals to entitled persons under Chapter II, such persons shall be entitled to receive such food security allowance from the concerned State Government to be paid to each person, within such time and manner as may be prescribed by the Central Government."*

22. Chapter VII of the Act of 2013 is devoted to the establishment and functioning of a grievance redressal mechanism including a forum of appeal for the card-holders. The relevant provisions are reproduced hereunder:

"14. Internal grievance redressal mechanism.- *Every State Government shall put in place an internal grievance redressal mechanism which may include call centres, help lines, designation of nodal officers, or such other mechanism as may be prescribed.*

15. (1) The State Government shall appoint or designate, for each district, an officer to be the District Grievance Redressal Officer for expeditious and effective redressal of grievances of the aggrieved persons in matters relating to distribution of entitled foodgrains or meals under Chapter II, and to enforce the entitlements under this Act.

(2) The qualifications for appointment as District Grievance Redressal Officer and its powers shall be such as may be prescribed by the State Government.

(3) The method and terms and conditions of appointment of the District Grievance Redressal Officer shall be such as may be prescribed by the State Government.

(4) The State Government shall provide for the salary and allowances of the District Grievance Redressal Officer and other staff and such other expenditure as may be considered necessary for their proper functioning.

(5) The officer referred to in sub-section (1) shall hear complaints regarding non distribution of entitled foodgrains or meals, and matters relating thereto, and take necessary action for their redressal in such manner and within such time as may be prescribed by the State Government.

(6) Any complainant or the officer or authority against whom any order has been passed by officer referred to in sub-section (1), who is not satisfied with the redressal of grievance may file an appeal against such order before the State Commission.

(7) Every appeal under sub-section (6) shall be filed in such manner and within such time as may be prescribed by the State Government.

16. (1) Every State Government shall, by notification, constitute a State Food Commission for the purpose of monitoring and review of implementation of this Act.

(2) The State Commission shall consist of--

(a) a Chairperson;

(b) five other Members; and

(c) a Member-Secretary, who shall be an officer of the State Government not below the rank of Joint Secretary to that Government:

Provided that there shall be at least two women, whether Chairperson, Member or Member-Secretary:

Provided further that there shall be one person belonging to the Scheduled Castes and one person belonging to the Scheduled Tribes, whether Chairperson, Member or Member-Secretary.

(3) The Chairperson and other Members shall be appointed from amongst persons--

(a) who are or have been member of the All India Services or any other civil services of the Union or State or holding a

civil post under the Union or State having knowledge and experience in matters relating to food security, policy making and administration in the field of agriculture, civil supplies, nutrition, health or any allied field; or

(b) of eminence in public life with wide knowledge and experience in agriculture, law, human rights, social service, management, nutrition, health, food policy or public administration; or

(c) who have a proven record of work relating to the improvement of the food and nutrition rights of the poor.

(4) The Chairperson and every other Member shall hold office for a term not exceeding five years from the date on which he enters upon his office and shall be eligible for reappointment:

Provided that no person shall hold office as the Chairperson or other Member after he has attained the age of sixty-five years.

(5) The method of appointment and other terms and conditions subject to which the Chairperson, other Members and Member-Secretary of the State Commission may be appointed, and time, place and procedure of meetings of the State Commission (including the quorum at such meetings) and its powers, shall be such as may be prescribed by the State Government.

(6) The State Commission shall undertake the following functions, namely:--

(a) monitor and evaluate the implementation of this Act, in relation to the State;

(b) either suo motu or on receipt of complaint inquire into violations of entitlements provided under Chapter II;

(c) give advice to the State Government on effective implementation of this Act;

(d) give advice to the State Government, their agencies, autonomous bodies as well as non-governmental organisations involved in delivery of relevant services, for the effective implementation of food and nutrition related schemes, to enable individuals to fully access their entitlements specified in this Act;

(e) hear appeals against orders of the District Grievance Redressal Officer;

(f) prepare annual reports which shall be laid before the State Legislature by the State Government.

(7) The State Government shall make available to the State Commission, such administrative and technical staff, as it may consider necessary for proper functioning of the State Commission.

(8) The method of appointment of the staff under sub-section (7), their salaries, allowances and conditions of service shall be such, as may be prescribed by the State Government.

(9) The State Government may remove from office the Chairperson or any Member who--

(a) is, or at any time has been, adjudged as an insolvent; or

(b) has become physically or mentally incapable of acting as a member; or

(c) has been convicted of an offence which, in the opinion of the State Government, involves moral turpitude; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as a member; or

(e) has so abused his position as to render his continuation in office detrimental to the public interest.

(10) No such Chairperson or Member shall be removed under clause (d) or clause (e) of sub-section (9) unless he

has been given a reasonable opportunity of being heard in the matter.

20. (1) The State Commission shall, while inquiring into any matter referred to in clauses (b) and (e) of sub-section (6) of section 16, have all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908, and, in particular, in respect of the following matters, namely:--

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office; and

(e) issuing commissions for the examination of witnesses or documents.

(2) The State Commission shall have the power to forward any case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973."

23. Chapter XI of the Act of 2013 creates a comprehensive system of accountability. The provisions speaking to transparency and accountability are extracted below:

"27. Disclosure of records of Targeted Public Distribution System.-All Targeted Public Distribution System related records shall be placed in the public domain and kept open for inspection to the public, in such manner as may be prescribed by the State Government.

28. Conduct of social audit.-(1) Every local authority, or any other authority or body, as may be authorised by the State Government, shall conduct or cause to be conducted, periodic social audits on the istribution System and other welfare schemes, and cause to publicise its findings and take necessary action, in such manner as may beprescribed by the State Government.

(2) The Central Government may, if it considers necessary, conduct or cause to be conducted social audit through independent agencies having experience in conduct of such audits.

29. (1) For ensuring transparency and proper functioning of the Targeted Public Distribution System and accountability of the functionaries in such system, every State Government shall set up Vigilance Committees as specified in the Public Distribution System (Control) Order, 2001, made under the Essential Commodities Act, 1955, as amended fromtime to time, at the State, District, Block and fair price shop levels consisting of such persons,as may be prescribed by the State Government giving due representation to the localauthorities, the Scheduled Castes, the Scheduled Tribes, women and destitute persons or persons with disability.

(2) The Vigilance Committees shall perform the following functions, namely:--

(a) regularly supervise the implementation of all schemes under this Act;

(b) inform the District Grievance Redressal Officer, in writing, of any violation of the provisions of this Act; and

(c) inform the District Grievance Redressal Officer, in writing, of any malpractice or misappropriation of funds found by it."

24. Section 33 provides for penalties and states thus:

"33. Any public servant or authority found guilty, by the State Commission at the time of deciding any complaint or appeal, of failing to provide the relief recommended by the District Grievance Redressal Officer, without reasonable cause, or wilfully ignoring such recommendation, shall be liable to penalty not exceeding five thousand rupees:

Provided that the public servant or the public authority, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed."

25. The scheme of the Act of 2013 establishes the fact that the rights of the card holder are primarily to receive the food grains, essential commodities and other benefits under various schemes. This right does not extend to make a preference to receive such food-grains from a particular person nor does it entitle the card holder interfere in the day to day running of the fair price shops.

26. In a prescient judgement which predates the Act of 2013, but remains relevant till date, this Court declined to permit a card-holder to choose a dealer or seek cancellation of his licence. In the case of ***Ashfaq (supra)***, this Court crystallized the rights of a card-holder/complainant and held thus:

"A person, holding a ration card, is a consumer of the scheduled commodities under the Public Distribution Scheme. If he is not distributed the scheduled commodities according to his entitlement at a fair price, he may make a complaint to the food officer. The food officer is required to take an action on such complaint in accordance with the agreement with the authorised agent under clause 25 of the control order. The ration card holder is not an adversery or the controller of the scheme of distribution of scheduled commodities to the poor persons. He does not have right to either appeal against the order of suspension or cancellation of an authorisation or to file a writ petition challenging the order by which the Commissioner or the Food Commissioner, as the case may be, has allowed the appeal or has remanded the same for fresh consideration in accordance with the law. As a consumer, his rights cannot be raised to the status of choosing a dealer or to seek the cancellation of the licence of the dealer. His right is confined, to his entitlement of the scheduled commodities at specified price."

27. The holdings in ***Ashfaq (supra)*** is fully consistent with the provisions of the Act of 2013.

28. The rights of ration card holder are defined, regulated but also restricted by the National Food Security Act, 2013 and the Rules framed thereunder. The card-holder can also be granted compensation or allowance for denial of the entitlements under the Act of 2013. However, card-holder cannot decide the quantum of punishment to be imposed on a defaulting fair price shop dealer, as per the provisions of the Act of 2013. This function falls in the jurisdiction of the authorities under the Act, the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016, and the Government Orders holding the field. The preceding paragraphs catalogue the rights and remedies of eligible persons under the Act. They also detail the jurisdiction and obligation of the authorities under the Act.

No further right to the ration card-holder is vested by the legislature. No additional right to the ration card holder or complainant can be granted by the courts.

29. The pleadings in the writ petition do not state that the petitioner is a ration card holder. The petitioner as a complainant does not have the locus standi to file the instant writ petition.

30. In wake of the preceding discussion, the writ petition is not maintainable at the instance of the petitioner and he has no right to seek cancellation of the licence of the fair price shop dealer.

31. The writ petition is dismissed.

(2021)08ILR A855
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE DINESH PATHAK, J.

Writ C No. 14607 of 2021

Naresh Gill ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rohit Kumar Singh

Counsel for the Respondents:
A.S.G.I., C.S.C., Sri Ram N. Kaushik

A. Constitution of India - Art. 226 - Mandamus - Under Article 226 Court should not issue a direction upon an officer of the State to ignore the order of a civil court - a writ court must not issue directions which has the effect to defeat a court's order - that would have a devastating effect on the sanctity of court proceedings & would encourage people to flout orders of the court by having an interpretation of their choice to suit their end (Para 7)

B. Civil Law - Civil Procedure Code, 1908 - O.39 R.2A, - Disobedience of injunction order passed in suit - so long the interim injunction is in operation any violation of it would justify proceeding under Order 39 Rule 2-A CPC - that subsequent order of the appellate court holding that the civil court held no jurisdiction would not render the interim injunction order non-est - so long the order of the civil court operates it is not appropriate for any party bound by the order to violate the same by having its own interpretation of the order (Para 7)

Civil Suit instituted in the court of Munsif, Saran, Chhapra, Bihar - on 06.11.2020 temporary injunction order passed in suit restraining sale of suit property - Under SARFAESI Act, Asset Reconstruction Company Ltd put the suit property to auction - petitioner (highest bidder), deposited sale consideration, sale deed was drawn & submitted for registration before Sub-Registrar, Ghaziabad - Sub-Registrar citing injunction order refused to register the sale deed - *Held* - High Court could not issue a direction upon an officer of the State to ignore the order of a civil court and proceed with the registration of the sale deed in teeth of the injunction order granted by the civil court at Chhapra, State of Bihar.

Dismissed. (E-4)

List of Cases cited:

1. Surjit Singh Vs Harbans Singh, (1995) 6 SCC 50

2. Tayabbhai M. Bagasarwalla & anr. Vs Hind Rubber Industries Pvt. Ltd. & ors. (1997) 3 SCC 443

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

1. Heard Sri Rohit Kumar Singh for the petitioner; learned Standing Counsel for the respondents 1, 2 and 3; and Sri Ram N. Kaushik for the respondent no.4.

2. According to the petitioner, by taking recourse to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short SARFAESI Act), the Asset Reconstruction Company (India) Limited (the fourth respondent) put the land and building located at plot No.223, Khata No.152, Village Abupur, Murad Nagar, Delhi-Meerut Road, Ghaziabad to auction. The petitioner being the highest bidder, deposited the sale consideration of Rs.4,30,00,000/- to the credit of the fourth respondent. Pursuant to which, a sale deed was drawn and submitted for registration in the office of the third respondent (Sub-Registrar, Modi Nagar, District Ghaziabad). The third respondent, however, by citing an order of injunction passed by a Court at District Chhapra, State of Bihar, refused to register the sale deed.

3. The prayer in this petition is to command the third respondent to register the sale deed and give effect to the transaction.

4. The contention of the learned counsel for the petitioner is that though there is an order of injunction passed by the Court at Chhapra, State of Bihar, in respect of property located in the State of Uttar Pradesh, but that order is without jurisdiction. Otherwise also, the suit in which injunction order has been passed is barred by Section 34 of the SARFAESI Act and, therefore the order of injunction is void and is liable to be ignored. It is thus claimed that the Sub-Registrar should ignore the order and proceed with the registration of the sale deed.

5. Sri Ram N. Kaushik, who appears for respondent no.4, supports the stand of the writ petitioner. However, the learned standing counsel, who represents the state respondents, submits that so long the injunction order lasts the third respondent, who is a party in the suit instituted at Chhapra, is bound by the order and would not be justified to ignore the same and suffer the consequences of wilful disobedience of court's order.

6. Having noticed the rival submissions, we proceed to peruse the record. A perusal of the record would reflect that one Shiv Chaudhary instituted a Suit No.529 of 2020 in the court of Munsif-First, Saran, Chhapra impleading (a) Rajendra Singh; (b) Asset Reconstruction Company (India Ltd.) (the fourth respondent herein); and (c) Sub-Registrar, Modi Nagar, District Ghaziabad (third respondent herein) as defendants. The suit property is plot No.223 at Village Abupur, Tehsil Modinagar, District Ghaziabad. The prayer in the suit is to restrain the defendants from creating third party rights over the suit property. The basis of the suit is some Memorandum of Understanding. From the document appended as Annexure No.5 to the petition it appears that on 06.11.2020 a temporary injunction order has been passed in that suit restraining sale.

7. Upon consideration of the rival submissions and perusal of the record the issue that falls for our consideration is, whether in exercise of our discretionary jurisdiction under Article 226 of the Constitution of India we should issue a direction upon an officer of the State to ignore the order of a civil court and

proceed with the registration of the deed. The answer to it would be NO. The reason for it is that a writ court must not issue directions which has the effect to defeat a court's order because that would have a devastating effect on the sanctity of court proceedings and would encourage people to flout orders of the court by having an interpretation of their choice to suit their end. Such a direction, as prayed for by the petitioner, would not only defeat the ends of justice but would go against the prevalent public policy. In this context, we may refer to a decision of the Apex Court in **Surjit Singh V. Harbans Singh, (1995) 6 SCC 50,** where on the basis of a sale made in defiance of court's order impleadment was sought. The Apex Court was required to decide whether such sale could form basis for seeking impleadment, or it be treated as void. Rejecting prayer for impleadment on the strength of such sale, the Apex Court observed: *"..If we were to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the court orders otherwise. The Court, in these circumstances has the duty, as also the right, to treat the alienation/ assignment as having not taken place at all for its purposes."* Similarly, in **Tayabbhai M. Bagasarwalla & another Versus Hind Rubber Industries Pvt. Ltd. and others, (1997) 3 SCC 443,** one of the issues that came for consideration before the Apex Court was whether a defendant would be liable to be punished under Order 39 Rule 2-A of the Code of Civil Procedure, 1908 ("CPC") for violating an order of injunction passed in a suit which was subsequently found to be out of the jurisdiction of the court that passed the injunction order. The facts of that case were that a preliminary objection as to the jurisdiction of the civil court was taken. The civil court without first addressing the preliminary objection proceeded to grant interim injunction. The interim injunction was not complied by the defendant. Later, the preliminary objection was rejected and the interim injunction was made absolute. The defendant took the matter in appeal questioning the jurisdiction of civil court. Ultimately, it was held that the civil court had no jurisdiction. In that background the issue that arose was as to what would be the consequence of non-compliance of the interim inunction so long it was in operation and whether there could be lawful proceeding under Order 39 Rule 2-A CPC against the defendant for its violation. The Apex Court held that so long the interim injunction was in operation any violation of it would justify proceeding under Order 39 Rule 2-A CPC and that subsequent order of the appellate court holding that the civil court held no jurisdiction would not render the interim injunction order non-est. The legal principle deducible from the decision noticed above is that so long the order of the court operates it is not appropriate for any party bound by the order to violate the same by having its own interpretation of the order. For all the reasons stated above, we are of the firm view that it would not be proper on our part, particularly, when we do not have power of superintendence over the civil court at Chhapra, (State of Bihar), to direct the third respondent to register the sale deed in the teeth of the injunction order granted by the civil court at Chhapra, State of Bihar.

8. We may hasten to clarify that where the court, whose order is questionable, falls within the power of superintendence of the writ court, that writ

court exercising its power of superintendence over that subordinate court may not only set aside the order but may issue such directions as may be justified in law. But, here, we do not have the power of superintendence over the Court at Chhapra which falls in the State of Bihar therefore, even if we find substance in the submission of the learned counsel for the petitioner that the suit as framed is barred by the provisions of Section 34 of the SARFAESI Act, it would not be appropriate on our part to comment on the merits of the order of Chhapra Court and declare it void more so when the person who instituted the suit is not party in this writ petition. We, therefore, decline the prayer of the writ petitioner and **dispose off** this petition by giving liberty to the petitioner as well as the respondents 3 and 4 to take recourse to such other appropriate legal remedy as may be advised to them.

(2021)08ILR A858
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE DINESH PATHAK, J.

Writ C No. 14619 of 2021

Scholar's Education Trust of India
...Petitioner
Versus
Authorized Officer, Bank of India & Anr.
...Respondents

Counsel for the Petitioner:
Sri Sarveshwari Prasad

Counsel for the Respondents:
C.S.C., Sri R.V. Pandey, Sri Sanjeev Singh

SARFAESI Act, 2002 - Section 17 - During the pendency of SARFAESI proceedings, secured asset was put for auction/sale - High court directed that the auction scheduled to be held on 16.03.2021 shall remain stayed till the case is finally decided DRAT - despite injunction order auction proceeded 16.03.2021 - petitioner was the highest bidder - later upon status of the auction marked as cancelled on account of stay - Subsequently, Securitisation Application dismissed - petitioner prayed for quashing the cancellation status of the auction & for direction to hand over the possession of the auctioned property to the petitioner - Held - auction took place when there was restraint order in operation therefore, according recognition to such an unlawful act would defeat the ends of justice and the prevalent public policy - prayer to quash the cancellation status of the auction and confirming the auction cannot be accepted

Disposed off. (E-4)

List of Cases cited:

1. Surjit Singh & ors. Vs Harbans Singh & ors. (1995) 6 SCC 50

2. Jehal Tanti & ors. Vs Nageshwar Singh (2013) 14 SCC 689

3. Vidur Impex and Traders Pvt. Ltd. & ors. Vs Toshi Apartments Pvt Ltd. (2012) 8 SCC 384

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

1. Heard Sri Sarveshwari Prasad for the petitioner; Sri Sanjeev Singh for the respondent no.1; learned Standing Counsel for respondent no.2; and perused the record.

2. A proceeding under the Securitisation and Reconstruction of

Financial Assets and Enforcement of Securities Interest Act, 2002 (In short SARFAESI Act, 2002) was drawn against M/s. Shiksha Education Trust. Aggrieved by those proceedings, M/s. Shiksha Education Trust filed an application (i.e Securitisation Application No.107 of 2020), under Section 17 of the SARFAESI Act, 2002, before the Debts Recovery Tribunal, Allahabad. During the pendency of those proceedings, the secured asset was put for auction/sale. To put a stay on the auction the applicant moved an application. When stay could not be obtained it approached the Debts Recovery Appellate Tribunal. When it failed to secure relief there, the applicant (i.e. M/s. Shiksha Education Trust) filed Writ C No.8816 of 2021 in this Court. This Court, by order dated 15th March, 2021, disposed off the writ petition filed by M/s Shiksha Education Trust by directing that the auction scheduled to be held on 16th March, 2021 shall remain stayed till the case is finally decided by the Debts Recovery Appellate Tribunal, Allahabad. However, despite the injunction order of this Court, the auction proceeded on 16th March, 2021. In that auction, the petitioner was the highest bidder. But, later, upon finding that the auction was stayed by the writ court, the auction agency (MSTC), on the web site concerned, marked the status of the auction as cancelled. Subsequently, Securitisation Application No.107 of 2020 filed by M/s. Shiksha Education Trust came to be dismissed by the Debts Recovery Tribunal, Allahabad vide judgment and order dated 15th June, 2021.

3. Consequent to the dismissal of the Securitisation Application filed by M/s. Shiksha Education Trust, this writ petition has been filed by the petitioner, that is, the successful bidder in the auction held on 16th March, 2021, for quashing the cancellation status of the auction and for a direction upon the Authorized Officer, Bank of India to hand over the possession of the auctioned property to the petitioner after confirmation of its sale after deciding the representation made by the petitioner on 17th June, 2021, followed by reminder dated 23rd June, 2021.

4. The contention of the learned counsel for the petitioner is that once the Securitisation Application is dismissed, the interim injunction order has merged in the final order and, therefore, the auction made should be confirmed and possession be handed over to the petitioner.

5. Sri Sanjeev Singh, who appears for the respondent Bank, submits that since by order dated 15th March, 2021 of the writ court the auction to be held on 16th March, 2021 was stayed, the auction proceedings that were carried out, inadvertently, being in the teeth of an injunction order were void and, therefore, the Bank has no option but to re-start the process of auction.

6. In response to the above submission, learned counsel for the petitioner submits that if the auction proceedings were void, the money deposited by the petitioner should have been returned/restored to the petitioner.

7. Having considered the rival submissions, we find that it is not in dispute that the auction was held on 16th March, 2021, that is, when the injunction order of the writ court, putting a restraint on the auction, was operating. Once that is the position, according recognition to such an auction would defeat the ends of justice and the prevalent public policy. Such an auction would therefore be void. In this regard we

may notice a decision of the Apex Court in **Surjit Singh and others Versus Harbans Singh and others, (1995) 6 SCC 50** where it was held that on the basis of an assignment made in violation of an injunction order, no impleadment should be allowed as recognition of such assignment would defeat the ends of justice and the prevalent public policy. Similar view has been expressed in **Jehal Tanti and others Versus Nageshwar Singh, (2013) 14 SCC 689** and **Vidur Impex and Traders Pvt. Ltd. & Others Versus Toshi Apartments Pvt Ltd., (2012) 8 SCC 384,** where it was observed that sale deed executed in the teeth of order of injunction would be unlawful and no valid title would pass.

8. The submission of the learned counsel for the petitioner that the interim injunction merged in the final order, consequent to dismissal of the Securitisation Application, therefore, now, there are no fetters in recognition of the auction cannot be accepted for two reasons, firstly, because that auction took place when there was restraint order in operation and, therefore, according recognition to such an unlawful act would defeat the ends of justice and the prevalent public policy, and, secondly, the purpose of an auction, which is to discover the best price, might not be achieved as people in the know of injunction might have abstained from participating in the auction. Hence, the prayer of the petitioner to quash the cancellation status of the auction and to provide possession to the petitioner after confirming the auction cannot be accepted and is, accordingly, rejected.

9. The alternative oral prayer of the petitioner that the money deposited by him be returned to him, if the auction was rendered void, is acceptable.

10. This writ petition is therefore disposed off by giving liberty to the petitioner to seek refund of the money deposited by it without prejudice to his right to participate in a fresh auction that might take place of the property concerned. If the petitioner seeks refund of the money deposited by it, the same shall be returned to the petitioner forthwith, subject to necessary verification. The return of the money shall be without prejudice to the right of the petitioner to participate in fresh auction of the property in accordance with law.

11. The writ petition is **disposed off.**

(2021)08ILR A860
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ C No. 4773 of 2021

Asgar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Yogendra Pal Singh

Counsel for the Respondents:
C.S.C., Sri Kaushal Kishore Mani

Civil Law - U.P. Revenue Code (8 of 2012) - Sections 67 & 67 A- Power to prevent wrongful occupation of Gram Panchayat properties - Certain house sites to be settled with existing owners thereof – proceedings u/s 67 A should be registered immediately if defence in that regard is made in proceedings u/s 67 – thereafter both proceedings u/s 67 & 67 A of the Code, should be consolidated and

heard together & decided by the same court - Courts to decide the eligibility of the noticee for protection u/s 67 A in case such defence is tendered by the notice (Para 7, 8, 9, 11)

Petitioner contended that his house was standing on the disputed parcel of land and he was entitled to the protection of Section 67 A Code - trial court did not return any finding on this aspect - appellate court misdirected that it was open to the petitioner to take out a fresh proceeding under law - Held - No fresh proceedings are liable to be taken out - matter remitted for fresh determination (Para 10, 13) (E-4)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. By the impugned order dated 30.10.2019 the Tehsildar/ Assistant Collector First Division has lodged the proceedings under Section 67 of the U.P. Revenue Code, 2006 (hereinafter referred to as 'Code'.) has directed the eviction of the petitioner from disputed parcel of land after imposing damages and other charges. The petitioner fared no better before the appellate court which by the impugned order dated 14.10.2020 has affirmed the judgment of the court of first instance and rejected his appeal.

2. The proceedings for eviction of the petitioner under Section 67 of the Code for illegally encroaching upon gram panchayat land were taken out by issuance of a show cause notice and registering Case No. 59 of 2019 Computerized Case No. 201909550101867. The petitioner tendered a reply to the show cause notice stating that he had erected his house on the disputed parcel of land. It is the sole dwelling unit of his family. Similar objections were taken by the petitioner before the appellate authority in the memo of appeal. The petitioner claimed that he was was entitled to the benefit of Section 67 (a) Code.

3. Adverting to the eligibility of the petitioner for protection under Section 67 (a) of the Code and the rights purportedly accruing to him thereunder, the appellate court held that it was open to the petitioner to take out proceedings under Section 67 (a) of the Code for grant of appropriate relief as claimed by him. After noticing the aforesaid facts, the appellate court agreed with the judgment of the trial court and dismissed the appeal. The trial court did not return any finding on this issue.

4. Section 67 as well as Section 67(a) of the Code reflect the composite intent of legislature. The legislature by enacting the aforesaid provision has recognized the vulnerability of the State land to illegal encroachment and the need for urgent corrective measures. Simultaneously the legislature has also acknowledged the reality of a large number of persons who have erected dwelling units on lands which are not reserved for any public purposes. The legislature has protected their rights in the manner prescribed in the provision. For ease of reference the provisions are extracted hereunder:

"67 Power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property.- (1) Where any property entrusted or deemed to be entrusted under the provisions of this Code to a **Gram Panchayat** or other local authority is damaged or misappropriated, or where any **Gram Panchayat** or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the Assistant

Collector concerned in the manner prescribed.

(2) **Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.**

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as the **Assistant Collector** may allow in this behalf, or if the cause shown is found to be insufficient, the **Assistant Collector** may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or 34 misappropriation of the property or for wrongful occupation, as the case may be, be recovered from such person as arrears of land revenue.

(4) If the **Assistant Collector** is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the **Assistant Collector** under sub-section (3) or sub-section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provision of this Code, and subject to the provisions of this section every order of the **Assistant Collector** under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation. - For the purposes of this section, the word 'land' shall include the trees and buildings standing thereon

67-A Certain house sites to be settled with existing owners thereof.- (1) If any person referred to in sub-section (1) of section 64 has built a house on any land referred to in section 63 of this Code, not being land reserved for any public purpose, and such house exits on the November 29, 2012, the site of such house shall be held by the owner of the house on such terms and conditions as may be prescribed.

(2) Where any person referred to in sub-section (1) of section 64, has built a house on any land held by a tenure holder (not being a government lessee) and such house exits on November 29, 2000, the site of such house, notwithstanding anything contained in this Code, be deemed to be settled with the owner of such house by the tenure holder on such terms and conditions as may be prescribed.

Explanation. - For the purpose of sub-section (2), a house existing on November 29, 2000, on any land held by a tenure holder, shall, unless the 35 contrary is proved, be presumed to have been built by the occupant thereof and where the occupants are members of one family by the head of that family. "

5. Section 67(a) of the Code confers rights on certain people who have

encroached upon public land. The perequisite conditions for invoking the protection of Section 67 (a) of the Code are these. The person against whom proceedings are taken out has built his house on any land referred to in Section 63 of the Code, the person who seeks protection of Section 67 (a) of the Code should be in the category of persons referred to in Section 63 of the Code. The land should not be reserved for any public purpose. The date of the construction of the house should be prior to 29 November, 2012. The house of such persons should be existing in the disputed parcels of land on or before 29 November 2012.

6. In many instances, as indeed in the present case, the noticee under Section 67 of the Code may invoke the protection of Section 67 (a) of the Code to resist the proceedings under Section 67 of the Code.

7. The authority/ court having jurisdiction to decide the proceedings taken out under Section 67 of the Code or Section 67(a) of the Code is the same. When the defence of Section 67 (a) of the Code is taken in proceedings of Section 67 of the Code, the same issues will be directly and substantially in issue in both the proceedings. Usually in such matters pleadings, defence, pleadings and evidence of the parties are same in both the proceedings. In case proceedings under Section 67 and 67(a) of the Code are conducted separately and in isolation to one another, it would lead to multiplicity of litigation and inconsistent judgments. There will also be an avoidable delay in decision of the controversy and may even result in miscarriage of justice.

8. In fact proceedings under Section 67 (a) of the Code should be registered immediately after a defence in that regard is made in proceedings under Section 67 of the Code.

9. The proceedings under Sections 67 and 67(a) of the Code, should be consolidated and heard together by the same court. Such procedure would faithfully implement the legislative intent and also serve the interest of justice.

10. In the case at hand the appellate court notices the fact that the petitioner had specifically contended that his house was standing on the disputed parcel of land and he was entitled to the protection of Section 67 (a) Code. The trial court neglected to return a specific finding on this critical aspect while proceeding to determine the issue finally. The appellate court misdirected itself in lay by holding that it was open to the petitioner to take out a fresh proceeding under law. No fresh proceedings are liable to be taken out in the case as stated earlier.

11.The courts in proceedings under Section 67 Code are under obligation of law to decide the eligibility of the noticee for protection under Section 67 (a) Code, in case such defence is tendered by the noticee. The said proceedings shall be registered separately. But both cases will be consolidated and heard and decided together.

12. In the wake of preceding discussion the impugned orders dated 14.10.2020 and 30.10.2019 are vitiated and contrary to law. The orders dated 14.10.2020 and 30.10.2019 are liable to be set aside and are set aside.

13. The matter is thus remitted to the respondent No. 3 /Tehsildar (Judicial)

Tehsil Sadar, District Muzaffarnagar/ Assistant Collector for a fresh determination consistent with the observation made in this judgment.

14. The following directions are being passed to serve the interest of justice in this case:

(1) The petitioner shall file fresh application under Section 67(a) of the Code before the respondent No. 3/Tehsildar (Judicial) Tehsil Sadar, District Muzaffarnagar/ Assistant Collector.

(2) The respondent No. 3/Tehsildar (Judicial) Tehsil Sadar, District Muzaffarnagar/ Assistant Collector shall register the proceedings under Section 67 (a) upon the submission of such application. Proceedings under Section 67(a) so instituted shall be consolidated and heard with proceedings under Section 67 of the Code registered as Case No. 59 of 2019 and decided by a common judgment.

15. The writ petition is allowed to the extent indicated above.

(2021)08ILR A864
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2021

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ C No. 11522 of 2021

Kshetriya Shree Gandhi Ashram, Ghazipur ...Petitioner

Versus

The Employee Provident Fund Appellate Tribunal and CGIT cum Labour Court , Kanpur & Anr. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Tewari, Sri Satyajit Mukerji, Sri Suresh Chandra Mishra

Counsel for the Respondents:
Sri Sachindra Upadhyay

Civil Law - Employees Provident Funds and Miscellaneous Provisions Act (19 of 1952) - composite order passed under Sections 14-B & 7-Q when appealed under Section 7-I, then there is no mandatory requirement for making pre-deposit in view of Section 7-O of the Act (Para 11)

Composite Order passed u/s 14-B as well as 7-Q of the "1952 Act" directing for payment of damages & penal interest - an appeal was preferred by the petitioner - Tribunal required the petitioner to make pre-deposit of the full amount assessed u/s 7-Q as well as 50% of the amount assessed u/s 14B - Held - Impugned order totally against the statutory provision 7-O of the Act of 1952 – impugned order quashed

Allowed. (E-4)

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Rajesh Tewari, learned counsel for the petitioner and Sri Sachindra Upadhyay, learned counsel for respondent Nos. 1 and 2.

2. This writ petition has been filed seeking quashing of order dated 26.02.2021 passed by respondent No.1 in appeal filed before Appellate Tribunal as well as recovery order dated 02.03.2021 passed by respondent No.2.

3. The facts, as disclosed in the petition, are that the petitioner is a registered society and has been established with an object of popularizing hand woven cloth by helping rural population of the country and to develop Cottage Industry. On 05.01.2021, an order was passed under

Section 14-B as well as 7-Q of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (*hereinafter called as "1952 Act"*) directing for payment of damages and penal interest of Rs.33,73,011/- on the ground that employer has not remitted the Provident Fund and allied dues within stipulated time as per Sections 6, 6A, 6C of 1952 Act and also not deposited the administrative charges for the period 01.4.2017 to 24.02.2020.

4. Against the said order, an appeal was preferred by the petitioner before respondent No.1 on 09.02.2021. The Tribunal on 26.02.2021 required the petitioner to make pre-deposit of the full amount assessed under Section 7-Q of 1952 Act as well as 50% of the amount assessed under Section 14B of 1952 Act. The petitioner is aggrieved by the said order.

5. It has been contended by learned counsel for the petitioner that appeal lies to the Tribunal under Section 7-I of the 1952 Act and orders passed under Sections 7-A, 7-B, 7-C or Section 14-B are only appellable and no appeal lies against the order passed under Section 7-Q. Further Section 7-O mandates deposit of 75% of the amount as determined under Section 7-A of 1952 Act, and thus there is no requirement for pre-deposit for any appeal filed against the order under Section 14B and Section 7Q of 1952 Act. It was further contended that the Appellate Tribunal should have decided the appeal on merit without asking for pre-deposit of the amount as it was against the statutory provisions of Section 7-O of 1952 Act. It was further contended that the Apex Court in case of **Arcot Textile Mills Limited vs. Regional Provident Fund Commissioner and others (2013)16 SCC 1** has held that when a composite order is passed under Section 14-B and 7-Q then such an order is appellable and in case the order under Section 7-Q is passed independently, no appeal lies against the said order. Reliance has been placed upon decision of Apex Court in case of **Shiv Harbal Research Laboratory vs. Assistant Provident Fund Commissioner, Laws (SC) 2010 (4) 121; SAM (India) Builtwell (P.) Ltd. vs. Assistant Provident Fund Commissioner 2018 (157) FLR 410** and **Old Village Industries Ltd. vs. The Asstt. Provident Fund (2005) LLJ 742 Delhi High Court.**

6. Sri Sachindra Upadhyay, learned counsel appearing for the respondent defending the order of Tribunal as well as respondent No.2 could not add anything more.

7. Having heard counsel for the parties and perusal of record it appears that the sole question before this Court is to the determination of fact whether in view of provisions, as contained in 1952 Act, any mandatory deposit of 75% of the amount has to be made in view of Section 7-O in appeal filed under Section 7-I against the composite order passed under Section 14-B and Section 7-Q of the 1952 Act?

8. In order to appreciate controversy in issue, a glance of relevant provisions of Sections 7-A, 7-I, 7-O, and 7-Q is necessary. Relevant sections are extracted here as under :

"7A. Determination of moneys due from employers

(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or

any Assistant Provident Fund Commissioner may, by order,--

(a) in a case where a dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the3[Pension] Scheme or the Insurance Scheme, as the case may be, and for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.

(2) The officer conducting the inquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), for trying a suit in respect of the following matters, namely:--

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses ;

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code.

(3) No order shall be made under sub-section (1), unless the employer concerned] is given a reasonable opportunity of representing his case.

(3A) Where the employer, employee or any other person required to attend the inquiry under sub-section (1) fails to attend such inquiry without assigning any valid reason or fails to produce any document or to file any report or return when called upon to do so, the officer conducting the inquiry may decide the applicability of the Act or determine the amount due from any employer, as the case may be, on the basis of the evidence adduced during such inquiry and other documents available on record.

(4) Where an order under sub-section (1) is passed against an employer ex parte, he may, within three months from the date of communication of such order, apply to the officer for setting aside such order and if he satisfies the officer that the show-cause notice was not duly served or that he was prevented by any sufficient cause from appearing when the inquiry was held, the officer shall make an order setting aside his earlier order and shall appoint a date for proceeding with the inquiry:

Provided that no such order shall be set aside merely on the ground that there has been an irregularity in the service of the show-cause notice if the officer is satisfied that the employer had notice of the date of hearing and had sufficient time to appear before the officer.

Explanation.--Where an appeal has been preferred under this Act against an order passed ex parte and such appeal has been disposed of otherwise than on the ground that the appellant has withdrawn the appeal, no application shall lie under this sub-section for setting aside the ex parte order.

(5) No order passed under this section shall be set aside on any application under sub-section (4) unless notice thereof has been served on the opposite party.

7I. Appeals to Tribunal

(1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or subsection (4) of section 1, or section 3, or sub-section (1) of section 7A, or section 7B

[except an order rejecting an application for review referred to in sub-section (5) thereof], or section 7C, or section 14B, may prefer an appeal to a Tribunal against such notification or order.

(2) Every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed.

7-O. Deposit of amount due, on filing appeal- *No appeal by the employer shall be entertained by a Tribunal unless he has deposited with it seventy-five per cent, of the amount due from him as determined by an officer referred to in section 7A:*

Provided that the Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.]

7Q. Interest payable by the employer- *The employer shall be liable to pay simple interest at the rate of twelve per cent, per annum or at such higher rate as may be specified in the Scheme on any amount due from him under this Act from the date on which the amount has become so due till the date of its actual payment:*

Provided that higher rate of interest specified in the Scheme shall not exceed the lending rate of interest charged by any scheduled bank."

9. From careful reading of Section 7-I, it transpires that appeal lies against determination order passed under Section 7-A as well as review orders passed under Section 7-B and determination of escaped amount under Section 7-C as well as orders under Section 14-B. The orders passed under Section 7-Q are not appellable under Section 7-I of 1952 Act. Further Section 7-O mandates for pre-deposit of 75% of the amount passed under Section 7-A which is in regard to the determination of the amount by the officers referred therein.

10. Thus, it is clear that requirement of pre-deposit is only when there is determination/assessment order made by the authority, while the order under Section 14-B is passed for quantifying penal damages upon the petitioner for not remitting the provident fund dues within time. Moreover, Section 7-Q mandates for the imposition of interest upon the employer at a rate of 12% p.a. when the actual payment has not been made on the due date, but no remedy has been provided under the Act for challenging the order passed under Section 7-Q of the Act.

11. The decision of Apex Court in case of **Arcot Textile Mills Ltd. (supra)** provides for an appeal under Section 7-I in case where the order passed under Section 14-B and 7-Q are composite orders. Thus, it can be safely said that the composite order passed under Section 14-B and 7-Q when appealed under Section 7-I, there is no mandatory requirement for making pre-deposit in view of Section 7-O of the Act.

12. The finding recorded by the Appellate Tribunal on 26.02.2021 that Section 7-O mandates an employer to deposit statutory amount of 75% of the amount due before his appeal is entertained by a Tribunal determined by an officer referred to in Section 7-A is totally against the statutory provision of 1952 Act.

13. In **Shiv Harbal Research Laboratory (supra)**, the Apex Court while dealing with this issue had categorically held that there was no requirement for complying the provision of Section 7-O in appeal filed under Section 7-I against the order passed under Section 14B and 7Q of the Act. Paras 4 and 5 of the judgment are extracted here as under :

"4. Apart from the above, the provision for preferring an appeal in

respect of an order under Section 14-B is contained in Section 7-Iof the above Act which provides for appeals to the Tribunal, inter alia against orders passed under Section 14-B. Sub-section (2) of Section 7-I indicates that every appeal under sub-section (1) shall be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed. There is nothing to indicate that any part of the amount awarded under Section 14-B was required to be deposited at the time of filing of the appeal.

5. When specific provision has been made within regard to appeals under Section 7-A and under Section 7-O, a definite provision has been indicated for deposit of 75% of the awarded amount and there is no such provision in Section 7-I, we cannot read the principles of Section 7-O into the provisions of Section 7-I in relation to appeals under section 14-B of the above Act."

14. Further the order dated 05.1.2021 passed by respondent No.2 under Section 14-B and 7-Q also appears to be non speaking as the Apex Court in case of **Mcleod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri and others (2014) 15 SCC 263** held as under :

"In HMT Ltd., this Court noted the beneficial nature of the ESIC Act; that subordinate legislation must conform to the provisions of the parent Act. Despite giving due regard to the use of the words "may recover damages by way of penalty", and mindful that mens rea and actus reus to contravene a statutory provision are necessary ingredients for levy of damages, this Court set aside the interference of the High Court vis-à-vis the imposition of damages and further held that imposition of damages by way of penalty was not mandated in each and every case. The dispute was remitted back to the High Court for fresh consideration, i.e. to proceed on the premise that the levy of penalty under the Act was not a mere formality, a foregone conclusion or an inexorable imposition; and that the circumstances surrounding the failure to deposit the contribution of the employees concerned would also have to be cogitated upon. This decision does not prescribe that damages or penalties cannot or ought not to be imposed. Further, the presence or absence of mens rea and/or actus reus would be a determinative factor in imposing damages Under Section 14B, as also the quantum thereof since it is not inflexible that 100 per cent of the arrears has to be imposed in all the cases. Alternatively stated, if damages have been imposed Under Section 14B it will be only logical that mens rea and/or actus reus was prevailing at the relevant time. We may also note that this Court had yet again reiterated the well-known but oft ignored principle that High Courts or any Appellate Authority created by a statute should not substitute their perspective of discretion on that of the lower Adjudicatory Authority if the impugned Order does not otherwise manifest perversity in the process of decision taking. HMT Ltd. does not proscribe imposition of damages; that would negate the intent of the legislature. The submission of the Petitioner before us is that the liability was of the erstwhile management and since the Petitioner was not the "employer" at the relevant time, default much less deliberate and wilful default on the part of the Petitioner was absent. However, it seems to us that once these damages have been levied, the quantification and imposition could be recovered from the party which has

assumed the management of the concerned establishment concerned."

15. Thus, having considered the argument as well as the pleadings of the parties, I find that the order dated 26.02.2021 passed by respondent No.1 and the recovery order issued by respondent No. 2 on 02.3.2021 are totally against the statutory provision 7-O of the Act of 1952 and thus they are hereby quashed. The matter is remitted back to the Appellate Tribunal respondent No.1 to hear and decide the appeal of the petitioner expeditiously preferably within next three months from the date of production of a copy of this order downloaded from the website of this Court.

16. Writ petition stands partly allowed.

(2021)08ILR A869
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ C No. 15641 of 2021

Ishwar Chand & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vishesh Rajvanshi

Counsel for the Respondents:
C.S.C.

Constitution of India - Art. 226 - writ petition after 41 years to stake a claim for compensation - Limitation for entertaining writ petition - there is no limitation provided for entertaining a writ petition under Article 226 - where no limitation is provided, the person must approach the Court within a reasonable time – *Reasonable time* - reasonable time is dependent on the facts of a case - Ordinarily, where a civil court remedy would get barred by limitation, the prayer should not be entertained in writ jurisdiction - period of limitation is to be counted from the date when the original cause of action arose - later examination of dead and stale issue would not give a fresh cause of action to revive a time-barred issue - Rejection of time barred claim by authorities do not give new cause of action for staking claim (Para 10, 13)

Petitioners ancestors. were owners of plot - acquisition of said land made in the year 1980, but no compensation was paid/ awarded to them - petitioners continued to represent their cause - representations/claims of the petitioners rejected in the year 2021 upon finding that the claim was highly belated - *Held* - cause of action to institute suit for compensation first arose when the land was utilised in the year 1980 or before - no documentary material on record to indicate that either within three years or even twelve years of such utilisation of the land any promise was extended by the State or its agencies to compensate the farmers - where even the remedy to seek possession was barred by limitation, that is on expiry of 12 years from the date the possession of land was taken from the farmers - writ petition, filed after 41 years, to stake a claim for compensation is hopelessly barred by laches – court rejected petitioner's contention that the cause of action should be taken as the date when the impugned order was passed i.e. 12.02.2021 – rejection of the time barred claim by the impugned order dated 12.02.2021 does gave the petitioners a new cause of action for staking a claim for compensation.

Dismissed. (E-4)

List of Cases cited:

1.Syed Maqbool Ali Vs St. of U.P. (2011) 15 SCC 383

2.St.of M.P. Vs Bhailal Bhai & ors. AIR 1964 SC 1006

3.Banda Development Authority, Banda Vs Moti Lal Agarwal & ors. 2011 (5) SCC 394

4. U.O.I. & anr. Vs V.M. Sarkar : 2010 (2) SCC 59

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

1. Heard learned counsel for the petitioners; the learned Standing Counsel for the State-respondents; and perused the record.

2. The case of the petitioners is that their ancestors were owners of plot nos. 238, 239, 340, 242, 243, 245 and 246 at village Saidbhar, Tehsil and District Baghpat. For construction of road from *Sarai Mod* (turn) of Baghpat road to Binauli, having a length of 16.45 kms, acquisition of land in favour of Public Works Department (PWD) was made sometime in the year 1980 with assurance that fair compensation would be offered to the land owners. The land of petitioners' ancestors was utilised for the purpose but no compensation was paid/ awarded to them. However, on the representations of the petitioners, on 19.01.2004, a Committee was constituted to look into the issue but the Committee took no action. As result, the petitioners continued to represent their cause. It is alleged that on 01.09.2010 in respect of some other plots, an award was passed in favour of one Smt. Angoori. Therefore, again, representations were made for payment of compensation but to not avail. Later, a survey was conducted in the year 2017 to ascertain whether the land of petitioners' ancestors was utilised for the road. The Survey report dated 20.06.2017 confirmed that the land was utilised. Thereafter, on representations, the matter was taken up again and, under the order of District Magistrate, Baghpat dated 25.06.2018, a five-member Committee was constituted to submit a report. The Committee submitted an ex parte report, dated 10.02.2021, of which copy was not provided. Acting on the report dated 10.02.2021, by the impugned order dated 12.02.2021, the representations/claims of the petitioners were rejected by the third respondent (Additional District Magistrate (Finance & Revenue), Baghpat).

3. A perusal of the impugned order dated 12.02.2021 would indicate that as per the report dated 10.02.2021 the road, namely, Binauli Baghpat Sarai Marg was built in between 1972 and 1984. Its length is 16.43 kms. The survey indicated that 2.13 hectare of land of the villagers of village Saidbhar was affected by construction of the road. It is stated in the report that the ancestors of the petitioners, keeping in mind the constraints of the existing chak- road and the benefits of a wider road, had voluntarily contributed small portions of their land for construction of the road and with their contribution and participation, a 12 meter wide road could be built which had been in existence for last nearly 40 years. The report further indicated that though the claimants claim the width of the road as 80 feet i.e. 34.2 meter but, on spot, the road is 12 meter wide. On the basis of this report, the third respondent, by placing reliance on a decision of the Apex Court in ***Syed Maqbool Ali vs. State of U.P. : (2011) 15 SCC 383,*** upon finding that the claim was highly belated; that the ancestors raised no objection; and that the road was constructed for the benefits of the villagers with their consent, rejected the

representation of the petitioners as not maintainable.

4. Aggrieved with the impugned order, this petition has been filed by claiming that the third respondent wrongly placed reliance on the decision of the Supreme Court in ***Syed Maqbool Ali's case (supra)*** inasmuch as the petitioners had been actively pursuing their cause and since it is proved on record that their bhumidhari land has been utilised for construction of road, they are entitled to compensation at the market rate.

5. Per contra, the learned Standing Counsel submitted that it is admitted in the petition that the road was completed sometime in the year 1980 and as it has not been demonstrated that any claim for compensation was made prior to the year 2004, the claim of the petitioners is hopelessly barred by laches and mere subsequent examination of the claim, to reject it later, will not make the laches condonable. Hence, the third respondent rightly rejected the claim by placing reliance on the decision of the Apex Court in ***Syed Maqbool Ali's case (supra).***

6. We have given our thoughtful consideration to the rival submissions and have perused the record carefully.

7. The factual position that emerges from the record is that a road was constructed up to a length of 16.43 kms. in the year 1980 or before. In construction of the road, small pieces of land belonging to different farmers was used apart from the chak-road that existed from before. The report of the Committee is that the land of the farmers was utilised with their consent and for their own benefit and no force was used upon them.

8. No doubt, the case of the petitioners is that their land was utilised under a promise that they would be paid compensation. But there is nothing on record that any promise was extended by the State or its agencies in respect of payment of compensation either to the petitioners or to their ancestors, though, it is alleged by the petitioners that on their representations, a Committee was set up in the year 2004 to examine their claim. Further, from our query to the learned counsel for the petitioners, it transpires that the petitioners are not those farmers whose land was utilised but are successors in interest of those farmers. Thus, in absence of a specific stand in the petition that any of the petitioners had been promised compensation at the time when the land was utilised for construction of road, it would be any body's guess as to what transpired at the time when the land was utilised for constructing the road. Whether the ancestors of the petitioners voluntarily contributed their land or it was forcible acquisition would be a matter of speculation. But what is clear on the record is that there is no material put forth to suggest that the ancestors of the petitioners had claimed compensation. Whether the ancestors of the petitioners had provided their land voluntarily with a view to have a road for the village and for their benefit or they were forced to provide land for construction of the road cannot be decided by us, at this stage, particularly, because those farmers, namely, ancestors of the petitioners, are no longer alive.

9. In this context, it would be apposite to notice the judgment of the Apex Court in ***Syed Maqbool Ali's case (supra)***. In ***Syed Maqbool Ali's case (supra)***, in paragraph 9, it was observed as follows:-

"The remedy of a land holder whose land is taken without acquisition is either to file a civil suit for recovery of possession and/or for compensation, or approach the High Court by filing a writ petition if the action can be shown to be arbitrary, irrational, unreasonable, biased, mala fide or without the authority of law, and seek a direction that the land should be acquired in a manner known to law."

In paragraph 10 of the aforesaid judgment, the apex court went on to observe as follows:-

"But that does not mean that the delay should be ignored or appellant should be given relief. In such matters, the person aggrieved should approach the High Court diligently. If the writ petition is belated, unless there is good and satisfactory explanation for the delay, the petition will be rejected on the ground of delay and laches."

In paragraph 12 of the aforesaid judgment, it was further observed as follows:-

"The High Courts should also be cautious in entertaining writ petitions filed decades after the dispossession, seeking directions for acquisition and payment of compensation. It is not uncommon for villagers to offer/donate some part of their lands voluntarily for a public purpose which would benefit them or the community - as for example, construction of an access road to the village or their property, or construction of a village tank or a bund to prevent flooding/erosion. When they offer their land for such public purpose, the land would be of little or negligible value. But decades later, when land values increase, either on account of passage of time or on account of developments or improvements carried out by the State, the land holders come up with belated claims alleging that their lands were taken without acquisition and without their consent. When such claims are made after several decades, the State would be at a disadvantage to contest the claim, as it may not have the records to show in what circumstances the lands were given/donated and whether the land was given voluntarily. Therefore, belated writ petitions, without proper explanation for the delay, are liable to be dismissed."

10. As a legal principle, there is no limitation provided for entertaining a writ petition under Article 226 of the Constitution of India. But, ordinarily, where no limitation is provided, the person must approach the Court within a reasonable time. As to what is the reasonable time is dependent on the facts of a case. Ordinarily, where a civil court remedy would get barred by limitation, the prayer should not be entertained in writ jurisdiction. In ***State of Madhya Pradesh v. Bhailal Bhai and others : AIR 1964 SC 1006***, a constitution bench of the Apex Court, in paragraph 21 of the judgment, observed as follows:

"Learned counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a Civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. The court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the court to hold that it is unreasonable."

Following the decision of the Apex Court in ***State of Madhya Pradesh v. Bhailal Bhai's case (supra), in Banda***

Development Authority, Banda v Moti Lal Agarwal and others; 2011 (5) SCC 394, the Apex Court, in paragraph 17 of its judgment, observed as under :-

"It is true that no limitation has been prescribed for filing a petition under Article 226 of the Constitution but one of the several rules of self imposed restraint evolved by the superior courts is that the High Court will not entertain petitions filed after long lapse of time because that may adversely affect the settled/crystallized rights of the parties. If the writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits"

11. When we examine the facts of the instant case in the light of the legal principle noticed above, we find that the cause of action to institute a suit for compensation first arose when the land was utilised. Admittedly, the land was utilised in the year 1980 or before. There is no documentary material on record to indicate that either within three years or even twelve years of such utilisation of the land any promise was extended by the State or its agencies to compensate the farmers. Under these circumstances, where even the remedy to seek possession was barred by limitation, that is on expiry of 12 years from the date the possession of land was taken from the farmers, in our view, the writ petition, filed after 41 years, to stake a claim for compensation is hopelessly barred by laches and is liable to be dismissed as such.

12. At this stage, the learned counsel for the petitioners submitted that the cause of action for filing the writ petition should be taken as the date when the impugned order was passed i.e. 12.02.2021.

13. In our view, the aforesaid contention is liable to be rejected for the simple reason that the impugned order rejects the claim of the petitioners on the ground of limitation. Even otherwise, the period of limitation is to be counted from the date when the original cause of action arose. A later examination of dead and stale issue would not give a fresh cause of action to revive a time-barred issue. In this context, we may refer to the decision of the Apex Court in ***Union of India and another v. V.M. Sarkar : 2010 (2) SCC 59***, wherein the Apex Court, in paragraph 15 of the judgement, observed as under:-

"When a belated representation in regard to a `stale' or `dead' issue/dispute is considered and decided, in compliance with a direction by the Court/Tribunal to do so, the date of such decision can not be considered as furnishing a fresh cause of action for reviving the `dead' issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction"

14. Though, in this case, it does not appear from the record that the representation of the petitioners was decided under court's direction but there is nothing on record to demonstrate that the claim of the petitioners was raised, or was under consideration from, within the period of limitation. As we have already noticed above that there is nothing to indicate that the claim was raised and was taken up for consideration up to the year 2004, the original cause of action, which arose sometimes in the year 1980, became barred by limitation. No doubt, the State-respondents did examine the plea and,

ultimately, rejected the plea to be barred by limitation but that would not provide fresh limitation for a claim which had already become barred by limitation. Under these circumstances, it cannot be said that the rejection of the time barred claim by the impugned order gave the petitioners a new cause of action for staking a claim for compensation.

15. For all the reasons noticed above, we are of the considered view that the claim of the petitioners raised in this petition is hopelessly barred by laches and the same cannot be entertained. The petition is therefore **dismissed as barred by laches.**

(2021)08ILR A874
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2021

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ C No. 17909 of 2021

Smt. Vimla Rani Agarwal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Dwivedi

Counsel for the Respondents:
C.S.C.

A. Indian Stamp Act, 1899 - Sections 47A, 56(1-A) & 76-A - Delegation of appellate power - power of Chief Controlling Revenue Authority u/s 45(1)(2), 56(1) and 70(2) can be delegated to the subordinate Revenue Authority in view of Section 76-A - Notification dated 24.5.2017 issued u/s 76-A(b), delegating power of entertaining appeal u/s 56(1-A) to the subordinate revenue authorities - As per notification dated 24.5.2017 in matter up to Rupees Ten lakh, appeal is cognizable by Additional Divisional Commissioner /Deputy Commissioner Stamp of Division/circle concerned. (Para 9, 10, 13)

B. U.P. Zamindari Abolition and Land Reforms Act, 1950 - Sections 143, S. 144 - getting non agricultural land converted as an agricultural land just for the purpose of sale deed and evading the stamp duty - Not approved by court

Original tenure holder sought declaration u/s 143 of U.P. Zamindari Abolition and Land Reforms Act, 1950 - Sub-Divisional Magistrate found the land not being used for agricultural purpose & on 16.7.2005 declared said land as non-agricultural land - On 07.09.2009, S.D.M. recalled the earlier declaration & proceeded to declare the said land as "agricultural' u/s 144 of the Act, 1950 - In years 2013 Petitioner purchased said agricultural land vide registered sale deed, stamp duty paid according to the circle rate - Revenue Authorities rightly proceeded to hold deficiency of stamp duty on the basis of the fact that once the declaration was made in the year 2005 u/s 143 of Act, 1950, no occasion arose for getting the land again converted as an agricultural land just for the purpose of sale deed and evading the stamp duty (Para 3, 17, 18)

Dismissed. (E-4)

List of Cases cited:

1. Yogesh Kumar & ors. Vs State of U.P. & ors. Writ-C No.33694 of 2013 dt 14.6.2013

2. Neetu Agarwal & anr. Vs Commissioner, Devi Patan Mandal, Gonda & ors. W.P. No.6600 (MS) of 2009 dt 17.12.2009

3. Ajay Kumar Srivastava Vs Commissioner, Allahabad Division & ors. Writ-C No.42865 of 2011 dt 9.5.2013

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Heard Sri Sanjay Kumar Tiwari, learned counsel for the petitioner, Sri Manish Goyal, learned Additional Advocate General along with Sri J.N.Maurya, learned Chief Standing Counsel for respondents-State.

2. This writ petition has been filed assailing the order dated 22.3.2021 passed by respondent No.2 in Appeal under Section 56(1-A) of Indian Stamp Act, 1899 *(hereinafter called as "Act, 1899")* and order dated 25.10.2018 passed by respondent No.3 in Case No.740 of 2015 in proceedings under Section 47-A of Act, 1899.

3. The facts in brief giving rise to the present petition are that petitioner had purchased the agricultural land of Khasra No.637 measuring about 0.105 Hectare situated at Mauza Sunrakh Bangar, Tehsil and District Mathura vide registered sale deed dated 08.05.2013. A stamp duty of Rs.78,200/- was paid according to the circle rate. The proceedings under the Act, 1899 was initiated at the behest of Additional Commissioner Stamp, Mathura on 25.7.2015 and notice under Section 47-A of Act, 1899 was issued. An objection was submitted by the petitioner denying any deficiency in stamp duty and it was specifically stated that Khasra Nos.637 and 604, whose original tenure holder was Smt. Sharda Devi Motiwala and Smt. Manju Vani Devi and one Ruchi Agrawal. A declaration under Section 143 of U.P. Zamindari Abolition and Land Reforms Act, 1950 *(hereinafter called as "Act, 1950")* was made by Sub-Divisional Magistrate, Mathura on 16.7.2005. It was in the year 2009 that on the application moved in respect of these two khasra numbers that on the report of Tehsildar dated 07.09.2009, Sub-Divisional Magistrate, Mathura proceeded to declare the said land as "agricultural' under Section 144 of the Act, 1950. It is further averred that once the land was declared as "agricultural', the petitioner had purchased the same through registered sale deed on 08.05.2013 and had paid stamp duty as per the circle rate. The respondent No.3/Assistant Commissioner Stamp Mathura, after considering the objection filed by petitioner, vide detailed order dated 25.10.2018, held that there was deficiency of stamp duty of Rs.3,52,000/- and imposed penalty of Rs.20,000/- and further directed that interest at the rate of 1.5% per month will be levied till the date of payment of balance amount of stamp duty along with penalty from the date of execution of the document.

4. Aggrieved by the said order, an appeal under Section 56(1-A) of Act, 1899 was preferred before Chief Controlling Revenue Authority/Deputy Commissioner Stamp Agra. The Appellate Authority found no substance in the appeal of the petitioner and after recording a finding, dismissed the same upholding the order passed by respondent No.3.

5. Sri Sanjay Kumar Dwivedi, learned counsel for the petitioner raised a preliminary objection in regard to maintainability of the proceedings before respondent No.2 and submitted that Section 56(1-A) of the Act, 1899 envisages that the appeal has to be decided by Chief Controlling Revenue Authority and not by the Deputy Commissioner and thus the appellate order dated 22.3.2021 was patently illegal. Learned counsel for the petitioner placed reliance upon a decision of this Court in the case of **Neetu Agarwal and another vs. Commissioner, Devi Patan Mandal, Gonda and others, Writ**

Petition No.6600 (MS) of 2009 decided on 17.12.2009 by the Lucknow Bench of this Court as well as decision in **Writ-C No.33694 of 2013 (Yogesh Kumar and 3 others vs. State of U.P. and 2 others)** decided on 14.6.2013.

6. The second limb of argument of learned counsel for the petitioner is that the earlier declaration made under Section 143 of Act, 1950 in the year 2005 was recalled and the land was declared as "agricultural' under Section 144 of Act, 1950 in the year 2009 and the petitioner having purchased the said land in the year 2013 was not liable to pay stamp duty on the basis of the declaration made under Section 143 of Act, 1950.

7. Apart from these two submissions, no other point has been advanced by learned counsel for the petitioner.

8. Replying to the argument, Sri Manish Goyal, learned Additional Advocate General, submitted that preliminary objection raised by the petitioner's counsel has no force in view of Section 76-A of Act, 1899 which is in regard to delegation of powers. Section 76-A of Act, 1899 is extracted here as under :

*"**76-a. Delegation of certain powers.**- The State Government may, by notification in the Official Gazette, delegate,-*

(a) all or any of the powers conferred on it by Sections 2(9), 33(3), 70(10, 74 and 78 to the Chief Controlling Revenue Authority, and

(b) all or any of the powers conferred on the Chief Controlling Revenue Authority by Sections 45(1)(2), 56(1) and 70(2) to such subordinate revenue authority as may be specified in the notification."

9. He then placed before the Court the Indian Stamp (Uttar Pradesh Amendment) Act, 2015 which received the assent of the President of India on 24th January, 2016 and published in the U.P. Gazette on 4th February, 2016, whereby in Sub-Clause (b) of Section 76-A figure "56(1)"has been substituted by "56(1)(1-A)". Relevant amending Act of 2015 is extracted here as under :

***"2. Amendment of Section 76-A to Act No.II of 1899.-** In Section 76-A of the Indian Stamp Act, 1899, as amended in its application to Uttar Pradesh, in clause (b) for the figures "56(1)" the figures and letter "56(1)(1-A)" shall be substituted."*

10. He next placed notification dated 24.5.2017 issued by the State Government in exercise of power under Clause (b) of Section 76-A of the Act, 1899 whereby powers conferred on Chief Controlling Revenue Authority under sub section (1-A) of Section 56 has been delegated to subordinate revenue authorities and matter up to Rupees Ten lakh was cognizable by Additional Divisional Commissioner /Deputy Commissioner Stamp of Division/circle concerned. Relevant notification issued by the State Government on 24.5.2017 is extracted hereas under :

"In exercise of the power under clause (b) of Section 76-A of the Indian Stamp Act, 1899 (Act 2 of 1899) read with Section 21 of the General Clauses Act, 1897 (Act 10 of 1897) and in supersession of Notification No. K.N.5-3614/11-2008-500(5)91T.C., dated December 8, 2008 and no.24/2016/889/94-SR-2-2016-500(5)-91 T.C., dated September 16, 2016, the Governor is pleased to delegate the powers conferred on the Chief Controlling Revenue Authority under sub-section (1-A) of Section 56 (except the control over the

powers exercisable by the Collector under Chapter V) of the said Act of 1899 to the subordinate revenue authorities mentioned in Column-I of the Schedule below in respect of disputes of stamp duty involving the amount shown against them in Column-2 with respect to their jurisdiction. Provided that the Revenue Authorities mentioned in Column-1 shall not entertain cases of disputes of stamp duty below their respective pecuniary jurisdiction as mentioned in Column-2 of the said Schedule.

SCHEDULE

Column-1	*Column-2*
Chief Controlling Revenue Authority	*Value of stamp duty involved in the dispute*
Member/Member Judicial, Board of Revenue	*Exceeding Rupees Twenty five lakh*
Divisional Commissioner	*Up to Rupees Twenty five lakh*
Additional Divisional Commissioner/Deputy Commissioner Stamp of Division/circle concerned	*Up to Rupees Ten lakh*

11. Sri Goyal then contended that reliance placed by petitioner's counsel upon the decision of Lucknow Bench of this Court in case of **Neetu Agarwal and another (supra)** and **Yogesh Kumar and 3 others (supra)** was prior to Uttar Pradesh Amendment made in the Act, 1899 and post amendment, power of Chief Controlling Revenue Authority has been delegated to the various authorities, as given in the notification dated 24.5.2017. He then placed before the court a decision of this Court in case of **Ajay Kumar Srivastava vs. Commissioner, Allahabad Division and others passed in Writ-C No.42865 of 2011** decided on 9.5.2013 wherein coordinate Bench of this Court had framed point of determination as to whether Commissioner of the Division has authority to decide an appeal filed under Section 56(1-A) of the Act and the appellate power which is exercisable by the Chief Controlling Revenue Authority is not delegable. The Court found that the power of Chief Controlling Revenue Authority can be delegated to the subordinate Revenue Authority in view of Section 76-A and held as under :

"(3) The Commissioner of the Division has no authority to decide the appeal filed under Section 56(1-A) of the Act and the appellate power which is exercisable by the Chief Controlling Revenue Authority is not delegable.

….

Point No.3

The order passed by the Collector under Section 47-A of the Act is both revisable and appealable under Section 56 of the Act. The revision lies under Section 56(1) of the Act whereas appeal is provided under Section 56(1-A) of the Act. The power under both the provisions is different.

Petitioner has filed revision and not appeal which means that he invoked the jurisdiction under Section 56(1) of the Act.

The powers of the Chief Controlling Revenue Authority which may

be delegated to the subordinate revenue authorities have been specified in Section 76-A of the Act. It provides that the State Government by notification in the Official Gazette may delegate all or any of the powers conferred on the Chief Controlling Authority by certain Sections of the Act including one exercisable under Section 56(1) of the Act to subordinate revenue authorities as may be specified. The said power has been delegated by notification dated 17.10.2002 (Annexure - 4 to the writ petition). Therefore, the argument that the power is not delegable is misconceived. The power to decide revision can be delegated as has rightly been delegated to the Commissioner by the aforesaid notification."

12. Coming to the second point, Sri Goyal submitted that one Kapil Deo Upadhyay had reported the matter to the Lokayukta in regard to the land, which were declared under Section 143 as non agricultural land and subsequent declaration being made under Section 144 of Act, 1950 and thereafter sale deeds were being executed to escape stamp duty on which, after inquiry, many matters have come into light where such sale deeds had been executed so as to escape stamp duty. The said complaint was made in respect of the land in which declaration under Section 144 of Act, 1950 was made between the years 2007-08 to 2013-14 and this was not an isolated case where the Stamp Authorities had proceeded to hold deficiency of stamp duty.

13. Having heard counsel for the parties and from perusal of record I find that the power of delegation vest under Section 76-A of the Act, 1899 and any power, which is conferred on Chief Controlling Revenue Authority under Section 45(1)(2), 56(1) and 70(2) can be delegated to such subordinate revenue authorities, as may be specified in the notification.

14. By the Uttar Pradesh Amendment made in Section 76-A in the year 2015 in Clause (b) of Section 76-A, figure "56(1)" was substituted by figures and letter "56(1)(1-A)". The presidential assent to the said amendment was received on 24.01.2016 pursuant to which a notification was issued under Clause (b) of Section 76-A, delegating power of entertaining the appeal under Section 56(1-A) to the subordinate revenue authorities on 24.5.2017. The Schedule to the said notification provided in Column-1 authorities and in Column 2 the valuation, for which the authorities had jurisdiction to entertain the matters.

15. As the present case was for deficiency of Rs.3,52,000/-, the appeal, which was filed by the petitioner before Deputy Commissioner Stamps Agra was maintainable in view of U.P. Amendment as well as Section 76-A of the Act, 1899. The argument of learned counsel that only the Chief Controlling Revenue Authority had jurisdiction to entertain an appeal under Section 56(1-A) falls flat in view of Section 76-A and the subsequent amendment of 2015.

16. The present proceedings was started in the year 2015 and the appeal was filed in the year 2018 thus respondent No.2 had jurisdiction to decide the same. This Court in **Ajay Kumar Srivastavav (supra)** had already held that the power of delegation was there in view of Section 76-A of the Act, 1899 and reliance placed upon decision of **Neetu Agarwal and another (supra)** cannot be accepted as the

same was given in the year 2009 and U.P. Amendment came in the year 2015 and the notification was issued by the Statement Government on 24.5.2017, well before the appeal was filed by petitioner before respondent No.2.

17. Now coming to the second argument raised by learned counsel that petitioner has purchased the land in question after declaration under Section 144 of Act, 1950 and thus was not entitled for payment of stamp duty on the basis of report that the land in question was a "non agricultural' land. Here it would be necessary to refer to the action initiated on complaint made to Lokayukt in respect of evasion of stamp duty in District Mathura from the year 2007-08 to 2013-14 wherein it was found that in number of cases, after getting declaration under Section 143 of the Act, 1950, the land was being transferred through sale, was again converted as an agricultural land and declaration is sought under Section 144 of Act, 1950. No plausible explanation has been accorded by the counsel as to what was the need in the year 2009 to have the land converted back as an agricultural land when once the declaration under Section 143 had already been made on 16.7.2005. From the perusal of the order passed by Sub Divisional Magistrate, Mathura dated 16.7.2005 it is clear that on the application of the original land holders, it was found that the land in question was not being used for agricultural purpose and on the basis of the report being received from the office of Tehsildar after inquiry that the declaration was made by the concerned officer. The subsequent order made under Section 144 of Act, 1950 does not record any ground for making such declaration once it was found to be land not being used for agricultural purpose.

18. As the learned Additional Advocate General has pointed out that this is not a solitary case and on an inquiry by the Lokayukt, it was found that between 2007 to 2014 there were number of cases where such declaration was made under Section 144 of Act, 1950 for the purpose of escaping the stamp duty, I find that the District Revenue Authorities rightly proceeded to hold deficiency of stamp duty on the basis of the fact that once the declaration was made in the year 2005 under Section 143 of Act, 1950, no occasion arise for getting the land again converted as an agricultural land just for the purpose of sale deed and evading the stamp duty.

19. Considering the facts and circumstances of the case and perusing the orders impugned, I find that no interference is required in the orders passed by respondents No.2 and 3.

20. Writ petition is hereby dismissed.

(2021)08ILR A879
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.03.2021

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Writ C No. 26413 of 2020

Smt. Kalawati Devi ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anupam Kulsreshtha, Sri Arpit Agarwal

Counsel for the Respondents:

C.S.C., Sri Nipun Singh, Sri Sunil Kumar Misra

A. Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (30 of 2013) - Section 24(2) - U.P. Avas Evam Vikas Parishad Adhiniyam , Section 28 - Section 32 - Acquisition proceedings under Adhiniyam, 1965 - Applicability of 2013 Act - provisions of Section 24 (2) of the Act, 2013 would not apply to the acquisition made under the provisions of Adhiniyam, 1965 - said issue no longer res integra in view of the Division Bench judgment of this Court in Atul Sharma & ors.. v. State of U.P. & ors. & Jagbeer Singh & ors.. v. State of U.P. & ors. (Para 30)

B. Land acquisition proceedings – Delayed Challenge - *Held* - Generally Court not interfere with the land acquisition when the challenge is made with delay and subsequent to taking of possession and publication of award - at belated stage court cannot permit to revive dead and stale claims on the pretext of enactment of Section 24 (Para 24, 30)

C. Constitution of India - Art.226 - Judicial Review - limited Scope - scope of judicial review is limited to the decision making procedure & not against the decision of the authority - Court may review to correct errors. of law or fundamental procedure requirements, which may lead to manifest injustice - Court has competence to examine as to whether there was material to form such opinion as required by law or the finding recorded by the authority concerned are perverse - *Pervse finding* - A finding is said to be perverse when the same is not supported by evidence brought on record or they are against the law where they suffer from vice of procedural irregularities - non consideration of relevant material renders an order perverse (Para 21)

Petition for directing the respondents to release the land on the ground that neither the possession of the land taken nor compensation paid, as such, the acquisition proceeding lapsed in view of S. 24 of the Act No.30 of 2013 – Held - claim of the petitioner does not fall u/s 24 of the Act, 2013.

- so far as determination of quantum of compensation, principles will have to be applied in relation to acquisition made by Parishad under the Adhiniyam, 1965.

- reliefs claimed in the writ petition with regard to lapse of acquisition not available to the petitioner - open to the petitioner to move appropriate application to get the compensation (Para 30, 31, 32)

Disposed Off. (E-4)

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri Anupam Kulshreshtha and Shri Arpit Agarwal, learned counsel for the petitioner; Shri Sanjay Kumar Singh, learned Addl. Chief Standing Counsel along with Shri Devesh Vikram, learned Standing Counsel as well as Shri Apurva Hajela, learned Standing Counsel for the State respondents and Shri Nipun Singh, learned counsel for respondent nos.2 to 4.

2. Present writ petition has been preferred for following reliefs:-

"a) To issue a writ, order or direction in the nature of mandamus directing the respondents to release the land of plot no.424/1 area 1 bigha & 10 biswa and plot no.424/2 area 5 biswa, situated in Village Jhunsi Kohna, Pargana Jhunsi, Tehsil Phoolpur, Distt. Prayagraj from the acquisition as the acquisition proceedings, initiated vide notifications dated 8.3.1979 and 27.10.1980 under Sections 28 and 32 of the Uttar Pradesh Avas Evam Vikas Praishad Adhiniyam, 1965 stand lapsed in view of the provisions

of Section 24 of the Right to Fair Compensation & Transparency in Land Acquisition, Rehabilitation & Resettlement Act, 2013 (Act No.30 of 2013);

b) To issue a writ, order or direction in the nature of mandamus directing the respondents to not to dispossess the petitioner from the land in dispute, namely; plot no.424/1 area 1 bigha & 10 biswa and plot no.424/2 area 5 biswa, situated in Village Jhunsi Kohna, Pargana Jhunsi, Tehsil Phoolpur Distt. Prayagraj in view of the fact that neither the compensation was paid nor possession was taken pursuant to the proceedings of acquisition, initiated vide notifications dated 8.3.1979/14.4.1979 and 27.10.1980/22.11.1980 under Sections 28 and 32 of the Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 stand lapsed;

c) To issue a writ, order or direction in the nature of mandamus directing the respondents to decide the representation of the petitioner dated 3.9.2007 (Annexure No.8 to the writ petition) and reminders dated 27.10.2007, 2.2.2008, 26.11.2008, 31.7.2013, 12.3.2013, 12.8.2013, 14.10.2013, 19.4.2017 and 4.7.2019 (Annexures No.9 to 16 of the writ petition) within a shortest possible time frame which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case....."

3. The record in question reflects that the petitioner claims to be Bhumidhar with transferable rights of plot no.424/1 area 1 bigha & 10 biswa and plot no.424/2 area 5 biswa situated in Village Jhunsi Kohna, Pargana Jhunsi, Tehsil Phoolpur Distt. Prayagraj1. A notification under Section 28 of the **Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965**2 was issued on 8.3.1979, which was published in the official gazette on 14.4.1979. The notification reflects that the **Uttar Pradesh Avas Evam Vikas Parishad**3 has framed a scheme in the name of **"Jhunsi Bhoomi Vikas Evam Grih Sthan Yojna-2, Allahabad4"** for solving the housing problems in the city of Allahabad (now Prayagraj). Thereafter, a notice under Section 29 of the Adhiniyam, 1965 was issued. It is claimed that the petitioner along with her co-tenure holder Smt. Shanti Devi daughter of Girdhari Lal filed objection on 2.5.1979. A notification under Section 32 of the Adhiniyam, 1965 was published in the Official Gazette on 29.11.1980. It is claimed that inspite of the objection dated 2.5.1979 finally the publication under Section 32 of the Adhiniyam, 1965 was issued. It is also claimed that no opportunity or notice was ever accorded to the petitioner under Section 9 of the **Land Acquisition, 1894**5. Therefore, the petitioner had no information relating to determination of the compensation under the LA Act. It is also reflected from the record that the petitioner had earlier approached this Court by preferring Writ Petition No.18480 of 1987 with following reliefs:-

"(i) To issue a suitable writ, order or direction in the nature of certiorari quashing the impugned notice (Annexure '2' to the writ petition).

(ii) to issue a suitable writ, order or direction in the nature of mandamus restraining the respondents from raising any constructions on plot no.424 without demarcating the area of the same,particularly on plot nos.424/1 and 424/2, Village Jhunsi, Kohna, Pargana Jhunsi, Tehsil Phoolpur, District Allahabad belonging to the petitioner besides dispossessing the petitioner from the same or from demolishing the houses and the

temples of the petitioner standing thereon....."

4. In the said matter initially an interim order was passed on 15.2.1992 restraining the respondents from carrying out any demolition of the disputed constructions till 17.2.1992 and also restrained the petitioner to make any construction over the disputed property. Finally the writ petition was dismissed vide order dated 8.8.2007, which reads as under:-

"Herd Sri A.P. Tiwari and S.C. Verma learned counsel for the petitioner and Sri Vivek Saran, learned counsel for the respondents.

By this petition, the petitioner has prayed for quashing the notice contained in Annexure-2 of the writ petition purporting to be under Section 29 of U.P. Avas Vikas Adhiniyam 1965 inviting objections against the proposal of notification dated 8.3.1979 under Section 28 of the Act. Thereafter, a declaration has been made under Section 32 of the Act on 29.11.1980 as stated in para 11 of the counter affidavit filed on behalf of the respondents. The petitioner cannot challenge the proposal of acquisition under Section 28 including the notice inviting objection issued to her. No further relief regarding declaration under Section 32 of the At has been sought for. However, since the only dispossession of the petitioner has been stayed by this Court on 12.10.1987 and land acquisition proceedings were not stayed, therefore, the land acquisition proceedings must have been culminated/ formalised and award must have been passed. In such facts and circumstances of the case, once the award has been made, it is not open for the petitioner to challenge the notification under Section 28 of the U.P. Avas Vikas Adhiniyam 1965 and impugned notice which is analogous provision to Section 4 of Land Acquisition Act which was only proposal for said acquisition. In view of these facts and circumstances of the case, we are not inclined to interfere in the matter.

Accordingly, the writ petition is dismissed. However, dismissal of writ petition will not preclude the petitioner to approach the appropriate authority for redressal of her grievances."

5. In the aforementioned proceeding detailed counter affidavit was filed by the respondents indicating in para 16 that notice under Section 9 (1) and 9 (3) of the LA Act was issued and inspite of sufficient notice the petitioner did not submit any claim/ compensation. It was also averred that other tenure holders, those have filed claims, the adequate compensation was awarded by the Special Land Acquisition Officer (SLAO).

6. Present writ petition has been preferred precisely on the ground that neither the possession of the land has been taken nor compensation has been paid, as such, the acquisition proceeding will lapse in view of the provisions of Section 24 (2) of the **Right to Fair Compensation & Transparency in Land Acquisition, Rehabilitation & Resettlement Act, 2013**6.

7. Shri Anupam Kulshreshtha, learned counsel for the petitioner has vehemently contended that the provisions of Section 24 (2) of the Act, 2013 would apply to the acquisition undertaken under the Adhiniyam, 1965 in view of the provisions of Section 55 of the Adhiniyam, 1965. He has submitted that as neither the possession has been taken nor the compensation has

been paid, therefore, the acquisition would lapse. He has submitted that pursuant to notification dated 8.3.1979, 14.4.1979 and 27.10.1980 the possession of land in dispute has not been taken and infact the petitioner is still in possession over the disputed land. The perusal of the award dated 22.9.1986 also does not reflect/ indicate that the award qua the petitioner's land was ever prepared. The award dated 22.9.1986 was prepared in respect of land admeasuring 44 bigha 3 biswa & 12 biswansi out of the total area of 56 bigha, 6 biswa & 12 biswansi. He has submitted that the burden lies on the respondents to prove that the award qua the land in dispute was made by the Collector, Kanpur Nagar dated 22.9.1986 vide Case No.1.

8. He has further submitted that the alleged possession dated 27.6.1986 is also unsustainable in view of the principles settled by Hon'ble Apex Court in **Banda Development Authority, Banda v. Motilal Agrawal & Ors**7. The possession memo must be signed by the owner of the land and two independent witnesses if crop or constructions are existing and merely going on spot by the authority concerned would not suffice for justifying the possession. The respondents have not prepared any memo of possession and merely showing that physical possession was taken is not sufficient. He lastly submitted that in view of the provisions of Section 24 (2) of the Act, 2013 the proceeding of acquisition initiated under Section 28 of the Adhiniyam, 1965 by issuing notifications dated 8.3.1979 and 27.10.1980 under Section 28 and 32 respectively would stand lapsed.

9. Per contra, Shri Nipun Singh, learned counsel for the Parishad and Shri Sanjay Kumar Singh, learned Addl. Chief Standing Counsel appearing for the State respondents have, however, contended that the provisions of Section 24 (2) of the Act, 2013 would not apply to the acquisition made under the provisions of Adhiniyam, 1965. The said issue is no longer res integra in view of the Division Bench judgment of this Court in **Atul Sharma & Ors. v. State of U.P. & Ors**8., and **Jagbeer Singh & Ors. v. State of U.P. & Ors**9. Shri Nipun Singh, learned counsel for the Parishad has also placed reliance on the averments contained in para 5 and 6 of the counter affidavit filed on behalf of Parishad dated 30.01.2021, wherein, a categorical stand has been taken that regarding land in dispute being Khasra No.424/1 the respondents had taken physical possession way back, and to this effect the possession certificate had also been given by the SLAO to the Parishad. The possession certificate dated 27.6.1986 is also brought on record as Annexure No.SCA-2. He has submitted that the award of the entire scheme has been made by the SLAO on 22.9.1986 and the adequate compensation had also been deposited in the account of the SLAO on 29.1.1982, 5.3.1984, 23.10.1984, 11.11.1985 and 23.9.1988. It was also contended that inspite of information to the concerned land owners, the reason best known to the petitioner, she did not lift her compensation, therefore, at this belated stage it cannot be claimed that neither the possession has been taken nor the award has been made. The entire compensation has been deposited, therefore, present writ petition is liable to be dismissed on the ground of delay and laches. Lastly it has been contended that challenge to the acquisition at this stage cannot sustain in view of the order dated 8.8.2007 passed by the Division Bench of this Court in earlier round of litigation and, therefore, the writ petition is liable to be dismissed with heavy cost.

10. We have heard rival submissions, perused the record and respectfully considered the judgments cited at Bar.

11. It is admitted by the parties that the proceedings for acquisition of land were initiated by notification under Section 28 of the Adhiniyam, 1965 on 8.3.1979. This was followed by declaration made under Section 32 of the Adhiniyam, 1965 on 27.10.1980. The award was made on 22.9.1986. The possession memo brought on record indicates that the possession was taken over on 27.6.1986. The entire claim has been set up on the pretext that since neither the possession has been taken nor compensation has been paid, therefore, the acquisition proceeding would lapse in view of Section 24 (2) of the Act, 2013. In this backdrop, it is necessary to first examine as to whether the provisions of Section 24 (2) of the Act, 2013 would apply to the acquisition made under the Adhiniyam, 1965. The said issue is no longer res integra. The authoritative pronouncement in this regard has been made by the Division Bench of this Court in **Atul Sharma & Ors.** (Supra) and **Jagbeer Singh & Ors.** (Supra). The operative portion of the judgment in Atul Sharma & Ors. (Supra) is quoted as under:-

".....The aforesaid observations have been later on reproduced, considered and explained by the Apex Court in at least three decisions which deserve mention, the leading being Ch. Tika Ramji and Ors etc. vs. The State of Uttar Pradesh and Ors. (AIR 1956 Supreme Court 676), paragraphs 30 to 39. The second decision is in the case of the State of T.N. and Anr. vs. Adhiyaman Educational & Research Institute and Ors,(1995 (4) SCC 104) paragraphs 15 to 18 and the third decision is in the case of Thirumuruga Kirupananda Variyarthavathiru Sundara Swamigalme vs. Stae of Tamil Nadu and Ors. (1996 Vol. 3 SCC 15) paragraphs 19, 20, 23 to 26. There are many more decisions to the same effect and it is not necessary for us to burden this judgment with anything further.

The basic principle that can be culled out from a perusal of these judgments is that the test of repugnancy is whether the law made by Parliament and that by the State Legislature occupy the same field and whether the Parliament intended to lay down a exhaustive code in respect of the subject matter replacing the act of the State Legislature.

The non-inclusion of the 1965 Act in the 4th Schedule to the 2013 Act in terms of section 105 thereof does not necessarily mean that the 2013 Act was extended to be applied in acquisitions under the 1965 Act. The intent of the 2013 Act was to eclipse the anomalies and improve the conditions of payment of compensation to acquisitions made under the Land Acquisition Act, 1894 only. Since the 1894 Act has been repealed, and the 1965 Act continues to exist without any amendment there does not arise any issue of repugnancy or inconsistency. *This has to be viewed from another angle. The benefit of deemed lapse is by a fiction under a specific statute. A provision of fiction has to be strictly construed and it cannot be impliedly treated to be incorporated unless the 1965 Act also contemplates any such fiction. It is for this reason that an amendment will have to be expressly brought about in the 1965 Act if the provisions of 2013 Act have to be applied and not otherwise in relation to the procedure of acquisition. A provision of deemed lapse cannot be read into by way of interpretation into 1965 Act without specific amendment therein.*

The other question is can this be construed the other way around by presuming an implied applicability of the 2013 Act merely because section 55 of the 1965 Act incorporates the procedure of acquisition under the 1894 Act. We may put on record that the issue of lapse of an acquisition proceeding under section 11-A of the 1894 Act was specifically held to be not applicable in acquisitions under the 1965 Act in Jainul Islam's case. The same situation exists here where the issue of deemed lapse under section 24(2) is sought to be introduced and read into the 1965 Act. We cannot accept this proposition inasmuch as section 55 of the 1965 Act has not been amended so as to include any provision relating to the acquisition resulting in any lapse as contained in the 2013 Act. Thus, such applicability cannot be implied when it has not been incorporated in the 1965 Act.

There is yet another reason namely the provisions of 2013 Act as contained in section 24(2) are not inconsistent with any provision of the State Act that exists from before. Conversely the State Act also does not include any provision that may said to be inconsistent or in conflict with 2013 Act. The non-inclusion of the benefit of the clause of deemed lapse does not make the enactment inconsistent, conflicting or repugnant.

To understand this recourse can be had to the provisions quoted herein above in the 2013 Act that clearly provide that the 2013 Act and its provisions are in addition and not in derogation of any law for the time being in force. Consequently the States have been left to enact any law that may provide for any better facilities relating to acquisition over and above that has been provided for in the 2013 Act. This, therefore, also removes the elements of discrimination or arbitrariness. It is open to the State to provide better facility or benefit in matters of acquisition by bringing about any amendment in the 1965 Act.

Coming to the last limb of this argument namely the resultant discrimination in relation to acquisitions having been made prior to 01.01.2014, we may point out that when there is a legislation by incorporation then it is only that part of legislation which stands incorporated and continues to exist and not a new legislation which refers to the proceedings under the old legislation. The reason is what can be incorporated is that which exists. It is for this reason that section 55 of the 1965 Act incorporated the then existing provisions of 1894 Act. The 1894 Act has now been repealed and is not in existence. Thus, it is only the provisions of 1894 Act that have been incorporated in section 55 of the 1965 Act that will continue to exist for that purpose only to that limited extent. The same does not within its fold draw the elements of the 2013 Act which has never been intended to be incorporated or included in the 1965 Act or vice-versa. Thus, these are two sets of acquisitions under the different Acts and the question of applying Article 14 to invoke discrimination does not arise.

However, there is another shade of this discrimination which has to be avoided keeping in view the ratio of the Jainul Islam's case. To that extent we hold that if any acquisition is made by the authority under the 1965 Act after 01.01.2014 then it's actions or the assessment of compensation cannot be less than what has been contemplated in 2013 Act. The determination of the quantum of compensation, therefore, on principles will have to be applied in relation to

acquisitions made by the Awas Vikas Parishad under the 1965 Act after 01.01.2014 as per the 2013 Act.

Consequently for all the reasons aforesaid the relief claimed in the writ petition with regard to the lapse of the proceedings cannot be availed of and the petition is accordingly dismissed."

12. For ready reference, the operative portion of the judgment in **Jagbeer Singh & Ors.,** (Supra) is quoted as under:-

".....The Fourth Schedule contained in the 2013 Act makes reference to 13 Acts but does not make reference to the Parishad Act.

This issue was also considered by a Division Bench of this Court in Atul Sharma. It was sought to be contended that Section 24(2) of the 2013 Act would apply to acquisitions made under the Parishad Act. This contention was repelled by the Division Bench holding that the absence of exclusion of the applicability of the 2013 Act would not necessarily mean that the 2013 Act would apply to the acquisitions made under the Parishad Act. The observations of the Division Bench are as follows:

"The non-inclusion of the 1965 Act in the 4th Schedule to the 2013 Act in terms of section 105 thereof does not necessarily mean that the 2013 Act was extended to be applied in acquisitions under the 1965 Act. The intent of the 2013 Act was to eclipse the anomalies and improve the conditions of payment of compensation to acquisitions made under the Land Acquisition Act, 1894 only. Since the 1894 Act has been repealed, and the 1965 Act continues to exist without any amendment there does not arise any issue of repugnancy or inconsistency. This has to be viewed from another angle. The benefit of deemed lapse is by a fiction under a specific statute. A provision of fiction has to be strictly construed and it cannot be impliedly treated to be incorporated unless the 1965 Act also contemplates any such fiction. It is for this reason that an amendment will have to be expressly brought about in the 1965 Act if the provisions of 2013 Act have to be applied and not otherwise in relation to the procedure of acquisition. A provision of deemed lapse cannot be read into by way of interpretation into 1965 Act without specific amendment therein. (emphasis supplied)

In this connection, the Division Bench also observed that since Section 11-A of the Acquisition Act was held not to be applicable to acquisitions made under the Parishad Act, the same position would exist in regard to Section 24(2) of the 2013 Act and the observations are:

"The other question is can this be construed the other way around by presuming an implied applicability of the 2013 Act merely because section 55 of the 1965 Act incorporates the procedure of acquisition under the 1894 Act. We may put on record that the issue of lapse of an acquisition proceeding under section 11-A of the 1894 Act was specifically held to be not applicable in acquisitions under the 1965 Act in Jainul Islam's case. The same situation exists here where the issue of deemed lapse under section 24(2) is sought to be introduced and read into the 1965 Act. We cannot accept this proposition inasmuch as section 55 of the 1965 Act has not been amended so as to include any provision relating to the acquisition resulting in any lapse as contained in the 2013 Act. Thus, such applicability cannot be implied when it has not been incorporated in the 1965 Act." (emphasis supplied)

The decisions referred to by the learned counsel for the petitioners relating to lapsing of acquisition under Section 24(2) of the 2013 Act when land was acquired under the provisions of the Acquisition Act would, therefore, not come to the aid of the petitioners.

Thus, for all the reasons stated above, it is not possible to accept the contention of the learned counsel for the petitioners that Section 24(2) of the 2013 Act would be applicable to the acquisitions made under the Parishad Act.

In the end, learned counsel for the petitioners submitted that though the award was made way back on 30 December 2013, compensation has not been paid to the petitioners who are the subsequent purchaser of the land that was acquired. It is for the petitioners to file an application before the Special Land Acquisition Officer for payment of the compensation and the Court has no reason to doubt that in case such an application is filed, it shall be decided in accordance with law after hearing the parties concerned.

The writ petition is, accordingly, dismissed with the aforesaid observations."

13. Hon'ble the Division Bench while considering the case of **Atul Sharma & Ors.** (Supra) has observed that the non-inclusion of the Adhiniyam, 1965 in the 4th Schedule to the Act, 2013 in terms of section 105 thereof does not necessarily mean that the Act, 2013 was extended to be applied in acquisitions under the Adhiniyam, 1965. The intent of the 2013 Act was to eclipse the anomalies and improve the conditions of payment of compensation to acquisitions made under the L.A. Act only. It was also observed that since the L.A. Act has been repealed, and the Adhiniyam, 1965 continues to exist without any amendment there does not arise any issue of repugnancy or inconsistency. The benefit of deemed lapse is by a fiction under a specific statute. A provision of fiction has to be strictly construed and it cannot be impliedly treated to be incorporated unless the Adhiniyam, 1965 also contemplates any such fiction. It is for this reason that an amendment will have to be expressly brought about in the Adhiniyam, 1965 if the provisions of Act, 2013 have to be applied and not otherwise in relation to the procedure of acquisition. It was opined *"a provision of deemed lapse cannot be read into by way of interpretation into 1965 Act without specific amendment therein."*

14. The decisions referred to by learned counsel for the petitioner relating to lapsing of acquisition under Section 24 (2) of the Act, 2013 when the land was acquired under the provisions of the L.A. Act would, therefore, not come to the aid of the petitioner. In view of above, it is not possible to accept the contention of learned counsel for the petitioner that Section 24 (2) of the Act, 2013 would be applicable to the acquisitions made under the Adhiniyam, 1965.

15. A Constitution Bench of Hon'ble Apex Court in **Indore Development Authority v. Manoharlal & Ors**10., has considered the correct interpretation of Section 24 of the Act, 2013 and finally answered as under:-

"359. We are of the considered opinion thatSection 24cannot be used to revive dead and stale claims and concluded cases. They cannot be inquired into within the purview ofSection 24of the Act of 2013. The provisions ofSection 24do not invalidate the judgments and orders of the Court, where rights and claims have been

lost and negatived. There is no revival of the barred claims by operation of law. Thus, stale and dead claims cannot be permitted to be canvassed on the pretext of enactment of Section 24. In exceptional cases, when in fact, the payment has not been made, but possession has been taken, the remedy lies elsewhere if the case is not covered by the proviso. It is the Court to consider it independently not undersection 24(2)of the Act of 2013.

360. It was submitted thatSection 101provides for return of unutilized land under the Act of 2013.Section 101provides that in case land is not utilized for five years from the date of taking over the possession, the same shall be returned to the original owner or owners or their legal heirs, as the case may be, or to the Land Bank of the appropriate Government by reversion in the manner as may be prescribed by the appropriate Government.Section 101reads as under:

"101. Return of unutilized land.-- When any land, acquired under this Act remains unutilized for a period of five years from the date of taking over the possession, the same shall be returnedto the original owner or owners or their legal heirs, as the case may be, or to the Land Bank of the appropriate Government by reversion in the manner as may be prescribed by the appropriate Government.

Explanation.-- For the purpose of this section, "Land Bank" means a governmental entity that focuses on the conversion of Government-owned vacant, abandoned, unutilized acquired lands and tax-delinquent properties into productive use."

361.Section 24deals with lapse of acquisition.Section 101deals with the return of unutilized land.Section 101cannot be said to be applicable to an acquisition made under the Act of 1894. The provision of lapse has to be considered on its own strength and not by virtue ofSection 101though the spirit is to give back the land to the original owner or owners or the legal heirs or to the Land Bank. Return of lands is with respect to all lands acquired under the Act of 2013 as the expression used in the opening part is "When any land, acquired under this Act remains unutilized". Lapse, on the other hand, occurs when the State does not take steps in terms ofSection 24(2). The provisions ofSection 101cannot be applied to the acquisitions made under the Act of 1894. Thus, no such sustenance can be drawn from the provisions contained inSection 101of the Act of 2013. Five years' logic has been carried into effect for the purpose of lapse and not for the purpose of returning the land remaining unutilized underSection 24(2).

362. Resultantly, the decision rendered in Pune Municipal Corporation & Anr. (supra) is hereby overruled and all other decisions in which Pune Municipal Corporation (supra) has been followed, are also overruled. The decision in Shree Balaji Nagar Residential Association (supra) cannot besaid to be laying down good law, is overruled and other decisions following the same are also overruled.In Indore Development Authority v. Shailendra (Dead) through L.Rs. and Ors., (supra), the aspect with respect to the proviso toSection 24(2)and whether "or' has to be read as "nor' or as "and' was not placed for consideration. Therefore, that decision too cannot prevail, in the light of the discussion in the present judgment.

363. In view of the aforesaid discussion, we answer the questions as under:

1. Under the provisions ofSection 24(1)(a)in case the award is not made as on 1.1.2014 the date of commencement of

Act of 2013, there is no lapse of proceedings. Compensation has to be determined under the provisions of Act of 2013.

2. In case the award has been passed within the window period of five years excluding the period covered by an interim order of the court, then proceedings shall continue as provided underSection 24(1)(b)of the Act of 2013 under the Act of 1894 as if it has not been repealed.

3. The word "or' used inSection 24(2)between possession and compensation has to be read as "nor' or as "and'. The deemed lapse of land acquisition proceedings underSection 24(2)of the Act of 2013 takes place where due to inaction of authorities for five years or more prior to commencement of the said Act, the possession of land has notbeen taken nor compensation has been paid. In other words, in case possession has been taken, compensation has not been paid then there is no lapse. Similarly, if compensation has been paid, possession has not been taken then there is no lapse.

4. The expression 'paid' in the main part ofSection 24(2)of the Act of 2013 does not include a deposit of compensation in court. The consequence of non-deposit is provided in proviso toSection 24(2)in case it has not been deposited with respect to majority of land holdings then all beneficiaries (landowners) as on the date of notification for land acquisition underSection 4of the Act of 1894 shall be entitled to compensation in accordance with the provisions of the Act of 2013. In case the obligation underSection 31of the Land Acquisition Act of 1894 has not been fulfilled, interest underSection 34of the said Act can be granted. Non-deposit of compensation (in court) does not result in the lapse of land acquisition proceedings. In case of non-deposit with respect to the majority of holdings for five years or more, compensation under the Act of 2013 has to be paid to the "landowners" as on the date of notification for land acquisition underSection 4of the Act of 1894.

5. In case a person has been tendered the compensation as provided underSection 31(1)of the Act of 1894, it is not open to him to claim that acquisition has lapsed underSection 24(2)due to non-payment ornon-deposit of compensation in court. The obligation to pay is complete by tendering the amount underSection 31(1). Land owners who had refused to accept compensation or who sought reference for higher compensation, cannot claim that the acquisition proceedings had lapsed underSection 24(2)of the Act of 2013.

6. The proviso toSection 24(2)of the Act of 2013 is to be treated as part ofSection 24(2)not part ofSection 24(1)(b).

7. The mode of taking possession under the Act of 1894 and as contemplated underSection 24(2)is by drawing of inquest report/ memorandum. Once award has been passed on taking possession underSection 16of the Act of 1894, the land vests in State there is no divesting provided underSection 24(2)of the Act of 2013, as once possession has been taken there is no lapse underSection 24(2).

8. The provisions ofSection 24(2)providing for a deemed lapse of proceedings are applicable in case authorities have failed due to their inaction to take possession and pay compensation for five years or more before the Act of 2013 came into force, in a proceeding for land acquisition pending with concerned authority as on 1.1.2014. The period of subsistence of interim orders passed by court has to be excluded in the computation of five years.

9.Section 24(2)of the Act of 2013 does not give rise to new cause of action to

question the legality of concluded proceedings of landacquisition.Section 24applies to a proceeding pending on the date of enforcement of the Act of 2013, i.e., 1.1.2014. It does not revive stale and time-barred claims and does not reopen concluded proceedings nor allow landowners to question the legality of mode of taking possession to reopen proceedings or mode of deposit of compensation in the treasury instead of court to invalidate acquisition.

Let the matters be placed before appropriate Bench for consideration on merits."

16. In the present matter admittedly notice under Section 29 of the Adhiniyam, 1965 was challenged in Writ Petition No.18480 of 1987 in which no doubt initially the respondents were restrained to carry out demolition. But eventually the writ petition was dismissed with observation that the acquisition proceedings were not stayed by the Court, therefore, the land acquisition proceeding must have been culminated/ formalised and the award must have been passed. In the circumstances, once the award has been made, it was not open for the petitioner to challenge the notification under Section 28 of the Adhiniyam, 1965 and the impugned notice which is analogous provisions to Section 4 of the LA Act, which was only proposal for said acquisition. In such circumstances, so far as challenge to the acquisition and lapsing of the proceeding under the Adhiniyam, 1965 would be impermissible at this belated stage. Even though while dismissing the writ petition leave was accorded to the petitioner to approach the appropriate authority for redressal of her grievance, since passing of the order dated 8.8.2007 at this belated stage present writ petition has been preferred with aforesaid relief.

17. In **Urban Development Trust, Udaipur v. Bheru Lal & Ors**11., the Hon'ble Supreme Court has considered the maintainability of the writ petition against the land acquisition proceeding since the petition had been preferred challenging the land acquisition proceeding after two years of publication under Section 6 (1) of the L.A. Act and it was held that the same would not be maintainable on the ground of delay and laches. The relevant portion of the judgment is quoted as under:-

".....It is apparent that the Notification under Section 4 was first published in the official gazette in June 1992. Thereafter substance was published in November 1992 at the conspicuous places and subsequently it was published in the local newspapers. Considering this sequence of publication, even if there is some delay, it would not mean that on this ground the land acquisition proceedings under Section 4 require to be set aside. Similar view is expressed by this Court in State of Haryana and another v. Raghubir Dayal and others [(1995) 1 SCC 133 para 7].

Further, learned counsel for the appellant rightly submitted that on the ground of delay and laches in filing the writ petitions, the Court ought to have dismissed the same. In the present case, as stated above, the Notification under section 6 was published in the Official Gazette on 24.5.1994. The writ petitions are virtually filed after two years. In a case where land is needed for a public purpose, that too for a scheme framed under the Urban Development Act, the Court ought to have taken care in not entertaining the same on the ground of delay as it is likely to cause serious prejudice to the persons for whose benefit the Housing Scheme is framed under the Urban Development Act and also

in having planned development of the area. The law on this point is well settled. [Re. Reliance Petroleum Ltd. v. Zaver Chand Popatlal Sumaria and others [(1996) 4 SCC 579] and Hari Singh and others v. State of U.P. and others [(1984) 3 SCR 417].

In the result, the appeals filed by the Urban Improvement Trust are allowed. The impugned judgment and order passed by the High Court in D.B. Civil Special Appeal Nos.270-277/97 etc. allowing the appeals and quashing the land acquisition proceedings is set aside. The judgment and order passed by the learned Single Judge is restored.

Civil Appeal No.5263/2001 filed by J.K. Udaipur Udyog Ltd. is also dismissed.

There shall be no order as to costs."

18. In **State of U.P. v. Smt. Pista Devi & Ors**12., Hon'ble the Apex Court has also observed that where large tracts of land is acquired, few cannot challenge the acquisition proceeding. The operative portion of the judgment is quoted as under:-

".....It is no doubt true that in the notification issued under section 4 of the Act while exempting the application of section 5-A of the Act to the proceedings, the State Government had stated that the land in question was arable land and it had not specifically referred to sub section (1-A) of section 17 of the Act under which it could take possession of land other than waste and arable land by applying the urgency clause. The mere omission to refer expressly section 17(1-A) of the Act in the notification cannot be considered to be fatal in this case as long as the Government had the power in that sub-section to take lands other than waste and arable lands also by invoking the urgency clause. Whenever power under section 17(1) is invoked the Government automatically becomes entitled to take possession of land other than waste and arable lands by virtue of sub-section (1-A) of section 17without further declaration where the acquisition is for sanitary improvement or planned development. In the present case the acquisition is for planned development. We do not, therefore find any substance in the above contention.

It is, however, argued by the learned counsel for the respondents that many of the persons from whom lands have been acquired are also persons without houses or shop sites and if they are to be thrown out of their land they would be exposed to serious prejudice. Since the land is being acquired for providing residential accommodation to the people of Meerut those who are being expropriated on account of the acquisition proceedings would also be eligible for some relief at the hands of the Meerut Development Authority. We may at this stage refer to the provision contained in section 21(2) of the Delhi Development Act, 1957 which reads as follows:

"21(2). The powers of the Authority or, as the case may be, the local authority concerned with respect to the disposal of land under sub-section (1) shall be so exercised as to secure, so far as practicable, that persons who are living or carrying on business or other activities on the land shall, if they desire to obtain accommodation on land belonging to the Authority or the local authority concerned and are willing to comply with any requirements of the Authority or the local authority concerned as to its development and use, have an opportunity to obtain thereon accommodation suitable to their reasonable requirements on terms settled

with due regard to the price at which any such land has been acquired from them:

Provided that where the Authority or the local authority concerned proposes to dispose of by sale any land without any development having been undertaken or carried out thereon, it shall offer the land in the first instance to the persons from whom it was acquired, if they desire to purchase it subject to such requirements as to its develop- ment and use as the Authority or the local authority concerned may think fit to impose."

Although the said section is not in terms applicable to the pre sent acquisition proceedings, we are of the view that the above provision in the Delhi Development Act contains a wholesome principle which should be followed by all Development Authorities throughout the country when they acquire large tracts of land for the purposes of land development in urban areas. We hope and trust that the Meerut Development Authority, for whose benefit the land in question has been acquired, will as far as practicable provide a house site or shop site of reasonable size on reasonable terms to each of the expropriated persons who have no houses or shop buildings in the urban area in question.

Having regard to what we have stated above, we are of the view that the judgment of the High Court cannot be sustained and it is liable to be set aside. We accordingly allow these appeals, set aside the judgment of the High Court and dismiss the Writ Petitions filed by the respondents in the High Court. There is no order as to costs."

19. Therefore, in case under the Scheme some portion of land is not utilised, on this ground the land cannot be released. No provision under the Adhiniyam, 1965 has been placed to us so as to warrant to decide the said issue.

20. In **State of Rajasthan & Ors. v. D.R. Laxmi & Ors**13., it has been held that even a void proceeding need not be set at naught in all events. If parties has not approached the Court well within reasonable time, judicial review is not permissible at belated stage. For ready reference, the operative portion of the judgment is quoted as under:-

".....The order or action, if ultra vires the power, it becomes void and it does not confer any right. But the action need not necessarily set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances. It is seen that the acquisition has become final and not only possession had already been taken but reference was also sought for ; the award of the Court under Section 26 enhancing the compensation was accepted. The order of the appellate court had also become final. The order of the appellate court had also become final. Under those circumstances, the acquisition proceedings having become final and the compensation determined also having become final, the High Court was highly unjustified in interfering with and in quashing the notification under Section 4 [1] and declaration under Section 6.

It is true that the respondent had offered to accept the compensation by shifting the date of the notification by 4 to 5 years from the date of the notification under Section 4(1). For this view, reliance was placed by Shri Sachar on the judgment of this Court in Ujjain Vikas Pradhikaran v. Raj Kumar Johri & Ors. [(1992) 1 SCC 328] where this Court had allowed the shifting of the date for the determination of the compensation. In that case since the award had not been passed, this Court had given the direction but in this case award determining the compensation has attained finality. It is not a case to shift the date for the determination of the compensation. Thus considered, we are of the view that the High Court was not justified in interfering with the notification and declaration under Section 4(1) and 6.

The appeal is accordingly allowed. The judgment of the High Court stands set aside. The writ petition stands dismissed but, in the circumstances, without costs."

21. It is well settled legal proposition that scope of judicial review is limited to the decision making procedure and not against the decision of the authority. The Court may review to correct errors of law or fundamental procedure requirements, which may lead to manifest injustice and can interfere with the impugned order in exceptional circumstances. The power of judicial review of the writ court is limited, but it has competence to examine as to whether there was material to form such opinion as required by law or the finding recorded by the authority concerned are perverse. It is settled law that non consideration of relevant material renders an order perverse. A finding is said to be perverse when the same is not supported by evidence brought on record or they are against the law where they suffer from vice of procedural irregularities.

22. In view of the aforesaid legal proposition, it emerges that land can be acquired for public purpose, the expression "public purpose" cannot be defined by giving a special definition as the same cannot be fitted in a straight jacket formula. The facts and circumstances of each case have to be examined to find whether the acquisition is for public purpose. It is also seen that in most of the matters, delay makes the problem more and more acute and increase urgency of necessity for acquisition.

23. In **Ramniklal N. Bhutta vs. State of Maharashtra**14, it is observed in paragraph No. 10 as under:-

"10. Before parting with this case, we think it necessary to make a few observations relevant to land acquisition proceedings. Our country is now launched upon an ambitious programme of all-round economic advancement to make our economy competitive in the world market. We are anxious to attract foreign direct investment to the maximum extent. We propose to compete with china economically. We wish to attain the pace of progress achieved by some of the Asian countries, referred to as "Asian tigers", e.g., South Korea, Taiwan and Singapore. It is, however, recognised on all hands that the infrastructure necessary for sustaining such a pace of progress is woefully lacking in our country. The means of transportation, power and communications are in dire need of substantial improvement, expansion and modernisation. These things very often call for acquisition of land and that too without any delay. It is, however, natural that in

most of these cases, the persons affected challenge the acquisition proceedings in courts. These challenge the acquisition proceedings in courts. These challenges are generally in shape of writ petitions filed on High Courts. Invariably, stay of acquisition is asked for and in some cases, orders by way of stay or injunction are also made. Whatever may have been the practices in the past, a time has come where the courts should keep the larger public interest in mind while exercising their power or grant in stay/injunction. The power under Article 226 is discretionary. It will be exercised only in furtherance of interests of justice and not merely on the making out of a legal point. And in the matter of land acquisition for public purposes, the interests of justice and the public purposes, the interests of justice and the public interest coalesce. They are very often one and the same. Even in civil suit, granting of injunction or other similar orders, more particularly of an interlocutory nature, is equally discretionary. The courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226 - indeed any of their discretionary powers. It may even be open to the High Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirement that the persons interested shall also be entitled to a particular amount of damages to be awarded as a lumpsum or calculated at a certain percentage of compensation payable. There are many ways of affording appropriate relief and redressing a wrong; quashing the acquisition proceedings is not the only mode of redress. To wit, it is ultimately a matter of balancing the competing interests. Beyond this, it is neither possible nor advisable to say. We hope and trust that these considerations will be duly borne in mind by the courts while dealing with challenges to acquisition proceedings."

24. There cannot be any dispute to the proposition that in land acquisition proceeding tenure holders cannot be allowed to challenge the land acquisition proceeding after lapse of reasonable time. Generally the Court will not interfere with the land acquisition when the challenge is made with delay and subsequent to taking of possession and publication of award. In the present case admittedly the challenge to the acquisition proceeding was made in the earlier round of litigation, which was eventually dismissed. As per the details come on record the possession was taken on 27.6.1986 and the award was made on 22.9.1986. Similar view has been expressed by Hon'ble Apex Court in **Swaika Properties Pvt. Ltd. & Anr. v. State of Rajasthan & Ors**15.

25. A Full Bench of this Court in **Gajraj & Ors. v. State of U.P. & Ors**16., has observed that substantial delay in challenging the acquisition may be relevant factor while determining the relief to be granted to the petitioner.

26. In **Satendra Prasad Jain v. State of U.P. & Ors**17., Hon'ble the Apex Court has held that once land vested in the State, the same is free from all encumbrances, it cannot be divested or revested. For ready reference, the operative portion of the judgment is quoted as under:-

".....Ordinarily, the Government can take possession of the land proposed to be acquired only after an award of compensation in respect thereof has been made under Section 11. Upon the taking of possession the land vests in the

Government that is to say, the owner of the land loses to the Government the title to it. This is what Section 16 states. The provisions of Section 11-A are intended to benefit the land owner and ensure that the award is made within a period of two years from the date of Section 6 declaration. In the ordinary case, therefore, when Government fails to make an award within two years of the declaration under Section 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of Section 11-A, lapse. When Section 17(1) is applied by reason of urgency, Government takes possession of the land prior to the making of the award under Section 11 and thereupon the owner is divested of the title to the land which is vested in the Government. Section 17(1) states so in unmistakable terms. Clearly, Section 11-A can have no application to cases of acquisition under Section 17 because the lands have already vested in the Government and there is no provision in the said Act by which land statutorily vested in the Government can revert to the owner.

Further, Section 17(3-A) postulates that the owner will be offered an amount equivalent to 80 per cent of the estimated compensation for the land before the Government takes possession of it underSection 17(1). Section 11-A cannot be so construed as to leave the Government holding title to the land without the obligation to determine compensation, make an award and pay to the owner the difference between the amount of the award and the amount of 80 per cent of the estimated compensation.

In the instant case, even that 80 per cent of the estimated compensation was not paid to the appellants although Section 17(3-A) required that it should have been paid before possession of the said land was taken but that does not mean that the possession was taken illegally or that the said land did not thereupon vest in the Ist respondent. It is, at any rate, not open to the third respondent, who, as the letter of the Special Land Acquisition Officer dated 27th June, 1990 shows, failed to make the necessary monies available and who has been in occupation of the said land ever since its possession was taken, to urge that the possession was taken illegally and that, therefore, the said land has not vested in the first respondent and the first respondent is under no obligation to make an award.

There is no merit whatsoever in the submission that compensation can be awarded to the appellants under Section 5. Section 5 postulates payment of compensation for damage done to land during the course of surveying it and doing all other acts necessary to ascertain whether it is capable of being adapted for a public purpose. Section 5 has no applicable to the instance case.

In the result, the appeal is allowed. The judgment and order under appeal is set aside. The Rule is made absolute and the first and second respondents are directed by a writ of mandamus to make and publish an award in respect of the said land within twelve weeks from today.

20. The third respondent shall pay to the appellants the costs of the appeal quantified in the sum of Rs. 10,000."

27. In **Aflatoon & Ors. v. Lt. Governor of Delhi & Ors**18., it has been observed as under:-

".....The planned development of Delhi had been decided upon by the Government before 1959, viz., even before

the Delhi Development Act came into force. It is true that there could be no planned development of Delhi except in accordance with the provisions of Delhi Development Act after that Act came into force, but there was no inhibition in acquiring land for planned development of Delhi under the Act before the Master Plan was ready (see the decision in Patna Improvement Trust v. Smt. Lakshmi Devi and Others(1). In other words, the fact that actual development is permissible in an area other than a development area with the approval or sanction of the local authority did not preclude the Central Government from acquiring the land for planned development under the Act. Section 12 is concerned only with the planned development. It has nothing to do with acquisition of property; acquisition generally precedes development. For planned development in an area other than a development area it is only necessary to obtain the sanction or approval of the local authority as provided in S. 12(3). The Central Government could acquire any property under the Act and develop it after obtaining the approval of the local authority. We do not think it necessary to go into the question whether the power to acquire the land under s. 15 was delegated by the Central Government to the Chief Commissioner of Delhi. ***We have already held that the appellants and the writ petitioners cannot be allowed to challenge the validity of the notification under s. 4 on the ground of laches and acquiescence.*** *The plea that the Chief Commissioner of Delhi had no authority to initiate the proceeding for acquisition by issuing the notification under s. 4 of the Act as s. 15 of the Delhi Development Act gives that-power only to the Central Government relates primarily to the validity of the notification. Even assuming that the Chief Commissioner of Delhi was not authorized by the Central Government to issue the notification under s. 4 of the Land Acquisition Act, since the appellants and the writ petitioners are precluded by their laches and acquiescence from questioning the notification, the contention must, in any event, be negatived and we do so.*

It was contended by Dr. Singhvi that the acquisition was really for the cooperative housing societies which are companies within the definition of the word company' in s. 3(e) of the Act, and, therefore, the provisions of Part VII of the Act should have been complied with. Both the learned Single Judge and the Division Bench of the High Court were of the view that the acquisition was not for company. We see no reason to differ from their view. The mere fact that after the acquisition the Government proposed to hand over, or, in fact, handed over, a portion of the property acquired for development to the cooperative housing societies would not make the acquisition one for company'. Nor are we satisfied that there is any merit in the contention that compensation to be paid for the acquisition came from the consideration paid by the cooperative societies. In the light of the averments in the counter affidavit filed in the writ petitions here, it is difficult to hold that it was cooperatives which provided the fund for the acquisition. Merely because the Government allotted a part of the property to cooperative societies for development, it would not follow that the acquisition was for cooperative societies, and therefore, Part VII of the Act was attracted. It may be noted that the validity of the notification under s. 4 and the declaration under s. 6 was in issue in Udai Ram Sharma and Others v. Union of India(1) and this Court upheld their validity.

We see no merit in the appeals and the writ petitions. They are, therefore, dismissed with costs.

Petitions dismissed."

28. Similar view has also been taken in **Kendriya Karamchari Evam Mitra Sahkari Avas Samiti Ltd. and Anr. v. State of U.P. and Anr**19.

29. Hon'ble the Apex Court in **V. Chandrasekaran & Anr. v. The Administrative Officer & Ors**20**.,** had considered that once land has been vested in the State whether can be divested and has observed in paragraph 16, 17, 18, 21 and 22 as under:-

"16. It is a settled legal proposition, that once the land is vested in the State, free from all encumbrances, it cannot be divested and proceedings under the Act would not lapse, even if an award is not made within the statutorily stipulated period. (Vide: Avadh Behari Yadav v. State of Bihar and. Ors. MANU/SC/002/1996: (1995) 6 SCC 31; U.P. Jal Nigam v. Kalra Properties (P) Ltd. (Supra); Allahabad Development Authority v. Nasiruzzaman and Ors. MANU/SC/1269/1996: (1996) 6 SCC 424, M. Ramalinga Thevar v. State of Tamil Nadu and Ors. MANU/SC/0291/2000: (2000) 4 SCC 322; and Government of Andhra Pradesh v. Syed Akbar and Ors. MANU/SC/0987/2004: AIR 2005 SC 492).

17. The said land, once acquired, cannot be restored to the tenure holders/persons-interested, even if it is not used for the purpose for which it was so acquired, or for any other purpose either. The proceedings cannot be withdrawn/abandoned under the provisions of Section 48 of the Act, or Under Section 21 of the General Clauses Act, once the possession of the land has been taken and the land vests in the State, free from all encumbrances. (Vide: State of Madhya Pradesh v. V.P. Sharma MANU/SC/0200/1966: AIR 1966 SC 1593; Lt. Governor of Himachal Pradesh and Anr. v. Shri Avinash Sharma MANU/SC/0417/1970: AIR 1970 SC 1576; Satendra Prasad Jain v. State of U.P. and Ors. MANU/SC/0392/1993 AIR 1993 SC 2517; Rajasthan Housing Board and Ors. v. Shri Kishan and Ors. MANU/SC/0466/1993: (1993) 2 SCC 84 and Dedicated Freight Corridor Corporation of India v. Subodh Singh and Ors. MANU/SC/0268/2011: (2011) 11 SCC 100).

18. The meaning of the word 'vesting', has been considered by this Court time and again. In Fruit and Vegetable Merchants Union v. The Delhi Improvement Trust MANU/SC/0082/1956: AIR 1957 SC 344, this Court held that the meaning of word 'vesting' varies as per the context of the Statute, under which the property vests. So far as the vesting Under Sections 16 and 17 of the Act is concerned, the Court held as under.-

In the cases contemplated by Sections 16 and 17, the property acquired becomes the property of Government without any condition or; limitations either as to title or possession. The legislature has made it clear that vesting of the property is not for any limited purpose or limited duration.

21. In Government of Andhra Pradesh and Anr. v. Syed Akbar (Supra), this Court considered this very issue and held that, once the land has vested in the State, it can neither be divested, by virtue of Section 48 of the Act, nor can it be reconveyed to the persons-interested/tenure holders, and that therefore, the question of restitution of possession to the tenure holder, does not arise. (See also: Pratap v. State of Rajasthan MANU/SC/1101/1996: AIR 1996 SC 1296; Chandragaudaj Ramgonda Patil v. State of Maharashtra MANU/SC/1264/1996: (1996) 6 SCC 405; State of Kerala and Ors. v. M.

Bhaskaran Pillai and Anr. MANU/SC/0731/1997: AIR 1997 SC 2703; Printers (Mysore). Ltd. v. M.A. Rasheed and Ors. MANU/SC/0307/2004: (2004) 4 SCC 460; Bangalore Development Authority v. R. Hanumaiah MANU/SC/0988/2005: (2005) 12 SCC 508; and Delhi Airtech Services (P) Ltd. and Anr. v. State of U.P. and Anr. MANU/SC/0956/2011: (2011) 9 SCC 354).

22.In view of the above, the law can be crystallized to mean, that once the land is acquired and it vests in the State, free from all encumbrances, it is not the concern of the land owner, whether the land is being used for the purpose for which it was acquired or for any other purpose. He becomes persona non-grata once the land vests in the State. He has a right to only receive compensation for the same, unless the acquisition proceeding is itself challenged. The State neither has the requisite power to reconvey the land to the person-interested, nor can such person claim any right of restitution on any ground, whatsoever, unless there is some statutory amendment to this effect."

30. Considering the facts and circumstances of the case, we are of the considered opinion that at this belated stage we cannot permit the petitioner to revive the dead and stale claims. The stale and dead claims cannot be permitted to be canvassed on the pretext of enactment of Section 24. In view of the law laid down by this Court in **Atul Sharma & Ors.** (Supra) and **Jagbeer Singh & Ors.** (Supra) Section 24 of the Act, 2013 would not be attracted in the present matter. Even otherwise as per the parameters of the Constitution Bench mandate in **Indore Development Authority** (Supra) as averred in detail, the claim of the petitioner does not fall under Section 24 of the Act, 2013.

31. In the facts and circumstances, so far as determination of quantum of compensation, principles will have to be applied in relation to acquisition made by Parishad under the Adhiniyam, 1965.

32. Consequently, for all the reasons aforesaid, the reliefs claimed in the writ petition with regard to lapse of acquisition proceeding cannot be available to the petitioner. However, it is always open to the petitioner to move appropriate application to get the compensation.

33. The writ petition stands **disposed of** accordingly.

34. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by the petitioner alongwith a self attested identity proof of the said person (preferably Aadhar Card) mentioning the mobile number to which the said Aadhar Card is linked.

35. The concerned Court/ Authority/ Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)08ILR A898
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.07.2021

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Government Appeal Defective No. 103 of 2021

State of U.P. ...Appellant

Versus

Yasin Beg ...Respondent

Counsel for the Appellant:
G.A.

Counsel for the Respondents:

A. Criminal Law - Criminal Procedure Code, S.378 - Appeal against acquittal - Presumption of innocence runs in favour of the accused right from the stage of commencement of trial and the same continues upto the Appellate stage - In case finding of acquittal is recorded by the trial court and the order of acquittal is found to be based on material on record then presumption of innocence is fortified and strengthened (Para 14)

B. Criminal Law - Criminal Procedure Code, S.378 - Appeal against acquittal - Even in cases where two views regarding the same incident are possible then the view adhered to and adopted by the trial court will not be disturbed if material on record justifies the finding so recorded (Para 15)

Dismissed. (E-4)

List of Cases cited:

1. Kanhaiya Lal & ors. Vs St. of Raj. AIR 2013 SC 1940

2. Bhadragiri Venkata Ravi Vs Public Prosecutor High Court of A.P., Hyderabad; 2013 (4) Supreme 450

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Bhanu Prakash Singh, learned Brief Holder for the State-appellant and perused the material brought on record.

2. The instant appeal is reported to be filed beyond time by 1529 days, as per the Stamp Reporting Section.

3. In view of prevailing pandemic Covid-19, reasons assigned in support of the delay condonation application as well as submissions, the delay in filing the instant appeal is condoned. The instant appeal is treated to be filed within time.

4. Delay condonation application is, accordingly, allowed.

5. Office is directed to allot regular number to this appeal.

6. At this stage, learned counsel for the State-appellant has requested for hearing of this appeal by pressing leave to appeal application, therefore, we are considering the leave to appeal as such.

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Bhanu Prakash Singh, learned Brief Holder for the State-appellant and perused the material brought on record.

2. The instant Government Appeal has been preferred by the State-appellant against judgement and order of acquittal dated 13.10.20216, passed by Additional Sessions Judge/Special Judge, E.C. Act Bareilly in Sessions Trial No.609 of 2010 *(State vs. Yasin Beg)* and Sessions Trial No.610 of 2010 *(State versus Yasin Beg)*, under Sections - 302/34 I.P.C. and 25 Arms Act, Police Station - Siroli, District - Bareilly.

3. We have been persuaded that in this case, there was plethora of evidence but casual approach was adopted in relation thereto by the trial judge, who failed to

appreciate properly and to take notice of the clinching circumstances, which were very much apparent on record, pointing to the guilt of the accused.

4. Learned Brief Holder for the State has added that primarily, it is worth mentioning that the circumstances of a case cannot tell a lie, whereas, a person can !. In this case, the circumstances are consistently intertwined and placed so innocuously as to point to the guilt of the accused. Merely because of the failure of the investigating officer in regard to carrying out certain formalities, modalities and technicalities, the entire prosecution story cannot be thrown out, once it is established that the accused- respondent Yasin Beg was conniving with the other co-accused - say Akeeb and Yamin, and he had a strong motive and cause for committing the offence, then there was no point that he should have been given benefit of doubt on account of fact that nothing exist against him involving him in the commission of the crime.

5. The learned counsel continued and added that irony of the case is that the two main accused against whom evidence existed and the F.I.R. entailed a detailed description for taking away the victim with them in the night of 9.3.2009 at about 9:00 p.m., there is nothing which may generate any suspicion regarding the complicity and involvement of the accused because the deceased Raisuddin son of the informant was having love affair with the daughter of the accused-respondent.

6. In the peculiar circumstances of this case, the testimony on record was plausible one and satisfactorily pointing to the guilt of the accused. However, the reasoning given by the trial court is on the face perverse and cannot be sustained as such vis a vis the evidence on record and the prevailing circumstances of the case.

7. So far as the factum of recovery is concerned, the police personnel, who effectuated the recovery have very much proved the factum of recovery. However, their evidence cannot be brushed aside and minimized merely on account of absence of independent witness.

8. We have considered the submissions and the argument advanced by the prosecution and also scanned the entire judgment - the certified copy of it as has been brought before us - whereby we gather that in this case the judgment and order of acquittal was delivered by the trial court on 13.10.2016 after taking into account each and every aspect of this case, it can be observed that evidence was properly appraised and circumstances were also considered by the court below.

9. It so happened that some F.I.R. was lodged on 10.03.2009 at about 11:15 a.m. with the Police Station ? Siroli, District ? Bareilly at Case Crime No. 81 of 2009, under Section ? 302 read with Section - 34 I.P.C. During course of investigation, some recovery was effectuated against the accused-respondent and a case under Section ? 25 Arms Act was also lodged against the accused at Case Crime No. 696 of 2009, Police Station ? Siroli, District ? Bareilly. The motive for committing the crime is no doubt the alleged illicit relationship in context between the daughter of the accused-respondent and Raisuddin son of the informant. After completion of the investigation, charge-sheet was filed against the accused-respondent-Yaseen Beg.

10. It is noticeable from the judgment itself that the other two accused say Aqib

and Yameen, both the named accused in the F.I.R. were found to be juvenile, therefore, after the submission of the charge-sheet, their trial was separated and they were tried separately by the Juvenile Justice Board, Bareilly.

11. Upon careful perusal of the testimony of the fact witnesses, to be particular P.W.1- Mohd. Hasmuddin son of Vikaruddin and P.W.2- Atikuddin son of Fatruddin, we come across fact that their version cannot be said to be free from inherent infirmities, for the reason that as per the testimony of P.W.-1, he came to hear about the sound of fire from some place one kilometer away from the place of occurrence where this witness was standing, still he says before the trial court that he saw the occurrence and the present accused respondent Yasin Beg fired two shots at the deceased, while Akib was pointing gun at the deceased and Yamin made first shot at the deceased. This goes to show by itself that the things have been tried to be improved and testimony of the witnesses of fact is full of embellishment. Their presence on the spot instantly cannot be accepted and inferred, if his testimony regarding the incident is taken to be true, for the reason that he himself says that he heard the sound of fire almost one kilometer away from the place of occurrence, then there is no point that he witnessed the incident as such and his explanation that because of fear, the accused-respondent Yasin Beg could not be named in the F.I.R. is also not sustainable in the eye of law.

12. Once the testimony of witnesses of fact becomes doubtful and suspicious regarding the occurrence itself, then in view of the recovery of the illegal countrymade gun while that too has not been proved within the four corners of law, goes to show that the factum of recovery cannot be said to be satisfactorily established by the prosecution. It is substantial law that merely recovery does not connect one with the commission of the offence, unless cogent, consistent and direct or clinching circumstantial evidence is brought forth to prove the guilt of the accused-respondent by the prosecution.

13. In that way, the trial court has taken note of each and every fact relevant and the circumstances of the case and has rightly calibrated the testimony of the witnesses of fact as well as that of the formal witnesses and has analyzed the circumstances properly and after churning the merit of this case, has entertained doubt regarding the complicity of the accused-respondent in commission of the crime. No doubt, some suspicion exist regarding cause of action being implicit or existing in the mind of the accused respondent that his daughter was having some relationship with the deceased - son of the informant, but this aspect is different from fact, which was required to be proved by the prosecution in accordance with the procedure and the law laid down, which has not been done in the present case. The illicit relationship here in this case may serve as the very motive behind the crime. So it is apparent that the finding of the trial court cannot be faulted with, once it is found to be based on material on record and the appreciation is based on analogy and reason supported by material. That being the case, the appellate court would not come to the rescue of the prosecution merely on the basis of several possibilities in the shape of suspicion and that cannot form the basis of conviction. In order to achieve a conviction, the things are required to be proved beyond all reasonable

doubt, which has not been done in this case.

14. Presumption of innocence runs in favour of the accused right from the stage of commencement of trial and the same continues upto the Appellate stage. In case finding of acquittal is recorded by the trial court and the order of acquittal is found to be based on material on record then presumption of innocence is fortified and strengthened in favour of the accused as has been held by Hon'ble Apex Court in the case of ***Kanhaiya Lal & Ors. v. State of Rajasthan; AIR 2013 SC 1940.***

15. Even in cases where two views regarding the same incident are possible then the view adhered to and adopted by the trial court will not be disturbed if material on record justifies the finding so recorded as has been held by Hon'ble Apex Court in the case of *Bhadragiri Venkata Ravi v. Public Prosecutor High Court of A.P., Hyderabad;* 2013 (4) Supreme 450.

16. For the reasons aforesaid, we affirm and approve the judgment and order of acquittal dated 13.10.20216, passed by Additional Sessions Judge/Special Judge, E.C. Act Bareilly in Sessions Trial No.609 of 2010 (State vs. Yasin Beg) and Sessions Trial No.610 of 2010 *(State versus Yasin Beg)*, under Sections - 302/34 I.P.C. and 25 Arms Act, Police Station - Siroli, District - Bareilly.

17. Thus, leave to appeal is refused.

18. Consequently, the instant appeal being insignificant is **dismissed.**

19. Let a copy of this order be certified to the trial court concerned.

(2021)08ILR A902
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2021

BEFORE

THE HON'BLE ARVIND KUMAR MISHRA-I, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Government Appeal Defective No. 113 of 2021

State of U.P. ...Appellant
Versus
Aslam & Ors. ...Respondenta

Counsel for the Appellant:
G.A.

Counsel for the Respondents:

A. Evidence Law - Evidence Act, 1872 -Section 24 - Extra-judicial confession - Evidentiary value - If the circumstances of a case are suspicious then it is rule of cautious that the court should normally look for corroboration of it from some independent source - Though, it is not imperative that an extra-judicial confession, to be admissible must be supported by independent evidence, fact or circumstance – If Extra-judicial confession truthful version beyond shadow of suspicion it is admissible (Para 10)

B. Evidence Law - Evidence Act,1872 - Section 3 - Circumstantial evidence - last seen theory - in case based on circumstantial evidence, all the links in the chain of circumstances must be consistently intertwined established and must leave aside every hypothesis of innocence of the accused and it must indicate invariably that the accused and accused alone were the author of the crime and none other (Para 11)

Dismissed. (E-4)

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.

&
Hon'ble Syed Aftab Husain Rizvi, J.)

Order on Delay Condonation Application

1. We have heard Sri Bhanu Prakash Singh and Sri Rajiv Rai brief holders for the State.

2. A delay of 1862 days has been reported by the Stamp Reporting Section.

3. In view of prevailing pandemic condition and considering the reasons assigned in support of the delay condonation application and in view of the submission that the matter should normally be considered on its merit, delay is liable to be condoned.

4. After considering the averments made in the delay condonation application and also considering the submission made in that regard the delay condonation application is allowed.

5. Delay is condoned.

6. Office is directed to allot regular number to this appeal.

7. Request has been made that hearing may be done on the merit of the application for leave to appeal which is sustained by us.

(Delivered by Hon'ble Arvind Kumar Mishra-I, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. We have heard Sri Bhanu Prakash Singh and Sri Rajiv Rai brief holders for the State / appellant.

2. By way of instant appeal, the State has challenged the order of acquittal dated 30.1.2016 of the trial Court, Additional Sessions Judge, Court No. 6, Agra passed in session trial no. 1067 of 2007 (State of U.P. Vs. Aslam) connected with session trial no. 1260 of 2007 (State Vs. Kalu & another) and sessions trial no. 1068 of 2007 (State Vs. Aslam) under Section 302 IPC and Section 25 of the Arms Act concerning Case Crime Nos. 258 of 2007 and 272 of 2007, Police Station - Malpura, District - Agra, respectively.

3. It has been claimed that in this case there is clear cut and clinching evidence produced by the prosecution regarding fact of disappearance of the deceased - Deepak - a boy of hardly 22 years. Further urged that in this case, all the circumstances of the case have been consistently proved and the chain of circumstances is complete. It is upon the accused and, in particular, on accused - Aslam to prove his innocence, once it was testified by the father of the deceased before the trial Court (as P.W.-2) that Aslam called his son by his mobile cell phone.

4. The mobile cell phone numbers of both Aslam and deceased have also been described in the testimony. It being the factual and admitted position, there was no point to base the judgment on conjuncture or surmises and to pass order of acquittal against the accused.

5. Before proceedings with this case, it would be relevant to take note of the relevant facts of this case for proper disposal of this case.

6. We peruse from record that a written information was given by Hiralal, the village chaukidar to the effect that on

4.6.2021 at about 10:00 a.m. he was going to take medicine and on the way when he reached the field of Mahavirjar, at village - Garhsani, he was crowd thronged over there, he reached near the spot, he saw dead body of a boy aged about 22 years lying over there and a knife was also lying beside it. It looked as if someone has caused the murder of the boy by inflicting knife injuries. The aforesaid information was taken down in General Diary and an FIR was registered on its basis. Thereafter on 5.6.2007 the information - Shivratan Joshi given an information (Exhibit - Ka-2) narrating that he is resident of district - Farrukhabad and presently residing at Aitmaddaula, Agra his son Deepak aged about 22 years went away from his house on 3.6.2007 at 1:30 p.m., he did not return back home. On 5.6.2007, he came across a news item published in Hindi Daily - Amar Ujala that a boy has been murdered by inflicting knife injuries under the police station - Malpura. Upon reading this, he went to the police station - Malpura and after seeing the photograph and the belongings, he identified the deceased as his son - Deepak. The police investigated into the matter. During course of the investigation, the name of accused - Aslam came to the light. He was arrested by the police and a country made gun was recovered from his possession for which a separate case under Section 5 of the Arms Act was registered against him.

7. Charge sheet was submitted against the accused under the aforesaid Section of IPC and Arms Act respectively. The accused were heard on point of charge but they denied the charges which were framed against them and claimed to be tried. Consequently, the prosecution in order to prove its case examined ten prosecution witnesses and after closing the evidence for the prosecution witnesses statement of the accused was recorded under Section 313 Cr.P.C. wherein they denied their involvement and participation in the occurrence. Accused - Aslam also denied any recovery having been effected from him by the police and claimed false recovery in this case by the police. The accused did not lead any evidence in defence.

8. Consequently, the case was heard on merit and after considering the evidence fact and circumstances vis-a-vis submission made by both the sides judgment of acquittal was delivered by the trial Court which gave rise to this appeal by the State.

9. It has been brought to our notice that no separate appeal has been filed by the complainant P.W.-2 - Shivratan father of the deceased. In so far as the finding of acquittal recorded by the trial Court is concerned, the trial Court was primarily concerned with the evidence and the supporting material in that regard. It so occurred that during course of the proceedings, P.W.-2 Shivratan, father of the deceased was produced in the Court where he categorically stated that Aslam called his son by calling from his cell phone and he also gave the cell phone number of Aslam which was described as 9719226477. However, this was found to be an improvement at subsequent stage because no such whisper was either recorded by the police in the first statement of the informant under Section 161 Cr.P.C.

10. It being so the contention urged by the defence that the testimony of P.W.-2 is full of deliberation, improvement and the witness is highly tutored on this specific point. Further, a case was also tried to be built up upon the plea of extra judicial

confession that after the occurrence took place, Aslam, Kale and Kake - all the three accused - came to him on 11.6.2007 and confessed to have committed the offence. This extra judicial confession was not supported by any independent testimony, facts or circumstances of the case therefore, they same when read in line with the testimony of P.W. -2 regarding the creation of last seen theory by adducing testimony in the shape of Aslam calling the deceased by using his cell phone, is not believable unless corroborated by independent circumstance or testimony as such. Though, it is not imperative that an extra-judicial confession, to be admissible must be supported by independent evidence, fact or circumstance - but under prevailing facts and circumstances of a particular case it should be a truthful version beyond shadow of suspicion. If the circumstances of a case are suspicious then it is rule of cautious that the court should normally look for corroboration of it from some independent source.

11. In view of the above, the trial Court was justified in recording the finding of acquittal, for the specific reason that it being a case based on circumstantial evidence, all the links in the chain of circumstances must be consistently intertwined established and must leave aside every hypothesis of innocence of the accused and it must indicate invariably that the accused and accused alone were the author of the crime and none other. Therefore, we are not inclined to interfere with the judgment of acquittal dated 30.1.2016 passed by Additional Sessions Judge, Court No. - 6, Agra, at this stage.

12. Consequently, the leave to appeal sans merit and the same is dismissed.

13. Resultantly, this appeal goes and the same is also dismissed.

(2021)08ILR A905
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2021

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Government Appeal No. 158 of 2020

State of U.P. ...Applicant
Versus
Pratibha Dubey ...Respondent

Counsel for the Applicant:
A.G.A.

Counsel for the Respondent:
Sri Saurabh Basu, Sri Premnendra Singh

A. Criminal Law - Acquittal - interference in an appeal or revision against acquittal - if two views of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court should not, in such a situation, reverse the order of acquittal recorded by the trial court (Para 12)

B. Railways Act,1989 - Section 143(2) - Evidence Act ,1872 - Section 3 - Offence of carrying unauthorised business of procuring & supplying of railway tickets - Suspicion - suspicion, howsoever, strong cannot take place of proof - *Held* - Prosecution has to prove by the cogent evidence that respondent-accused helped by illegal means in procurement of reservation tickets, by co-accused, only then the guilt of the respondent-accused will stand proved - there is no sufficient evidence on the record to prove the said facts - no evidence on record to establish that while issuing the PRS window tickets, the respondent-accused has committed any irregularity or violated any rule -

Prosecution failed to prove its case against respondent (Para 10, 11)

Dismissed. (E-4)

List of Cases cited:

1. St.of Karn. Vs K. Gopalkrishna reported in (2005) 9 SCC 291

2. Babu Vs St. of Ker.l (2010) 9 SCC 189

3. Dilawar Singh Vs St. of Har., (2015) 1 SCC 737

(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri S.B. Maurya, learned A.G.A. assisted by Sri Anshuman Singh, learned A.G.A. for the appellant and Sri Saurabh Basu, learned counsel for the respondent.

2. This Government Appeal has been filed against the part of the judgment and order dated 17.03.2020 by which the respondent (accused) has been acquitted for charges under Section 143 (1) and 143 (2) of the Railways Act in criminal case No. 7461 of 2019 (State of U.P. vs. Chandrakant Purohit and another) passed by Additional Chief Judicial Magistrate, Jhansi. By the same judgment, the co-accused Chandrakant Purohit has been convicted for offence under Section 143 (1) of the Railways Act which is not a matter in issue in this appeal.

3. The prosecution case is that co-accused Chandrakant Purohit is an authorized agent of IRCTC but in greed of more money, he used to sell e-tickets using his personal ID and reservation tickets from PRS window to the needy persons. On the information received the police party of Railway Protection Force, lead by S.I- Hari Ram Yaday accompanying with constable Vikas Vyas and constable Yogendra Khare raided the premises of Anjali Travels where Chandrakant Purohit was found working on computer and on search of the premises in presence of public witnesses Dhani Ram and Channa, 17 e-tickets of future journey amounting to Rs. 39,411/-, 33 PRS window tickets of future journey amounting to Rs. 48005/-, six PRS window tickets of past journey amounting to Rs.3695/-, 19 cancelled PRS window tickets amounting to Rs. 39,625/- were recovered from the counter. Laptop, printer, mobile phones were also recovered. The recovery memo was prepared by S.I. Hari Ram Yadav. During further enquiry, it was revealed that out of 58 PRS window tickets recovered 41 tickets were booked by respondent (accused) Pratibha Dubey who is an employee of the Railway and was deployed at the booking counter as booking clerk. It was also revealed that Chandrakant Purohit has made various phone calls from his mobile phone (Mob. No.9450067076) to the accused Pratibha Dubey on her Mob. Nos. 9450034021 & 7080310910 and both have talked 18 times including six times on duty. The Inquiry Officer, S.I. Hari Ram Yadav recorded the statements of some PRS window ticket holders of future journey, the accused persons and other witnesses and after completion of enquiry, filed a complaint before the learned Magistrate.

4. Under 244 Cr.P.C., three witnesses P.W.1 (Constable Vikas Vyas) P.W.2 (S.I. Hari Ram Yadav) and P.W.3 (Raj Kumar Jha) were produced and on this evidence, charges under Section 143 (1) & 143 (2) of Railways Act were framed against both the accused persons namely Chandrakant Purohit and Pratibha Dubey. The accused denied the charges and claimed for trial.

Under Section 246 Cr.P.C., the three witnesses examined under Section 244 Cr.P.C. were reproduced for further cross-examination and ten other witnesses were also examined. The statements of accused were recorded under Section 313 Cr.P.C. In her statement accused (respondent) Pratibha Dubey, denied the complaints version and further submitted that she has acted as per rules. She has also stated that she is a government employee and no prosecution sanction has been obtained before filing complaint and that she is innocent and has not committed any irregularity. The learned Magistrate after hearing the arguments of both the parties, by the impugned judgment has acquitted the respondent Pratibha Dubey from all the charges, while recorded the conviction of co-accused Chandrakant Purohit for offence under Section 143 (1) of the Railways Act. Against the order of acquittal of respondent-accused Pratibha Dubey, the State has filed this Government Appeal.

5. Learned counsel for the State-appellant contended that the learned trial court has not properly appreciated the prosecution evidence and has decided the case only on the basis of conjectures and surmises. There is ample evidence on record that the PRS window tickets recovered from the possession of the co-accused Chandrakant Purohit has been booked by the respondent (accused) and the trial court has believed this prosecution story but even then acquitted the respondent (accused). Learned trial court has committed gross error in dis-believing the testimony of the prosecution witnesses and order of acquittal is wholly illegal, perverse and against the evidence on record.

6. The learned counsel for the respondent-accused drawn the attention of the Court at page no.24 to 27 of the impugned judgment and submitted that the learned trial court has rightly recorded the findings that CDR filed by the prosecution has not been duly proved and was not admissible in the evidence. The mere fact that PRS window tickets have been booked by the respondent (accused) is not enough to prove her role in any crime as she is the railway employee deputed for the purpose and has performed the act in discharge of her official duty and particularly when there was single window operation for reservation at Railway Station- Lalitpur at the relevant time. There is no illegality or perversity in the impugned judgment and order of acquittal. Prosecution has failed to prove its case against the respondent (accused) and the trial court has rightly acquitted her.

7. The provisions of Section 143 of the Railways Act is as follows:-

(1) If any person, not being a railway servant or an agent authorized in this behalf,--

(a) carries on the business of procuring and supplying tickets for travel on a railway or from reserved accommodation for journey in a train; or

(b) purchases or sells or attempts to purchase or sell tickets with a view to carrying on any such business either by himself or by any other person,

he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to ten thousand rupees, or with both, and shall also forfeit the tickets which he so procures, supplies, purchases, sells or attempts to purchase or sell:

Provided that in the absence of special and adequate reasons to the contrary to be mentioned in judgment of the court, such punishment shall not be less

than imprisonment for a term of one month or a fine of five thousand rupees.

(2) Whoever abets any offence punishable under this section shall, whether or not such offence is committed, be punishable with the same punishment as is provided for the offence.

8. It is established fact that respondent-accused is a railway employee, hence Section 143(1) is not applicable on her and only Section 143(2) attracts her. The prosecution has examined 13 witnesses, P.W.-1 Constable Vikas Vyas, P.W.-2, S.I. Hari Ram Yadav, P.W.-8 Constable Yogendra Khare are the members of the police party, who have conducted the raid and searched the premises of Anjali Travels and according to prosecution version, they have recovered various railway tickets, e-tickets as well as PRS window tickets from the counter and other articles i.e., laptop, printer etc. One public witness of the aforesaid recovery namely Dhani Ram has also been examined as P.W.-12 but he has not supported the prosecution case. From the testimony of the P.W.-1, Vikas Vyas, P.W.-2, S.I Hari Ram Yadav and P.W.-8 constable Yogendra Khare, it is proved that 58 PRS window tickets and various e-tickets were recovered from the possession of co-accused Chandrakant Purohit. The respondent-accused is concerned only with the PRS window tickets. Out of 58 window tickets 33 tickets were for future journey while six PRS window tickets were of past journey and 19 PRS window tickets were the cancelled tickets. Prosecution has also examined P.W.-3, Raj Kumar, Chief Reservation Observer who has stated that on the enquiry made by the complainant S.I. Hari Ram Yadav information was provided regarding the recovered PRS window tickets and according to which 41 PRS window tickets were booked by the accused Pratibha Dubey during her working hours from 7:30 to 15:30 of the relevant period. He also said that on the request of complainant, certified photocopy of the filled reservation forms of PRS window tickets were also provided to the complainant. All these documents have been produced by the prosecution and have been marked as exhibits. The recovered PRS window tickets have also been produced by the prosecution and have been marked as exhibits. So from the prosecution evidence, it is also proved that out of 58 PRS window tickets recovered from the possession of the co-accused Chandrakant Purohit, 41 PRS window tickets were booked by respondent-accused Pratibha Dubey during her duty hours.

9. For holding guilty the respondent-accused, prosecution has to prove that she has abetted the act of procurement of PRS window tickets by co-accused Chandrakant Purohit for sale. In this regard, prosecution has relied on CDR and the oral testimony of P.W.-6 to P.W.-13, the PRS window tickets holders of future tickets. During enquiry made by the complainant, the Chief Reservation Observer, Mr. Raj Kumar has provided the name and other particulars of staff on duty of the booking counter and in this information, the mobile number of respondent-accused Pratibha Dubey was also given to the Inquiry Officer/ complainant S.I. Hari Ram Yadav. The Inquiry Officer has also recorded the statement of respondent-accused Pratibha Dubey in which she has disclosed her two mobile numbers and one is the same which has been provided by Mr. Raj Kumar, the Chief Reservation Observer. The Inquiry Officer/ complainant has obtained the CDR of co-accused Chandrakant Purohit's mobile which shows the conversation of

both the accused for 18 times including six times during duty hours of respondent-accused Pratibha Dubey. While analyzing this evidence, the learned trial court has observed that the Inquiry Officer, S.I. Hari Ram Yadav has not verified the facts from service provider agency that the mobile numbers belonged to accused-persons. These observations of the learned trial court are not proper because it is not necessary for prosecution to prove that the SIM's were owned by the accused-persons. It is enough that these SIM's were used by them and from the evidence on record, it is clearly established that these SIM's were used by the accused persons, because the two numbers has been provided by the respondent-accused herself to the Inquiry Officer during enquiry.

10. The prosecution has also examined the public witness namely Upendra Jain P.W.-6, Abhishek Srivastava P.W.7, Ram Lakhan Singh Gurjar P.W.-9, Dr. R.R. Srivastava P.W.-10, Jagdish Singh P.W.-11 and Rajiv Dubey P.W.-13 who are some of the ticket holders of future journey of PRS window tickets which have been recovered. Out of the aforesaid, public witnesses Abhishek Srivastava P.W.-7 and Ram Lakhan Singh Gurjar P.W.-9 have become hostile and have not supported the prosecution version. The remaining witnesses namely Upendra Jain P.W.-6, Dr. R.R. Srivastava P.W.-10, Jagdish Singh P.W.-11 and Rajiv Dubey P.W.-13, in their statement, have said that they got the reservation tickets through Chandrakant Purohit who is a railway agent and they have instructed Chandrakant Purohit to get these reservation tickets on their behalf. So their oral testimony is only against co-accused Chandra Kant Purohit. There is nothing in their statement to implicate the accused-respondent. From oral as well as documentary evidence, it is proved that out of 58 PRS window tickets recovered from the possession of co-accused Chandrakant Purohit, 41 PRS window tickets were booked by respondent-accused Pratibha Dubey. It is an established fact that respondent no.2 Pratibha Dubey being a railway employee deployed on the reservation counter, it was her part of duty to issue PRS window tickets, so her involvement in the offence can only be established if it is proved that in issuing PRS window tickets any irregularity has been committed by her. From the evidence on record, it stands proved that duly filled reservation/ cancellation requisition form required for the reservation booking were available and prosecution witness Raj Kumar Jha P.W.-3, CRS Lalitpur in his statement has admitted that there is no irregularity in these forms. So merely because of the fact that the maximum number of PRS window tickets recovered from the possession of the co-accused Chandrakant Purohit have been booked by respondent-accused Pratibha Dubey and the fact that as per CDR accused-respondent has talked 18 times with co-accused including six times on duty, it cannot be said that she has abetted or helped by illegal means in procurement of these tickets by co-accused. The argument of the learned counsel for the respondent that the respondent is an employee deputed for the purpose at Railway Station- Lalitpur, there is single window operation for reservation, there is nothing unusual or abnormal that the tickets have been booked by the respondent is very much relevant and forceful. Learned trial court has further observed that during arguments the prosecution has submitted before the court that the conversation between the co-accused is from 01.05.2018 to 17.11.2018 and in this period they have talked about 18

times. The learned trial court has also observed that conversation of 18 times during the period of six months cannot be said to be abnormal thing. The learned trial court has also observed that it is not necessary that the ticket holder for reservation should himself go to the ticket counter and fill the form and sign it. Even his representative can get the ticket reserved from any booking counter. These observation, of the learned trial court are just and proper. The facts that out of 58 PRS window tickets, 41 PRS window tickets have been booked by the co-accused respondent Pratibha Dubey, and her mobile conversation with co-accused only creates suspicion about the role of respondent-accused, but it is a well settled principle of law that suspicion, howsoever, strong may be cannot take place of proof. Prosecution has to prove by the cogent evidence that respondent-accused has helped by illegal means in procurement of these reservation tickets, by co-accused Chandra Kant Purohit, only then the guilt of the respondent-accused will stand proved. From the perusal of the evidence on record, it is clear that there is no sufficient evidence on the record to prove the aforesaid facts. There is no evidence on record to establish that while issuing the PRS window tickets, the respondent-accused has committed any irregularity or violated any rule.

11. From the perusal of the impugned judgment, it is clear that the learned trial court has described the entire evidence produced by the prosecution and has fully analyzed and has appreciated the oral and documentary evidence available on record and has minutely discussed every aspect and after appreciation of evidence, the learned trial court has come to the conclusion that the prosecution has failed to prove its case against respondent no.2 Pratibha Dubey. There is no illegality or perversity in the above findings of the learned trial court.

12. While considering the scope of interference in an appeal or revision against acquittal, it has been held by the Supreme Court that if two views of the evidence are reasonably possible, one supporting the acquittal and other indicating conviction, the High Court shluld not, in such a situation, reverse the order of acquittal recorded by the trial court. In the matter of ***State of Karnataka vs. K. Gopalkrishna reported in (2005) 9 SCC 291***, the Hon'ble Supreme Court, while dealing with an appeal against acquittal, observed as under:

"In such an appeal the Appellate Court doe not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the court below are wholly unreasonable or perverse and not based on the evidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal."

13. In the case of ***Babu vs. State of Keral (2010) 9 SCC 189***, the Hon'ble Apex Court has held that:

"This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set

aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law".

14. In ***Dilawar Singh v. State of Haryana***, (2015) 1 SCC 737, the Supreme Court reiterated the same in paragraph no. 36 as under :

"36. The court of appeal would not ordinarily interfere with the order of acquittal unless the approach is vitiated by manifest illegality. In an appeal against acquittal, this Court will not interfere with an order of acquittal merely because on the evaluation of the evidence, a different plausible view may arise and views taken by the courts below is not correct. In other words, this Court must come to the conclusion that the views taken by the learned courts below, while acquitting, cannot be the views of a reasonable person on the material on record.

15. Considering the above legal position and factual aspects of the case, this Court is of the view that findings of acquittal given by the trial court is justified and the appeal is liable to be dismissed.

16. Accordingly, this criminal appeal is hereby ***dismissed.***

(2021)08ILR A911
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2020

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ C No. 18743 of 2020

Smt. Asha Devi & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sheetala Prasad Pandey

Counsel for the Respondents:
C.S.C.

A. Constitution of India - Art. 226 - Writ of Mandamus - Bigamy - Petitioner guilty of bigamy cannot be granted protection by court under Article 226 from interference by others in their living as husband and wife - writ of mandamus cannot be issued contrary to law or to defeat a statutory provision including penal provision (Para 18)

B. Criminal Law - Indian Penal Code,1860 - Section 494 - Marrying again during lifetime of husband or wife - Hindu Marriage Act,1955 - Section. 17 - Punishment of bigamy - Till a decree of divorce is passed marriage subsist - Any other marriage during the subsistence of the first marriage would constitute an offence under Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955 and the person, inspite of his conversion to some other religion would be liable to be prosecuted for the offence of bigamy (Para 21)

C. Marriage - relationship in the nature of marriage - de facto relationship, marriage-

like relationship, cohabitation, couple relationship, meretricious relationship (now known as committed intimate relationship - Live-in-relationship - live-in relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as immoral - Relationship which are not live-in-relationship or relationship in the nature of marriage - Concubine, Polygamy, Bigamy

Writ petition filed by petitioners for protection from interference by others in their living as husband and wife - *Held* - Once the petitioner No.1 is a married woman being wife of one Mahesh Chandra, the act of petitioners particularly the petitioner No.2, may constitute an offence under Sections 494/495 I.P.C. - Such a relationship does not fall within the phrase "live-in-relationship" or "relationship in the nature of marriage" - If the protection as prayed is granted, it may amount to grant protection against commission of offences under Sections 494/495 I.P.C (Para 21)

Dismissed. (E-4)

List of Cases cited :

1. Lata Singh Vs St.of U.P. (2006)5 SCC 475

2. Indra Sarma Vs V. K.V. Sarma (2013)15 SCC 755

3. D. Velusamy Vs D Patchaiammal (2010) 10 SCC 469

4. A Subhash Babu Vs St.of A.P. (2011) 7 SCC 616

5. Shayara Bano Vs U.O.I. (2017) 9 SCC 1

6. Lily Thomas & anr. U.O.I. & ors. (2000)6 SCC 224

7. S. Khushboo Vs Kanniammal (2010)5 SCC 600

8. Proprietary Articles Trade Association Vs Attorney General for Canada AIR 1931 PC 94

9. Thomas Dana Vs St. of Pun. AIR 1959 SC 375

10. Jawala Ram & ors. Vs The State of Pepsu (now Punjab) & ors. AIR 1962 SC 1246

11. Standard Chartered Bank & ors. Vs Directorate of Enforcement & ors. AIR 2006 SC 1301

12. Director of Settlement, A.P. Vs M.R. Apparao (2002) 4 SCC 638

13. Kalyan Singh Vs St. of U.P. AIR 1962 SC 1183

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Dr. Yogendra Kumar Srivastava, J.)

1. This writ petition has been filed praying for the following reliefs:-

(i) Issue a writ, order or direction in the nature of mandamus commanding and directing the respondents not to harass or take any coercive action against the petitioners.

(ii) Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(iii) Award cost of the petition to the petitioners.

Submissions

2. Learned counsel for the petitioners submits that the petitioners are living as husband and wife and both are major and therefore protection may be granted to them so that the respondent no. 4, the father of the petitioner no. 1, may not harass the petitioners. He submits that a representation dated 17.09.2020 was submitted by the petitioner no. 1 before the respondent no.2 but no action has been taken so far.

3. Learned Standing Counsel submits that the petitioner no. 2 has taken away the petitioner no. 1 who appears to be duly married wife of one Sri Mahesh Chandra and thus the petitioner no. 2 is an offender and therefore no protection can be granted to the petitioner.

4. We have carefully considered the submissions of learned counsel for the parties.

Facts

5. In paragraph nos. 4, 5 and 6 of the writ petition, it has been stated as under :-

4. That the petitioner no. 2 is also major aged about 23 years old and his date of birth is 01.01.1997 according to Aadhar Card, the petitioner no. 1 is educated only Class 5th she has no any age proof except Aadhar Card.

5. ***That the petitioner no. 1 was married earlier with one Mahesh Chandra*** *but who is habitual drinker and assaulted her maliciously therefore she left his home and came at her parental house.*

6. That at present the ***petitioner no. 1 is living in relation with petitioner no.2 from 24.8.2020*** *but the father of the petitioner no. 1 (respondent no. 4) is very much annoyed and given threat to kill her.*

6. It has been stated in paragraph no. 8 of the writ petition that the petitioner no. 1 has filed a representation dated 17.09.2020 before the respondent no. 2 which is reproduced below :-

सेवा में,
श्रीमान पुलिस अधीक्षक महोदय,
हाथरस।
महोदय,

विनम्र निवेदन है कि **प्रार्थिनी आशा** पुत्री राम बाबू नि0 बिजलीघर ससनी, थाना सासनी जिला हाथरस,जो कि अरविन्द पुत्र सूरजाभाना निवासी नया बिजलीघर बिजाहरी थाना सासनी जिला हाथरस **के साथ पति पत्नी के रूप में रह रही है** प्रार्थिनी बालिग है तथा अपना भला बुरा सोचने में पूरी तरह से सक्षम है लेकिन हमारे पिता जी हम लोगों के इस रिश्ते से बहुत ही नाराज है तथा हमे जाने से मारने की धमकी दे रहे है दिनांक 24.8.2020 को हमारे पिता जी तथा थाना सासनी के कुछ पुलिस वाले अरविन्द के घर पर आये और बोले अगर लडकी हमारे हवाले नहीं किया तो बहुत बुरा होगा और धमकी दिये कि तुम लोगों को फर्जी मुकदमें में फॅसा देगे हमारे पिता ने पुलिस के सामने ही धमकी दिया कि तुम दोनो को जान से खत्म करे देगे। हम दोनो की जान खतरे में है तथा हम दोनो बहुत डरे हुए हैं।

अतः श्रीमान जी से निवेदन है कि हमारे प्रार्थना पत्र पर सहानूभूतिपूर्वक विचार करते हुए हम लोगों को सुरक्षा प्रदान करने की कृपा करे।

सदा आभारी रहेगी।

प्रार्थिनी
दिनांक– 17/09/2020 आशा पुत्री राम बाबू
नि0 बिजलीघर ससनी
थाना सासनी, जिला हाथरस,

7. From perusal of the writ petition, we find that none of the pages of the writ petition bear signature of either of the writ petitioners. The writ petition is neither accompanied by an affidavit of the petitioners nor it is accompanied with declaration of the counsel for the petitioners.

8. It has been stated in paragraph 5 of the writ petition that the petitioner no. 1 is married with one Sri Mahesh Chandra. There is no averment in the writ petition that the petitioner no. 1 has obtained a decree of divorce from her husband Mahesh Chandra. In the alleged representation, it has been stated that the

petitioner nos. 1 and 2 are living as husband and wife. The fact of the case as briefly noted above shows that the petitioner no. 1 is legally wedded wife of Mahesh Chandra who has not been even impleaded as respondent.

Questions:-

9. From the facts and submissions of learned counsels for the parties as briefly noted above, the following questions are framed with the consent of learned counsels for the parties for final disposal of the present writ petition :-

(i) Whether the petitioners, who claim themselves to be living together as husband and wife; can be granted protection when the petitioner No.1 is legally wedded wife of someone else and has not taken divorce sofar ?

(ii) Whether protection to petitioners as husband and wife or as live-in-relationship can be granted in exercise of powers conferred under Article 226 of the Constitution of India, when their living together may constitute offences under Sections 494/495 I.P.C. ?

Discussion & Findings

10. Since both the questions as framed above are interlinked, therefore, both are being considered and decided together.

What is live-in-relationship

11. Live-in-relationship is a relationship which has not been socially accepted in India, unlike many other countries. In **Lata Singh v. State of U.P.1 and in Indra Sarma Vs. V. K.V. Sarma2 (paras 40, 42, 43 & 53)** Hon'ble Supreme Court observed that live-in relationship between two consenting adults of heterosexual sex does not amount to any offence even though it may be perceived as immoral. In **D. Velusamy Vs. D Patchaiammal3 (paras 31 & 32)** Hon'ble Supreme Court explained the phrase "relationship in the nature of marriage" as under :-

"31. In our opinion a "relationship in the nature of marriage" is akin to a common law marriage. Common law marriages require that although not being formally married :-

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

(see `Common Law Marriage' in Wikipedia on Google)

In our opinion a `relationship in the nature of marriage' under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a `shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a `domestic relationship'.

*32. In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the co**nditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a `keep' whom he***

maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'."
(Emphasis supplied by us)

12. The expression "relationship in the nature of marriage" is also described as de facto relationship, marriage-like relationship, cohabitation, couple relationship, meretricious relationship (now known as committed intimate relationship etc.).

Relationship which are not live-in-relationship
or relationship in the nature of marriage

13. Perusal of various judgments of Hon'ble Supreme Court reveals that the **following relationship have not being recognised or approved as live-in-relationship or relationship in the nature of marriage.** This list is not exhaustive but merely illustrative :-

(a) **Concubine** can not maintain relationship in the nature of marriage vide paras 57 & 59 of the judgment of Hon'ble Supreme Court in **Indra Sarma's Case (supra).**

(b) **Polygamy,** that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage vide para 58 of judgment in **Indra Sarma's Case (supra) & A Subhash Babu Vs. state of A.P.4** (paras 17 to 21, 27, 28 & 29). **Polygamy is also a criminal offence** under Section 494 & 495 I.P.C., vide **Shayara Bano Vs. Union of India5** (paras 299.3).

(c) Till a decree of divorce is passed the marriage subsist. Any other marriage during the subsistence of the first marriage would constitute an offence under Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955 and the person, inspite of his conversion to some other religion would be liable to be prosecuted for the **offence of bigamy,** vide **Lily Thomas and another Vs. Union of India and others6 (Para 35).** In para 38 of the aforesaid judgment, Hon'ble Supreme Court observed as under:-

"38. Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a super-natural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, ***a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited.*** *The institution of marriage under every personal law is a sacred institution. Under Hindu Law, Marriage is a sacrament. Both have to be preserved."*
(Emphasis supplied by us)

(d) If both the persons are otherwise not qualified to enter into a legal

marriage including being unmarried, **vide D Velusamy Vs. D Patchaiammal (supra) (para 31).**

What is Criminal Offence

14. "Offence" means "an act or instance of offending"; "commit an illegal act" and "illegal" means, "contrary to or forbidden by law". "Offence" has to be read and understood in the context as it has been prescribed under the provisions of Sections 40, 41 and 42 IPC which cover the offences punishable under I.P.C. or under special or local law or as defined under Section 2(n) Cr.P.C. or Section 3(38) of the General Clauses Act, 1897 (vide S. Khushboo Vs. Kanniammal7, Proprietary Articles Trade Association Vs. Attorney General for Canada8; Thomas Dana Vs. State of Punjab9; Jawala Ram & Ors. Vs. The State of Pepsu (now Punjab) & Ors.10; and Standard Chartered Bank & Ors. Vs. Directorate of Enforcement & Ors.11).

Whether Writ of Mandamus can be issued

15. In **Director of Settlement, A.P. Vs. M.R. Apparao12,** (para 17) Hon'ble Supreme Court considered the High Court's **power for issuance of mandamus** and held as under :-

"17. Coming to the third question, which is more important from the point of consideration of High Court's power for issuance of mandamus, it appears that the constitution empowers the High Court to issue writs, directions or orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the rights conferred by Part III and for any other purpose under Article 226 of the Constitution of India. ***It is, therefore essentially, a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression 'for any other purpose'. The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion, they must be exercised along recognised lines and subject to certain self-imposed limitations.*** *The expression 'for any other purpose' in Article 226, makes the jurisdiction of the High Courts more extensive but yet the Court must exercise the same with certain restraints and within some parameters.* ***One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command.*** *It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by statute or by the common law to do a particular act.* ***In order to obtain a writ or order in the nature of mandamus, the***

applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition.*{Kalyan Singh vs. State of U.P., AIR 1962 SC 1183}. The duty that may be enjoined by mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law. When the aforesaid principle are applied to the case in hand, the so-called right of the respondents, depending upon the conclusion that the amendment Act is constitutionally invalid and, therefore, the right to get interim payment will continue till the final decision of the Board of Revenue cannot be sustained when the Supreme Court itself has upheld the constitutional validity of the amendment Act in Venkatagiri's case (2002) 4 SCC 660 on 6.2.1986 in Civil Appeal Nos. 398 & 1385 of 1972 and further declared in the said appeal that interim payments are payable till determination is made by the Director under Section 39(1). The High Court in exercise of power of issuance of mandamus could not have said anything contrary to that on the ground that the earlier judgment in favour of the respondents became final, not being challenged. The impugned mandamus issued by the Division Bench of the Andhra Pradesh High Court in the teeth of the declaration made by the Supreme Court as to the constitutionality of the amendment Act would be an exercise of power and jurisdiction when the respondents did not have the subsisting legally enforceable right under the very Act itself. In the aforesaid circumstances, we have no hesitation to come to the conclusion that the High Court committed serious error in issuing the mandamus in question for enforcement of the so-called right which never subsisted on the date, the Court issued the mandamus in view of the decision of this Court in Venkatagiri's case. In our view, therefore, the said conclusion of the High Court must be held to be erroneous." (Emphasis supplied by us)*

16. According to own case of the petitioners, the petitioner no.1 is still a legally wedded wife of one Mahesh Chandra. As per own alleged application dated 17.09.2020 (as reproduced in para 6 above), the petitioners are living as husband and wife and they have sought protection from interference in their living together as husband and wife. **Once the petitioner No.1 is a married woman being wife of one Mahesh Chandra, the act of petitioners particularly the petitioner No.2, may constitute an offence under Sections 494/495 I.P.C. Such a relationship does not fall within the phrase "live-in-relationship" or "relationship in the nature of marriage"**. The writ petition has been filed by the petitioners for protection from interference by others in their living as husband and wife. If the protection as prayed is granted, it may amount to grant protection against commission of offences under Sections 494/495 I.P.C.

17. Article 226 of the Constitution of India empowers High Court to issue directions, orders or writs in the nature of habeas corpus, mandamus, prohibiton, quo warranto and certiorari or any of them. Such directions, orders or writs may be issued for the enforcement of fundamental rights or for any other purpose. The jurisdiction under Article 226 is equitable and discretionary.

18. It is settled law that writ of mandamus can be issued if the petitioner has a legal right to the performance of a

legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition. Similar view has also been taken by Hon'ble Supreme Court in **Kalyan Singh vs. State of U.P.13.** Applying the principles of issuance of writ of mandamus on the facts of the present case, we find that the **petitioners have no legal right for protection on the facts of the present case inasmuch as such the protection as being asked, may amount to protection against commission of offence under Section 494/495 I.P.C. It is well settled law that writ of mandamus can not be issued contrary to law or to defeat a statutory provision including penal provision.** The petitioners do not have legally protected and judicially enforceable subsisting right to ask for mandamus.

Judgments relied by the Petitioners :

19. Lastly, learned counsel for the petitioners has relied upon a Division Bench judgment of this Court dated 11.11.2020 in **Criminal Misc. Writ Petition No.11367 of 2020 (Salamat Ansari & 3 Others Vs. State of U.P. & 3 others)**. We find that the aforesaid judgment has no relevance on the facts of the present case. In the case of **Salamat Ansari and others (supra)** the F.I.R. Under Sections 363, 366, 352, 506 I.P.C. and Section 7/8 POSCO Act was quashed by the Court primarily on the ground that no offence has been made out as the two grown up individuals were living together for over a year of their own free will and choice. In the case of **Salamat Ansari and others (supra)** (paras 13,14,15,17) this Court considered the judgment of learned single Judge, dated 16.12.2014 in **Writ C No.57068 of 2014 (Smt. Noor Jahan Begum @ Anjali Misra and another Vs. State of U.P. and others) and,** without interfering with the principles of law in **Smt. Noor Jahan's** (supra) case on "conversion of religion and void marriage"; **observed** that no doubt the ladies in question could not authenticate their alleged conversion and once the alleged conversion was under cloud; the constitutional Court was obliged to ascertain the wish and desire of the girls as they were above the age of 18 years and were living together which can be classified as a relationship in the nature of marriage as distinct from the relationship arising out of marriage in view of the provisions of Protection of Women from Domestic Violence Act, 2005. In paragraph 17 of the judgment in **Salamat Ansari and others (supra)** the Court observed that "we clarify that while deciding this petition, we have not commented upon the validity of alleged marriage/conversion". In the aforesaid judgment in **Salamat Ansari and others (supra)** this Court had no occasion to consider what is "live-in-relationship" or "relationship in the nature of marriage" or when a writ of mandamus can be issued or whether protection can be granted to such petitioners whose act prima facie constitute offences under Sections 494/495 I.P.C.

20. Another judgment relied by learned counsel for the petitioner being judgment dated 2.11.2020 in **Writ - C No. - 17394 of 2020 (Sultana Mirza And Another Vs. State of U.P. and 5 others)** is also distinguishable on facts of the present case. Therefore, it is of no help to the petitioners.

Conclusions:

21. The discussion and findings as recorded in foregoing paragraphs are briefly summarized as under:-

(i) **A "relationship in the nature of marriage"** is akin to a common law marriage. Common law marriages require that although not being formally married :-

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

(ii) A `relationship in the nature of marriage' under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a `shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a `domestic relationship'.

(iii) Following relationship have not being recognised or approved as live-in-relationship or relationship in the nature of marriage. This list is not exhaustive but merely illustrative :-

(a) **Concubine** can not maintain relationship in the nature of marriage.

(b) **Polygamy,** that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage. **Polygamy is also a criminal offence** under Sections 494 & 495 I.P.C.

(c) Till a decree of divorce is passed the marriage subsist. Any other marriage during the subsistence of the first marriage would constitute an offence under Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955 and the person, inspite of his conversion to some other religion would be liable to be prosecuted for the **offence of bigamy**

(d) If both the persons are otherwise not qualified to enter into a legal marriage including being unmarried.

(iv) Once the petitioner No.1 is a married woman being wife of one Mahesh Chandra, the act of petitioners particularly the petitioner No.2, may constitute an offence under Sections 494/495 I.P.C. Such a relationship does not fall within the phrase "live-in-relationship" or "relationship in the nature of marriage". The writ petition has been filed by the petitioners for protection from interference by others in their living as husband and wife. If the protection as prayed is granted, it may amount to grant protection against commission of offences under Sections 494/495 I.P.C.

(v) It is settled law that writ of mandamus can be issued if the petitioner has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition. Similar view has also been taken by Hon'ble Supreme Court in **Kalyan Singh vs. State of U.P. (supra)** and in **Director of Settlement A.P. (supra).** Applying the principles of issuance of writ of mandamus on the facts of the present case, **we find that the petitioners have no legal right for protection on the facts of the present case inasmuch as such the protection as being asked, may amount to protection against commission of offence under Section 494/495 I.P.C. It is well settled law that writ of mandamus can not be issued contrary to law or to defeat a**

statutory provision including penal provision. The petitioners do not have legally protected and judicially enforceable subsisting right to ask for mandamus.

Answer to Questions

22. We answer question Nos.(i) and (ii) in negative i.e. no protection can be granted to petitioners by this Court in exercise of powers conferred under Article 226 of the Constitution of India.

23. For all the reasons aforestated, we are not inclined to exercise our discretionary jurisdiction. Consequently, the writ petition fails and is hereby **dismissed.**

(2021)08ILR A920
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Writ C No. 2737 of 2021

Kisan Seva Sansthan & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ved Prakash Shukla

Counsel for the Respondents:
C.S.C.

Civil Law - Maintenance and Welfare of Parents and Senior Citizens Act, 2007 - The Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 (hereinafter referred to as "the Rules') have been framed and enforced by the State Government of Uttar Pradesh - s. 21. Duties and Powers of the District Magistrate- Rule 21 (2) (iii) of Rules District Magistrate of each district alone has been vested with the authority to ensure that the old age home complies with the laws - Director, Social Welfare has no jurisdiction to cancel the earlier approval granted to the petitioner to run an old age home (Para 8)

Earlier approval granted to the petitioner to run an old age home cancelled on a bald assertion that the facility is not being run as per the norms - *Held* - Neither the violation of norms has been specified in the impugned communication nor the petitioner has been given any notice or opportunity to cure or explain the same - Communication set aside. (Para 28)

Allowed.(E-4)

List of Cases cited :

1. Commissioner of Police Vs Gordhandas Bhanji, AIR 1952 SC 16

2. Ashwani Kumar Vs U.O.I., (2019) 2 SCC 636

3. Nawabkhan Abbaskhan Vs St. of Guj., (1974) 2 SCC 121

(Delivered by Hon'ble Naheed Ara Moonis, J.
&
Hon'ble Saumitra Dayal Singh, J.)

1. Heard Shri Ved Prakash Shukla, learned counsel for the petitioners and Shri Mata Prasad, learned Standing Counsel for the State.

2. Present petition has been filed to challenge the communication dated 30.09.2020 issued by respondent no.4 - the District Social Welfare Officer, Sant Kabir Nagar. Thereby, the earlier approval granted to the petitioner no.1 to run an old age home has been cancelled and its existing inmates-forty seven in number,

directed to be shifted to another old age home run by respondent no.5.

3. Relevant to the dispute, it may be noted that petitioner no.1 is a registered society. It established the facility namely, an old age home at District Sant Kabir Nagar with a capacity to accommodate 150 senior citizens. Petitioner no.2 has described himself as the Superintendent of the old age home in question. On 15.03.2017, it was granted approval by respondent no. 2 - the Director, Social Welfare, Lucknow, Uttar Pradesh, to run that facility. The initial term of that approval was three years. The State has also granted aid to the petitioner to run the said old age home. Almost at the end of three years, an inspection is stated to have been conducted on 29.02.2020 at the facility being run by the petitioner, by the Deputy Director, Social Welfare, Lucknow, U.P. A nineteen-point report was prepared by the said Deputy Director in his inspection note. Copy of the same is annexed as Annexure CA-2 to the counter affidavit filed by the State.

4. It is the case of the petitioner, without any jurisdiction and without issuing any show cause notice or calling for any explanation from the petitioner, the impugned communication dated 30.09.2020 was issued by the Director, Social Welfare, cancelling the approval of the petitioner facility, for a solitary reason that that facility was not as per the government norms. No other violation has been made or elaborated in the impugned communication.

5. Various grounds of challenge have been pressed. Considering the wide impact of such action by the State authorities, on the vulnerable and exposed members of the society, besides affecting the activity of the petitioners, we have proceeded to consider the dispute raised by the petitioner, in its widest amplitude.

6. Having heard learned counsel for the petitioner and learned Standing Counsel for the State, we find, under section 19 of The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter referred to as "the Act'), the State Government is obligated to establish such number of old age homes in each district as may be necessary, the minimum being one old age home in each district of the State. Under section 19(2) read section 32 (2) (d) of the Act, the State Government has been delegated, amongst others, the power to frame Rules to provide for a Scheme for management of old age homes and to prescribe standards and types of services to be provided as may be necessary for medical care, entertainment etc. of the inmates of such old age homes. Thus, The Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 (hereinafter referred to as "the Rules') have been framed and enforced by the State Government of Uttar Pradesh. Rules 20 and 21 of the Rules read as under:

*"**20. Scheme for management of oldage homes for indigent senior citizens.** - (1) Oldage homes established under Section 19 of the Act shall be run in accordance with the following norms and standards:*

(A) The home shall have physical facilities and shall be run in accordance with the operational norms as laid down in Schedule III.

(B) Inmates of the home shall be selected in accordance with the following procedure:

(a) applications shall be invited at appropriate intervals, but at least once

each year, from indigent senior citizens, as defined in Section 19 of the Act, desirous of living in the home;

(b) in case the number of eligible applicants on any occasion is more than the number of places available in a home for admission, selection of inmates will be made in the following manner:

(i) the more indigent and needy will be given preference over the less indigent applicants;

(ii) other things being equal, older senior citizens will be given preference over the less old; and

(iii) other things being equal, female applicants will be given preference over male applicants.

Illiterate and/or very senior citizens may also be admitted without any formal application if the competent authority, is satisfied that the senior citizen is not in a position to make a formal application, but is badly in need of shelter;

(c) While considering applications or cases for admission, no distinction shall be made on the basis of religion or caste;

(d) The home shall provide separate lodging for men and women inmates, unless a male and a female inmate are either blood relations or a married couple;

(e) Day-to-day affairs of the old age home shall be managed by a Management Committee, such that inmates are also suitably represented on the Committee.

(2) State Government may issued detailed guidelines/orders from time to time for admission into and management of oldage homes in accordance with the norms and standards laid down in sub-rule (1) and the Schedule.

(3) State Government may form implementation committee at district level for management of day to day affairs of oldage homes.

(4) Visitors will be allowed in the oldage homes upon prior permission of the home management within prescribed hours, keeping in mind the security and welfare of the inmates.

(5) Under sub-section (2) of Section 9 of the Act and other relevant sections the State Government/department will start and publish integrated schemes and appropriate guide line for senior citizens."

21. Duties and Powers of the District Magistrate. *- (1) The District Magistrate shall perform the duties and exercise the powers mentioned in sub-rules (2) and (3) so as to ensure that the provisions of the Act are properly carried out in his district.*

(2) It shall be the duty of the District Magistrate to:

(i) ensure that life and property of senior citizens of the district are protected and they are able to live with security and dignity;

(ii) oversee and monitor the work of Maintenance Tribunals and Maintenance Officers of the district with a view to ensuring timely and fair disposal of applications for maintenance, and execution of Tribunals' orders;

(iii) oversee and monitor the working of old homes in the district so as to ensure that they conform to the standards laid down in these rules and any other guidelines and orders of the Government;

(iv) ensure regular and wide publicity of the provisions of the Act, and Central and State Governments, programmes for the welfare of senior citizens;

(v) encourage and co-ordinate with panchayats, municipalities, Nehru Yuva Kendras, educational institutions and

especially their National Service Scheme Units, organizations, specialists, experts, activists, etc. working in the district so that their resources and efforts are effectively pooled for the welfare of senior citizens of the district;

(vi) ensure provision of timely assistance and relief to senior citizens in the event of natural calamities and other emergencies;

(vii) ensure periodic sensitization of officers of various Departments and Local Bodies concerned with welfare of senior citizens, towards the needs of such citizens, and the duty of the officers towards the latter;

(viii) review the progress of investigation and trial of cases relating to senior citizens in the district, except in cities having a Divisional Inspector General of Police;

(ix) ensure that adequate number of prescribed application forms for maintenance are available in offices of common contact for citizens like Panchayats, Block Development Offices, Tahsildar Offices, District Social Welfare Offices, Collectorate, Police Station etc;

(x) promote establishment of dedicated help lines for senior citizens at district headquarters, to begin with; and

(xi) perform such other function as the Government, may by order, assign to the District Magistrate in this behalf, from time to time.

(3) With a view to performing the duties mentioned in sub-rule (2), the District Magistrate shall be competent to issue such directions, not consistent with the Act; these rules, and general guidelines of the Government, as may be necessary, to any concerned Government or statutory agency or body working in the district, and especially to the following;

(a) Officers of the State Government in the Police, Health and Publicity Departments, and the Department dealing with welfare of senior citizens;

(b) Maintenance Tribunals and Conciliation Officers;

(c) Panchayats and Municipalities; and

(d) Educational Institution."

7. The Schedule to the Rules lays down norms of physical facilities and operational standards for an old age home for indigent senior citizen, established under section 19 of the Act. It reads as below:

"NORMS OF PHYSICAL FACILITIES AND OPERATIONAL STANDARDS FOR AN OLD AGE HOME FOR INDIGENT SENIOR CITIZEN ESTABLISHED UNDER SECTION 19 OF THE ACT.

(I) Physical Facilities

(1) Land: The land for the old age home should be adequate to compete with the Floor-Area-Ratio (FAR) as prescribed by the relevant urban body/rural areas, the State Government shall provide adequate land for setting up of an old age home of requisite capacity that is adequate for living, medical, dining, toilet facilities, recreation, gardening, further expansion, etc.

(2) Living Space: The oldage home shall, as far as possible, have minimum area per intimate as per inmate as per the following norms:

(i) area of bedroom/dormitory per inmate.. 7.5 Sq. metres

(ii) Living area or carpet area per inmate i.e. including (i) above.. 12 Sq. metres plus ancilliary areas like kitchen, dining hall, recreation room, medical

room, etc., but excluding verandah, corridor, etc.

(2). Facilities

(1) The old age home shall have the following facilities:

(i) residential area comprising rooms/dormitories - separately for men and women;

(ii) adequate water for drinking and ancillary purposes;

(iii) electricity, fans and heating arrangement for inmates (as necessary);

(iv) kitchen-cum-store-and office;

(v) dining hall;

(vi) adequate number of toilets and baths, including toilets suitable for disabled persons;

(vii) recreation facilities, television, newspaper and an adequate collection of books: and

(viii) first aid, sick bay, and primary healthcare facilities.

(2) The old age home should be barrier-free with provision of ramps and handrails, and, wherever necessary, lifts etc.

(3) Operational standards

(1) Supply of nutritious and wholesome diet as per scale to be fixed by the State Government.

(2) Adequate clothing and linen for the inmates, including for the winter season.

(3) Adequate arrangements for sanitation, hygiene, and watch and ward/security.

(4) Arrangements with the nearest Government hospital for emergency medical care, and with the nearest Police Station for security requirements."

8. In the first place, by virtue of the clear intent expressed in Rule 21 (2) (iii) of the Rules and in absence of any other contrary provision of law, in that regard, we find, the District Magistrate of each district alone has been vested with the authority to ensure that the old age home such as the one set up by the petitioner complies with the laws. The power to grant approval is nothing more than a certification made that the old age home conforms to the laws. The District Social Welfare Officer is not the District Magistrate. That power vests in the District Magistrate and no other authority. There is no delegation of that authority, in law and therefore, none is permissible. Consequently, the communication issued by the District Social Welfare Officer dated 30.09.2020 is found to be without jurisdiction and *non-est.*

9. Even otherwise, a perusal of the Schedule to the Rules and therefore the Scheme framed by the State Government reveals, it provides for the standard of the accommodation - with reference to Floor-Area Ratio (FAR); private living space, being size of bedroom; common living area; separate rooms for men and women; clean water for drinking and other purposes; electricity supply; kitchen-cum-store; dining hall; toilets and bathrooms including toilets for disabled persons; recreation facilities; access to television, newspaper, first aid, sick bay; other facilities for assistance and comfort for living of the old and disabled persons. That Scheme also lays down the operational standards required to be maintained, being availability of wholesome diet, clothing, sanitation, hygiene, security and access to government medical hospitals and emergency medical aid as also police station.

10. As to facts noted in the inspection report dated 29.02.2020, it does not appear

that any specific or functional or other fundamental inadequacy or deficiency was noted, in the facility being run by the petitioner. Amongst the nineteen points on which the report was submitted, it has been observed, against point no.1 that the room size is very small. At the same time, the size of the rooms inspected has been recorded as 8 x 10 feet (15 rooms) and 10 x 10 feet (3 rooms). Against the prescribed norm of 7.5 sq. meters, the smaller room size noted in the inspection report is 8' x 10' feet, i.e. 7.43 sq. meter. Second, the record of routine medical check-up (of the inmates) was not found at the time of inspection. Third, deficiencies were noted with respect to admission granted by the petitioner to the inmates. Thus, admission of some of the inmates was found not approved by the District Social Welfare Officer. Direction was issued for necessary correction to be made in that regard. Also, against 15 employees required at the petitioner's facility, the staff was found to be short by three. However, the inspection note also records that the petitioner was seeking to make fresh appointments. Fourth, the total number of inmates (47) was observed to be less than the capacity (150). Again, a direction was issued to fill up the facility with adequate number of inmates.

11. Other than the above observations, it has been positively mentioned in the inspection report that the facility being run by the petitioner has available, power back up of 5 kVA electricity generator and another back up provided by two power inverters sets. The water availability was also found to be proper. The location of the facility is about 500 meters from the police station. On enquiry made, the inmates informed the inspection team that they were being helped to do Yoga exercises and to offer prayers, at the facility. The district hospital was reported to be 2 kms away from the facility. The facility for bed and storage etc. were found adequate. The food being supplied to the inmates was found to be as per menu that was being rotated. The store was also inspected and the food ingredients etc. were found to be of desired quality. The kitchen facility was also found to be proper. Out of forty seven inmates residing at the petitioner's facility, 25 were males and 18 females. The attendance register was also found to have been properly maintained. Cleanliness was also found to be of desired standard at the petitioner's facility. Facilities for recreation such as availability of carrom board, playing cards, etc. were found existing.

12. Detailed reference has been made by us to the inspection report to bring out the true nature of deficiencies noted therein. None of the deficiencies noted in the inspection report gave rise to any show cause notice or other proceeding against the petitioner by the District Magistrate or any other authority, before the impugned communication dated 30.09.2020 came to be issued. In fact, none of those deficiencies has been stated or cited as a reason to cancel the approval granted to the petitioner society.

13. On the other hand, it clearly appears that the facility being run by the petitioner was of desired quality, fit for human inhabitation by the citizens in need thereof, as contemplated by the Act and the Rules framed thereunder. The detailed note of inspection dated 29.02.2020 referred to above, clearly points in that direction. That inspection note *per se* does not indicate either violation of Article 21 of the Constitution of India or any provision of

the Act, the Rules or the Scheme proved thereunder.

14. Though we are not inherently inclined to draw a subjective satisfaction as to the facts found during that inspection as that exercise may not be desirable, though not impermissible in exercise of the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, we proceed to examine the *prima facie* merit of the objections noted in the inspection dated 29.02.2020. While doing so, we are conscious of the time-tested rule applicable to exercise of judicial review - an order may be defended on the strength of the recital it contains and not what the authority may seek to rely in support thereof, upon challenge being made to the same. In ***Commissioner of Police Vs. Gordhandas Bhanji, AIR 1952 SC 16,*** it was observed:

"13. An attempt was made by referring to the Commissioner's affidavit to show that this was really an order of cancellation made by him and that the order was his order and not that of Government. We are clear that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

15. We have been constrained to adopt that pro-active approach as the avowed object of the Act and the Rules is humanitarian that in the context of the State action is to advance the welfare object of the State and to further the purpose, firmly established by Article 21 of the Constitution of India. Thus, we allow the learned standing counsel to rely on the points noted in the inspection note to test if there exists any material whatsoever to contemplate a proceeding to cancel the approval granted to the petitioner. If the result of that enquiry would result in an answer in the negative, there would survive no need to adopt the jurisprudentially most palatable option to remand the proceedings. It is so because, cancellation of the approval of the old age home, three years after it has been run, affects, amongst others, the right to shelter of the indigent and other inmates of that home.

16. An old age home is not a reformatory home or a place of confinement. It is the last hope offered by the society, of humanity, to the indigent, the abandoned, the uncared and the needy. Once brought to that last refuge, it offers hope of a goodlife that human existence deserves by its very nature. It helps preserve and rekindle that hope - in those who need it the most. Such a place provides an opportunity of some companionship, emotional support, therapeutic occupation, friendships and acquaintances, recreation facilities and activities to overcome social isolation, if not on a sustained or permanent basis, at least on some intermittent and temporary basis. It provides independence to senior citizens in daily life and helps them re-establish faith in high values of life. Bereft of such ingredients, a human life may truly be reduced to a bare animal existence. In the context of the Act, the Supreme Court in ***Ashwani Kumar v. Union of India, (2019) 2 SCC 636*** recognised the right to live with dignity,

right to shelter and right to health as parts of right to life under Article 21 of the Constitution of India. It was held:

"44. We accept that the right to life provided for in Article 21 of the Constitution must be given an expansive meaning. The right to life, we acknowledge, encompasses several rights but for the time being we are concerned with three important constitutional rights, each one of them being basic and fundamental. These rights articulated by the petitioner are the right to live with dignity, the right to shelter and the right to health. The State is obligated to ensure that these fundamental rights are not only protected but are enforced and made available to all citizens".

17. Looked in that perspective, the displacement of the inmates of an old age home on whims and fancies of government functionaries and others is not only undesirable but would have a deleterious impact on the already seriously impaired fundamental right to live with dignity, of the hapless citizens who are forced purely by turn of circumstances and vagaries of life, to reside at such homes for reasons not of their making. It may not be forgotten, to be housed and to be taken care of at an old age home, upon being abandoned or not cared enough, itself involves a dent to human dignity, to lesser or larger extent, depending on the individual circumstances visiting each inmate, immediately preceding his admission to such facility.

18. However, with passage of time, some wounds may heal. Hurt and injury to one's dignity may be soothed by the balm of love, affection and care received and time lived in a conducive environment. Such inmates/persons may develop desired or necessary levels of comfort, companionship, friendships, social inter dependencies, besides enjoying some comfort within the safe physical environment of an old age home where they may be housed. To forcibly move out such inmates for trivial, non-permissible grounds noted in routine inspection notes may be to allow for another violation of or injury to arise, to their fundamental right to live with dignity, though unintentionally. Also, it would defeat the very object that the Act, Rules & the Scheme seek to serve.

19. The inmates of an old age home are not hostages of time. They are living human beings whose life and dignity the welfare State promises to protect. We cannot fathom a situation where life and dignity of a human being may be claimed to have been protected if his opinion as to his choice of residence is completely ignored or not heard. One who may have been abandoned or left alone cannot be shifted from one facility to another with his choice counting for nothing. We do not see how his fundamental right to dignity may be claimed to have been protected unless his views are ascertained and considered. In the other situation, though a free citizen he would have been treated and dealt with as not.

20. It is not only the life but the dignity of human existence that the Act and the Rules clearly seek to preserve. The inmates being the persons whose fundamental right to live with dignity and to shelter is likely to be affected upon an action that may be proposed by the District Magistrate, a minimum opportunity of being heard, is necessary wherever such proposed action may result in dislocation of the inmates. Though their views may not be decisive as to the action to be taken yet,

due weightage must be given to the same before a final decision is taken.

21. In ***Nawabkhan Abbaskhan v. State of Gujarat, (1974) 2 SCC 121***, it was observed:

"7. Unfortunately, Counsel overlooked the basic link-up between constitutionality and deviation from the audi alteram partem rule in this jurisdiction and chose to focus on the familiar subject of natural justice as an independent requirement and the illegality following upon its non-compliance. In Indian constitutional law, natural justice does not exist as an absolute jural value but is humanistically read by Courts into those great rights enshrined in Part III as the quintessence of reasonableness. We are not unmindful that from Seneca's Medea, the Magna Carta and Lord Coke to the constitutional norms of modem nations and the Universal Declaration of Human Rights it is a deeply rooted principle that "the body of no free man shall be taken, nor imprisoned, nor disseised, nor outlawed, nor banished nor destroyed in any way" without opportunity for defence and one of the first principles of this sense of justice is that you must not permit one side to use means of influencing a decision which means are not known to the other side.

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...

14.Where hearing is obligated by a statute which affects the fundamental right of a citizen, the duty to give the hearing sounds in constitutional requirement and failure to comply with such a duty is fatal. Maybe that in ordinary legislation or at common law a tribunal, having jurisdiction and failing to hear the parties, may commit an illegality which may render the proceedings voidable when a direct attack is made thereon by way of appeal, revision or review, but nullity is the consequence of unconstitutionality and so without going into the larger issue and its plural divisions, we may roundly conclude that the order of an administrative authority charged with the duty of complying with natural justice in the exercise of power before restricting the fundamental right of a citizen is void andab initioof no legal efficacy. The duty to hear manacles his jurisdictional exercise and any act is, in its inception, void except when performed in accordance with the conditions laid down in regard to hearing. Maybe, this is a radical approach, but the alternative is a traversty of constitutional guarantees, which leads to the conclusion of post-legitimated disobedience of initially unconstitutional orders.....…

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20. We express no final opinion on the many wide-ranging problems in public law of illegal orders and violations thereof by citizens, grave though some of them may be. But we do hold that an order which is void may be directly and collaterally challenged in legal proceedings. An order is null and void if the statute clothing the Administrative Tribunal with power conditions it with the obligation to hear, expressly or by implication. Beyond doubt, an order which infringes a fundamental freedom passed in violation of the audi alteram partem rule is a nullity. When a competent court holds such official act or order invalid, or sets it aside, it operates from nativity, i.e., the impugned act or order was never valid. The French jurists call it L'inexistence or

outlawed order (Brown and Garner: French Administrative Law, p. 127) and could not found the ground for a prosecution. On this limited ratio the appellant is entitled to an acquittal. We allow his appeal".

22. Thus, in our view, any action such as cancellation of an earlier approval granted to an old age home would result in dislocation of it's inmates. It would have to be tested if the inmates of such an old age home perceive any loss of or violation of their fundamental right to live with dignity. To that end, we read into these proceedings an opportunity of hearing to its inmates to ascertain their individual and collective views on the subject matter of such proceedings. It is necessary to safeguard their fundamental right to live with dignity. The impugned communication dated 30.09.2020 has clearly been issued without ascertaining the views of the inmates on the change proposed. For that reason as well the said communication cannot be sustained.

23. On merits, we find, against the room size 7.5 sq. meters prescribed by the Rules, the measurement of the smaller rooms at the petitioners' facility was found to be 7.432 sq meters. The difference, even if exists is negligible. In fact, it is meaningless. There is no satisfaction recorded of that room size being insufficient or inadequate. Also, the room size is not alleged to have been altered after the grant of approval in 2017. The other deficiencies recorded - of a few admissions having been granted without approval of the authorities and; less number of staff by three (out of fifteen) were issues that ought to have been resolved by issuing time bound directions for necessary compliance by the petitioner. Also, in absence of any satisfaction of lack of medical care of the inmates in general and/or any inmate in particular, the lack of record of regular medical check-up could not, *per se*, be relied on to support action of cancellation of approval to run the old age home that too by way of a measure of first resort. Corrective measures should have been specified and enforced on the petitioner, in a time bound manner. The respondent authorities may remember the Act, the Rules and the State government's Scheme seek to pursue the welfare object of the State and establish old age homes as a collaborative effort by the State with active participation of private individuals etc. That spirit of the laws must pervade all State actions to establish, run and improve such facilities.

24. A holistic view ought to have been taken before cancelling the petitioner's approval. Here, it may be noted that such facility could not have been granted approval and it could not have run unless proper inspection had been made prior to its running. It is not the case of the respondents that such inspection was not carried out before the approval was granted. Before cancellation of the approval that results in closure of the facility/old age home, facts must exist, be ascertained and be considered by the District Magistrate and his objective satisfaction must be recorded, in writing to justify such extreme action. It is necessary to protect the interest of the vulnerable and the needy i.e. the inmates or potential inmates in particular and the society in general, beside ensuring fairness in State action.

25. Thus, cancellation of approval has to be a measure of last resort, to be adopted when no realistic possibility is seen to exist

to help or make such old age home run in accordance with the laws. It may be adopted only after (i) serious deficiencies/lacuna/violations are noticed by the respondent authorities in the course of their regular inspections or otherwise, (ii) those deficiencies/lacuna/violations have been notified to the person running the facility by means of a prior written notice (issued by the District Magistrate) requiring it to rectify the same in a reasonable time or to show cause, (iii) the person has failed to offer necessary rectification and (iv) the District Magistrate is satisfied for cogent reasons to be recorded in writing (a) upon consideration of the reply furnished by the petitioner to that notice [(ii) above], that the facility/old age home was being run contrary to any mandatory provision of the Act or the Rules or the Scheme framed by the State Government, to the detriment of the inmates/potential inmates and (b) that the person failed to or is unable to make necessary corrections as may ensure that the old age home is run in accordance with the Act read with the Rules and the Scheme. At that stage and before taking that final decision, the views of the inmates of the old age home must be ascertained and considered before taking any decision that may result in transferring them out from the existing facility.

26. In the present facts, it may be safely assumed in the context of the inspection report dated 29.02.2020 and the earlier approval granted, the petitioner facility was largely in order and therefore the approval was granted to it in the year 2017. No serious or incurable defect or deficiency having been noted and the inmates being not dissatisfied with the same, it was an obligation on the State authorities to extend the approval rather than initiate cancellation proceedings. An approval once granted should be looked to be continued though with equal conviction all efforts should be continuously made to ensure that such an old age home complies with all laws and stays true to the object for which it may have been established.

27. The power given to the respondents under the Rules and the Scheme is to monitor and to regulate such facility. Once the facility has been set up in accordance with law, its approval cannot be cancelled or tinkered with in a casual or whimsical manner as that action has, amongst others, a negative impact on the inmates for whose benefit it exists. It also brings a wholly avoidable uncertainty in their lives. Any defect or deficiency that may have been noted in the running the facility, duly approved, ought to be corrected by issuing necessary directions and by seeking necessary compliance/s, in the spirit of collaboration, in a time bound manner.

28. In that regard, we find that the deficiencies with respect to non-approval of the admission of the inmates, non-maintenance of record of medical check-up and shortage of staff have been noted in the inspection report. Those have to be corrected. To that extent, the inspection report and the direction issued are wholly correct. However, we are unable to appreciate the cancellation order being passed on a bald assertion that the facility is not being run as per the norms. Neither the violation of norms has been specified in the impugned communication nor the petitioner has been given any notice or opportunity to cure or explain the same nor we find any such gross violation exists, in the present case. In the face of the inspection report to which we have referred

to in detail, the petitioner is found to have largely observed all norms under the Act and the Rules. The observation to the contrary made in the impugned communication is plainly unfounded and perverse. As to the other matters, appropriate directions should have been issued for compliance.

29. For the above reasons, the impugned communication dated 30.09.2020 cannot stand and is accordingly set aside. The District Magistrate is directed to consider the petitioner's claim for renewal of approval, in light of the observations made above and pass appropriate orders within a period of two weeks therefrom. In that regard, the petitioners may file a proper application to establish the fact of their continuing to comply with the Act, the Rules and the Scheme. That application may be filed within one month from today along with a copy of this order. The District Magistrate shall take a decision thereon. As for the Respondent no.5, no relief is granted against that respondent. We allow both facilities to exist. However, as to the forty seven inmates originally housed at the old age home set up by the petitioner, their views may govern their admission at either of the facilities.

30. Let a copy of this order be communicated to the Chief Secretary, Government of Uttar Pradeseh, by the Registrar General of this Court for his knowledge and issuance of necessary directions to all concerned in the State of Uttar Pradesh for necessary action and compliance.

31. We may make it clear that the present order has not been passed to prohibit the respondents from cancelling any approval granted to any old age home but to confine those proceedings to the extreme cases where such action becomes necessary and unavoidable for any reason as discussed in this order, or otherwise.

32. Accordingly, the present petition is **allowed**.

33. No order as to costs.

(2021)08ILR A931
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2021

BEFORE

THE HON'BLE NAHEED ARA MOONIS, J.
THE HON'BLE SARAL SRIVASTAVA, J.

Writ C No. 56046 of 2013

M/S Promotional Club ...Petitioner
Versus
C.E.O. NOIDA & Anr. ...Respondents

Counsel for the Petitioner:
Sri Rakesh Kumar, Sri Chandra Kumar Rai, Deba Siddiqui, Sri Kshitij Shailendra, Sri Munesh K. Sharma, Sri Ravi Kiran Jain

Counsel for the Respondents:
C.S.C., Sri Kaushalendra Nath Singh, Sri Shivam Yadav, Sri Neeraj Tripathi, Sri Manish Goyal

Civil Law - Constitution of India - Art.226 - Civil Procedure Code,1908 – O.47 - R.1 - Review - limits to the exercise of the power of review - In review it is not permissible for an erroneous decision to be "reheard and corrected - while exercising power of review, Court not act as an appellate court and cannot rehear the matter - party seeking review has to establish that despite the exercise of due diligence, it could not bring on record the facts which it wants to bring on record

through review application - *Due Diligence* - meaning - law imposes a duty upon a person to act with due diligence which means that his action should exhibit candour which a prudent man would exercise in accomplishing his own affairs. (Para 24,36, 72)

Review application for review of judgement whereby the Court directed NOIDA to consider applications of petitioner for allotment of plots - Review by NOIDA on the ground that despite the exercise of due diligence, it could not bring on record the correct fact that no plot is available with the NOIDA under the old scheme, therefore, the claim of the petitioner cannot be considered in the year 2019-2020 under the old scheme - Held - Review application lacks necessary pleadings as regards the exercise of due diligence adopted by the NOIDA in bringing the fact of non-availability of plots under the old scheme - NOIDA was granted opportunity twice to place correct facts before the Court, but NOIDA chooses to remain dormant - Facts which NOIDA wants to bring on record by review application if allowed to be brought on record through review application would reopen the rehearing, which is not permissible (Para 45, 58, 66)

Dismissed. (E-4)

List of Cases cited :

1. S.Nagaraj Vs St. of Karn. 1993 (Suppl.) (4) 595

2. Sunil Vasudeva & ors. Vs Sundar Gupta & ors. 2019 (17) SCC 385

3. Mohammad Azizul Rahman Khan Vs Mohammad Ibrahim AIR 1958 Alld. 19 (DB)

4. Sureshkumar Kanhaiyalal Jethlia Vs St. of Mah. & ors. AIR 2001 (Bombay) 438 (DB)

5. Ram Sarup Gupta (dead) by L.Rs. Vs Bishun Narain Inter College & ors. AIR 1987 SC 1242

6. Bhagwati Prasad Vs Chandramaul AIR 1966 SC 735

7. Brij Behari Lal Budholiya Vs IVth A.D.J., Jalaun at Orai & ors. 2000 (2) ARC 456

8. State of Haryana & ors. Vs Mohinder Singh & ors. 2003 (1) AWC 567 SC

9. Rajendra Kumar & ors. Vs Rambhai & ors. AIR 2003 SC 2095

10. Lily Thomas etc. Vs U.O.I. & ors. AIR 2000 SC 1650

11. Smt. Meera Bhanja Vs Smt. Nirmala Kumari Choudhury AIR 1995 SC 455

12. St. of Har. Vs M.P. Mohla (2007) 1 SCC 457 (Paragraphs 27 & 28)

13. M/s Banaras Electric Light & Power Co. Ltd. Vs The Collector, Varanasi & ors. AIR 1982 Alld. 355 (DB)

14. Satya Prakash Pandey Vs Dev Brat Mishra 2011 (3) AWC 2512

15. Divisional Superintendent Northern Railway Allahabad Vs Second A.D.J., Allahabad & Anr 1997 AWC (Supp.) 298

16. Aribam Tuleshwar Sharma Vs Aribam Pishak Sharma, AIR 1979 SC 1047

17. Bhagwati Prasad Vs Shri Chandramaul, (1966) 2 SCR 286 : (AIR 1966 SC 735

18. Chander Kanta Bansal Vs Rajinder Singh Anand (2008) 5 SCC 117

19. M/s Banaras Electric Light & Power Co. Ltd. Vs The Collector, Varanasi & ors. AIR 1982 Alld. 355 (DB)

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

Order on Civil Misc. Review Application No.19 of 2020.

1. Heard Sri Manish Goyal, learned Senior Counsel assisted by Sri Shivam Yadav and Sri Kaushalendra Nath Singh, learned counsel for the NOIDA and Sri

Kshitij Shailendra, learned counsel for the petitioner.

2. Learned counsel for the petitioner has filed counter affidavit to the review petition of NOIDA (respondent in writ petition). When learned counsel for the NOIDA was asked as to why no rejoinder affidavit has been filed to the counter affidavit, he submitted that since notices have not been issued and counter affidavit has not been invited, therefore, this is not the appropriate stage to file rejoinder affidavit.

3. Because of the submission raised by the learned counsel for the NOIDA, this Court has heard the review petition on admission stage ignoring counter affidavit.

4. The NOIDA has preferred the present review application for review of the judgement dated 31.07.2019 passed by this Court in Writ-C No.56046 of 2013 whereby this Court had directed the NOIDA to consider the two applications of petitioner for allotment of plots by law.

5. The brief facts, as stated in the judgement dated 31.07.2019 necessary for the present dispute, are that petitioner had made two applications nos.284 and 285 for allotment of plot of larger than 2000 square meter in Phase-II & Phase-III of the industrial area on the lease of 90 years in the open-ended scheme advertised by the NOIDA.

6. The registration was opened on 05.03.2010 and was closed on 05.07.2012. The petitioner submitted two applications complete in all respect for allotment of plots. The petitioner deposited the registration amount of Rs.8 lacs for each application. The applications of the petitioner were registered on 09.12.2011 during the period, the scheme was open.

7. The NOIDA refunded the registration amount of Rs.8 lacs to the petitioner vide separate letters dated 07.11.2012 stating that the scheme had closed. The petitioner being aggrieved by the action of NOIDA preferred the aforesaid writ petition praying for direction upon NOIDA-authorities to consider its application nos.284 & 285 and to allot the plots in its favour, and for quashing the illegal allotment made by NOIDA.

8. This Court on 23.01.2019 passed the following order in the writ petition:-

"Heard Shri Ravi Kiran Jain, learned Senior Advocate assisted by Shri Kshitij Shailendra & Ms. Deba Siddiqui appearing for the petitioner and Shri Shivam Yadav, learned counsel for the New Okhla Industrial Development Authority.

A counter affidavit has been filed, but in the counter affidavit it is not clear as to when the claim for allotment of industrial plots were closed by whose order and what was the target of the scheme as to how many allotment should be made and how many applications were considered and why the application of the petitioner has not been considered in spite of fulfilling all the criteria. It is further to be disclosed to the Court that who are the allottees and whether any plots are still available for allotment under the aforesaid scheme of 2010 pursuant to an advertisement dated 5.3.2010.

Shri Shivam Yadav, learned counsel appearing for the New Okhla Industrial Development Authority prays that he may be allowed three weeks' time to file a better affidavit by way of a supplementary counter affidavit brining on

record the information sought by this Court and any other material that may be relevant for proper adjudication of the case.

As prayed, three weeks is allowed.

List after three weeks."

9. Pursuant to the aforesaid order, the NOIDA filed a supplementary affidavit titled as 'second supplementary counter affidavit', wherein it stated in paragraph no. 8 that there were 27 plots under the scheme and only 15 plots were allotted. In paragraph no. 9 of the affidavit, it is stated that total 90 applications were received under the scheme, out of which 65 applications were rejected and industrial plots were allotted to 15 applicants only. Thus, given the averments made in paragraph no.8 of the Supplementary Affidavit, 12 plots were not allotted and remained with NOIDA.

10. This Court again on 22.05.2019 directed the counsel for the NOIDA to take instructions if the applications of the petitioner can still be considered for allotment of plots from amongst the remaining unallotted plots. In response to the above direction of the Court, Sri Shivam Yadav learned counsel for the NOIDA submitted that 8 plots remained unallotted, and NOIDA shall consider the allotment of plots to the petitioner if so directed by the Court.

11. In the light of the aforesaid fact, this Court found that application of the petitioner was not considered for allotment of plots, and without the opportunity to the petitioner to appear before the Screening Committee, its registration money had been refunded.

12. The Court while allowing the writ petition, gave the following directions:-

"Accordingly, we are of the opinion that the petitioner is entitled to consideration of its two applications for the purposes of allotment in accordance with law.

In view of the aforesaid facts and circumstances, the petitioner is directed to re-deposit the registration amount of Rs.8 lakh each in respect of its two applications with NOIDA within a period of one month and on deposit of such registration amount the applications No.284 and 285 would be deemed to have been revived and the NOIDA would consider them in accordance with law for the purposes of allotment of the un-allotted remaining plots in Phase - II & III of the industrial area, NOIDA within a period of two months from the aforesaid deposit.

A writ of mandamus is issued accordingly and the writ petition stands allowed with no order as to costs."

13. It transpires that since NOIDA had delayed the processes of compliance of judgement dated 31.07.2019, therefore, the petitioner preferred Contempt Application (Civil) No.8214 of 2019. In Contempt Application, NOIDA took a stand that an order was passed after the screening of the petitioner's claim on 20.12.2019 in which the petitioner was found eligible for allotment of plots. The NOIDA vide letter dated 07.01.2020 informed the petitioner that there are as many as 93 plots available with the NOIDA and has sought information as to in which category the petitioner would like to apply.

14. It appears that in that process NOIDA found that incorrect facts in respect to unallotted plots have been stated by it in the second supplementary counter affidavit since relying upon said facts the Court recorded a finding that there were 27

plots available under the old scheme out of which 15 plots had been allotted and 12 plots remain unallotted. On discovery that incorrect fact has been stated in the second supplementary counter-affidavit, NOIDA took out the details of 27 plots which were available with it at the time of introduction of scheme 2009-10. It found that all 27 plots were allotted by the end of the year 2014.

15. In the aforesaid backdrop, the NOIDA thought that it could not allot plots to petitioner under the old scheme, and accordingly, it filed Civil Misc. Modification/Clarification Application No.17 of 2020 seeking modification/clarification of the judgement dated 31.07.2019 which was dismissed by this Court by order dated 01.10.2020.

16. It is only after dismissal of modification/clarification application, NOIDA has preferred the present review application. The facts stated by the NOIDA in paragraphs 5 to 13 of the affidavit filed in support of the stay application in review application are reproduced hereinbelow:-

"5. That on the basis of the 2nd Supplementary Counter Affidavit, this Hon'ble Court has came to a conclusion that since eight plots are still available with 'NOIDA' for the purposes of allotment, and also on the ground that the petitioner's claim was never considered by 'NOIDA', the Hon'ble Court has considered the aforesaid submission, which was made by Shri Shivam Yadav, Counsel representing 'NOIDA' on behalf of the 2nd Supplementary Counter Affidavit.

6. That the Hon'ble Court has discussed the scheme in which the application was made by the petitioner and further came to the conclusion that the petitioner's case since has not been considered by the screening committee, it is at least entitled for consideration of application by 'NOIDA'. It further directed for revival of the applications on the payment of Rs.08 Lacs per application and further directed 'NOIDA' to consider them in accordance with law for the purposes of allotment of the un-allotted remaining plots in Phase-II & Phase-III of industrial area of 'NOIDA' within a period of two months from the aforesaid deposit.

7. That in this backdrop, the 'NOIDA' has inquired into the matter and on inquiry it was found out that the instruction which was passed on by one of its officers, who sweared the 2nd Supplementary Counter Affidavit, was a false information, in fact when such affidavit was filed, all the plots under the old scheme i.e. 27 in numbers were allotted by the end of year 2014. What was available with the 'NOIDA' were newly carved out plots which were available for the purposes of allotment under the new schemes of 'NOIDA'.

8. That faced with such circumstances, the 'NOIDA' immediately took out the details of all the 27 plots, which were present with 'NOIDA' at the time of introduction of scheme of 2009-10 and it was found out that all 27 plots were allotted by the end of year 2014. For kind perusal of this Hon'ble Court, a copy of the list of all 27 plots is being filed herewith and marked as Annexure No.2 to this affidavit.

9. That when such incorrect affidavit was filed before the Hon'ble Court, the matter became important for the purposes of investigation and scrutiny at the end of 'NOIDA' and for the aforesaid reasons, 'NOIDA' has issued show-cause notice to the concerned erring officer on 12.06.2020 and has also referred his

matter to the State Government. For kind perusal of this Hon'ble Court, the copy of the show-cause notice dated 12.06.2020, issued by the 'NOIDA' is being filed herewith and marked as Annexure No.3 to this affidavit.

10. That it is under these circumstances, and in this backdrop, the 'NOIDA' is filing present review application, wherein, if the aforesaid fact of 08 plots belonging to the new scheme would have been communicated to the Hon'ble Court, the Hon'ble Court would have directed the consideration of petitioner's claim in accordance with law and as per the prevailing schemes.

11. That there were 95 applicants against 27 plots, who were to be allotted in the said scheme of 2009-2010, however only 15 applicants were found eligible and they were allotted plots accordingly. It is pertinent to mention here that in case all the 95 applicants would have been found eligible they then also the authority would have to find a fair method of allotment, thus it is clear that merely applying for a plot does not mean that a plot should have been allotted to the person applying for same.

12. That it is pertinent to mention here that the plot for which the respondent applied were for an area of 3200 Square Meter and 4000 Square Meter out of 27 plots there were three plots of 4000 Square Meter and 8 plots of 3200 Square Meter, which were all allotted in different schemes till 2014.

13. That the whole controversy germinated because of the observation which took note of an affidavit filed by 'NOIDA' in which it was communicated that, at present 8 plots were available/un-allotted and it took note of a submission that 'NOIDA' will consider the allotment of plot if the Court so directs."

17. Learned Senior Counsel for the NOIDA has submitted that an order or judgement passed by the Court can be recalled for the ends of justice. He submits that in the instant case, the Court had proceeded to allow the writ petition on the basis of incorrect facts brought on record which has resulted in grave injustice to NOIDA, and the High Court being a Court of record and a Court of plenary jurisdiction inheres the power to prevent miscarriage of justice and correct the record of the Court. Accordingly, he submits that the review application is maintainable and Court can review its order to set the record straight.

18. On the submission about the scope of review, learned Senior Counsel for the NOIDA has placed reliance upon the following judgements:-

(i). S.Nagaraj Vs. State of Karnataka 1993 (Suppl.) (4) 595 (Paragraphs 18 & 19);

(ii). Sunil Vasudeva and Others Vs. Sundar Gupta & Others 2019 (17) SCC 385 (Paragraphs 19 & 28);

(iii). Mohammad Azizul Rahman Khan Vs. Mohammad Ibrahim AIR 1958 Alld. 19 (DB);

(iv). Sureshkumar Kanhaiyalal Jethlia Vs. State of Maharashtra and Others AIR 2001 (Bombay) 438 (DB) (Paragraphs 6 & 9).

19. He further contends that the NOIDA has acted diligently without any delay in bringing to the notice of the Court the correct facts, thus, the present case falls within the parameters of law laid down by the Court for review of judgement or order. He further submits that from the reading of the averments made by the NOIDA in the review application, it is evident that NOIDA has acted diligently and efficiently in bringing to the notice of the Court the

correct facts. He submits that necessary pleadings in respect of the exercise of due diligence by the Noida to bring the said facts to the notice of the court has been stated in the affidavit, and the Court should take a liberal view in constructing pleadings. Accordingly, he submits that the present case falls within the parameters of O47R1 of C.P.C. and the law laid down by the courts for review of the judgment.

20. On the submission that the Court should adopt a liberal view instead of pedantic approach in constructing the pleading, Senior Counsel for the NOIDA has placed reliance upon the following judgements:-

(i). ***Ram Sarup Gupta (dead) by L.Rs. Vs. Bishun Narain Inter College & Others AIR 1987 SC 1242;***

(ii). ***Bhagwati Prasad Vs. Chandramaul AIR 1966 SC 735;***

(iii). ***Brij Behari Lal Budholiya Vs. IVth Additional District Judge, Jalaun at Orai and Others 2000 (2) ARC 456.***

21. It is also urged that since there is no plot under the old scheme, therefore, the claim of the petitioner cannot be considered in the year 2019-2020 for allotment of plots under the old scheme.

22. Per contra, learned counsel for the petitioner contends that the fact no plot is available under the old scheme is not correct as according to him the plots are available with NOIDA under the Old Scheme. He submits that presuming without admitting that no plot is available with the NOIDA under the old scheme, this fact was in the knowledge of the NOIDA, and as it is not a new fact which took place after the judgement of this Court, therefore, no ground for review is made out and review application is misconceived.

23. Sri Kshitij Shailendra, learned counsel for the petitioner has placed catena of judgements on the scope of review, but only the following judgements relevant in the instant case are being referred:-

(i). ***State of Haryana and Others Vs. Mohinder Singh and Others 2003 (1) AWC 567 SC*** (Paragraphs 3 & 5);

(ii). ***Rajendra Kumar and Others Vs. Rambhai and Others AIR 2003 SC 2095*** (Paragraph 5);

(iii). ***Lily Thomas etc. Vs. Union of India and Others AIR 2000 SC 1650*** (Paragraphs 52, 55 & 57);

(iv). ***Smt. Meera Bhanja Vs. Smt. Nirmala Kumari Choudhury AIR 1995 SC 455*** (Paragraph 8);

(v). ***State of Haryana Vs. M.P. Mohla (2007) 1 SCC 457*** (Paragraphs 27 & 28).

24. He further submits that one of the essential condition for review of the judgement is that the party seeking review has to establish that despite the exercise of due diligence, it could not bring on record the facts which it wants to bring on record through review application which is necessary for the ends of justice; but in the present case, the affidavit filed in support of the stay application lacks necessary pleading in respect of the fact that despite the exercise of the due diligence by the NOIDA, it could not bring aforesaid facts on record. He submits that the review application is liable to be dismissed at the threshold.

25. It is also urged that prayer made in the review application is also vague since the review application does not

disclose that the NOIDA is seeking review of which part of the judgement.

26. In respect of submission that since NOIDA has failed to demonstrate that despite the exercise of due diligence, it could not bring correct facts on record, therefore, review application is not maintainable, learned counsel for the petitioner has placed reliance upon following judgements:-

(i). ***M/s Banaras Electric Light and Power Co. Ltd. Vs. The Collector, Varanasi and Others AIR 1982 Alld. 355 (DB)*** (Paragraphs 9 & 11);

(ii). ***Satya Prakash Pandey Vs. Dev Brat Mishra 2011 (3) AWC 2512*** (Paragraphs 9 & 10);

(iii). ***Divisional Superintendent Northern Railway Allahabad Vs. Second Additional District Judge, Allahabad and another 1997 AWC (Supp.) 298*** (Paragraph 10).

27. We have heard learned counsel for the parties and perused the record.

28. Before adverting to the merits of the case, it would be apposite to refer to the judgement of the Apex Court relied upon by the learned counsel for the petitioner laying down parameters within which the Court can review its judgement. The judgements relied upon by the learned Senior Counsel for NOIDA in support of his contention regarding the scope of review shall be dealt with at the appropriate place.

29. In the case of ***State of Haryana and Others (supra)***, the High Court disposed of the writ petition as *infructuous* by giving certain directions. The respondents-Mohinder Singh and others preferred review application, in which certain clarification had been made by the High Court. The order passed by the High Court on the said review-application was assailed by the State of Haryana in Special Leave Petition. The Apex Court held that a judgement may be opened to review inter- alia if there is a mistake or an error apparent on the face of the record. Paragraphs 3 & 5 of the aforesaid judgement are being reproduced hereinbelow:-

"3. Learned additional solicitor general appearing for the appellant-state strongly contended that the High Court could not have passed the order under challenge in the purported exercise of its powers of review and the order under challenge is liable to be set aside on this ground alone, dehors even the infirmities in the ultimate decision on merits. Reliance has been placed in support thereof on the decision in Parsion Devi and others v. Sumitra Devi and others JT 1997 (8) SC 480, wherein it has been observed as follows:-

"9. Under Order XLVII, Rule 1, C.P.C., a judgment may be open to review inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order XLVII, Rule 1, C.P.C. In exercise of the jurisdiction under Order XLVII, Rule 1, C.P.C., it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered, has a limited purpose and cannot be allowed to be "an appeal in disguise."

10. Considered in the light of this settled position we find that Sharma, J., clearly overstepped the jurisdiction vested in the Court under Order XLVII, Rule 1 C.P.C. The observations of Sharma, J., that

"accordingly, the order in question is reviewed and it is held that the decree in question was of composite nature wherein both mandatory and prohibitory injunctions were provided" and as such the case was covered by Article 182 and not Article 181 cannot be said to fall within the scope of Order XLVII, Rule 1 C.P.C. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction."

5. We have carefully considered the submissions of learned counsel appearing on either side. The Division Bench in the High Court, in our view, completely overstepped the limits of its review jurisdiction and on the face of it appears to have proceeded as though it is a rehearing of the whole petition which had been earlier finally disposed of. It has often been reiterated that the scope available for a litigant invoking the powers of review is not one more chance for rehearing of the matter already finally disposed of. The course adopted in this case by the High Court appears to be really what has been held by this Court to be not permissible. On this ground alone, without expressing any views on the merits of the claim, the order of the High Court dated 14.5.1999 is set aside and the original order dated 14.5.1998 shall stand restored. While noticing some of the submissions made on merits by either side, we consider it appropriate to place on record that even the learned counsel for the appellant could not seriously dispute the position that the respondents would at any rate be entitled to be placed on the 'first higher standard pay scale' and that to this extent atleast, the respondents' claim would deserve consideration. The appeals are allowed in the above terms. No order as to costs."

30. In the case of ***Rajendra Kumar and Others (supra),*** claimants-appellants preferred an appeal for enhancement of compensation. The learned Single Judge enhanced the compensation. Being dissatisfied with the amount of compensation awarded by the learned Single Judge, claimants preferred an appeal before the High Court and Division Bench of the High Court by judgement dated 09.08.1999 enhanced the compensation amount to Rs.2,55,000/- with 12% interest. Thereafter, on the review application preferred by the Oriental Insurance Company, the amount of compensation was reduced to Rs.1,83,000/- by order dated 03.04.2001 which was assailed by the claimants-appellants before the Apex Court. The Apex Court while setting aside the judgement and order of the High Court in review application held in paragraphs 5 & 6 as under:-

"5. On perusal of the order under challenge it is clear that the High Court without considering the question whether the judgment/order sought to be reviewed suffered from any error, entered upon the exercise of reappreciating the evidence and on such reappreciation of evidence redetermined the compensation by reducing the amount to the extent noted earlier. The limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order cannot be disturbed.

6. Coming to the merits of the case, suffice it to say that on perusal of the order, which has been reviewed by the order under challenge did not suffer from any serious illegality, which called for correction by exercise of review jurisdiction. It is relevant to note here that the deceased was holding the post of Supervisor in Women and Child Welfare Department, Government of Karnataka at the time of her death and she was aged about 48 years at that time. The salary drawn by the deceased, as evident from the salary certificate produced as additional evidence was Rs. 2,570/- p.m. The multiplier, which had been accepted by the Division Bench in the previous order, was 10. In the circumstances of the case, multiplier of 10 was rightly taken. Thus on merit also no interference with the order was called for."

31. In the case of ***Lily Thomas etc. (supra)*** the appellants sought review of the judgement of the Apex Court in the case of ***Sarla Mudgal (Smt.) President 'Kalyani' Vs. Union of India,*** the Apex Court held that Court can review its judgement or order if there is a mistake apparent on the face of the record and if an error which has to be searched and fished out is not an error apparent on the face of the record. Paragraphs 52, 55 & 57 of the said judgement are being reproduced hereinbelow:-

"52. The dictionary meaning of the word "review" is "the act of looking, offer something again with a view to correction or improvement. It cannot be denied that the review is the creation of a statute. This Court in Patel Narshi Thakershi. v. Pradyumansinghji Arjunsinghji, AIR 1970 SC 1273 held that the power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. The review is also not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules or procedures or technicalities of law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review petition was under a mistake and the earlier judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice nothing would preclude the Court from rectifying the error. This Court in S. Nagaraj v. State of Karnataka 1993 Supp. (4) SCC 595 held:

"Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest Court indicating the circumstances in which it could rectify its order the Courts culled out such power to avoid abuse of process or miscarriage of justice. In Prithwi Chand Lal Choudhury v. Sukhraj Rai, AIR 1941 FC 1 the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh (1836) 1 Moo PC 117 that an order made by the

Court has final and could not be altered……

55. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised. However, this Court in exercise of its powers under Art. 136 or Art. 32 of the Constitution and upon satisfaction that the earlier judgments have resulted in deprivation of fundamental rights of a citizen or rights created under any other statute, can take a different view notwithstanding the earlier judgment.

57. Otherwise also no ground as envisaged under O.40 of the Supreme Court Rules read with O.47 of the Code of Civil Procedure has been pleaded in the review petition or canvassed before us during the arguments for the purposes of reviewing the judgment in Sarla Mudgal's case (1995 AIR SCW 2326: AIR 1995 SC 1531: 1995 Crl LJ 2926). It is not the case of the petitioners that they have discovered any new and important matter which after the exercise of due diligence was not within their knowledge or could not be brought to the notice of the court at the time of passing of the judgment. All pleas raised before us were in fact addressed for and on behalf of the petitioners before the Bench which, after considering those pleas, passed the judgment in Sarla Mudgal's case. We have also not found any mistake or error apparent on the face of the record requiring a review. Error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. No such error has been pointed out by the learned Counsel appearing for the parties seeking review of the judgment. ……

Therefore, it can safely be held that the petitioners have not made out any case within the meaning of Art.137 read with O.40 of the Supreme Court Rules and O.47, Rule 1 of the C.P.C. for reviewing the judgment in Sarla Mudgal 's case (1995 SC 1531: 1995 Crl LJ 2926). The petition is misconceived and bereft of any substance."

32. In the case of ***Smt. Meera Bhanja (supra)*** the Apex Court relying upon the judgement of ***Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma, AIR 1979 SC 1047*** held that there are certain limitations to the exercise of the power of review by the High Court and the power of review is not to be confused with the power of appeal. Paragraph 8 of the said judgement is being reproduced hereinbelow:-

"8. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1, C.P.C. In connection with the limitation of the powers of the Court under Order 47, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, AIR

1979 SC 1047, speaking through Chinnappa Reddy, J., has made the following pertinent observations (para 3):

"It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

Now it is also to be kept in view that in the impugned judgment, the Division Bench of the High Court has clearly observed that they were entertaining the review petition only on the ground of error apparent on the face of the record and not on any other ground. So far as that aspect is concerned, it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale, AIR 1960 SC 137, wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:

"An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ."

33. In the case of ***M.P. Mohla (supra)***, it is held that new issues cannot be raised in the review petition. The review is not allowed under the garb of seeking clarification. Paragraphs 27 & 28 of the said judgement are being extracted herein below:-

"27. A review petition filed by appellants herein was not maintainable. There was no error apparent on the face of the record. The effect of a judgment may have to be considered afresh in a separate proceeding having regard to the subsequent cause of action which might have arisen but the same by itself may not be a ground for filing an application for review.

28. Mr. Srivastava submitted that an application for review in effect and substance was an application for clarification of the judgment of the High Court. We do not think so. An application for clarification cannot be taken recourse to to achieve the result of a review

application. What cannot be done directly, cannot be done indirectly. (Ram Chandra Singh v. Savitri Devi)."

34. On reading of aforesaid judgements and principles enunciated by the Apex Court about the power of review of High Court, it can safely be culled out that though there is nothing in Article 226 of Constitution of India which precludes the High Court from exercising the power of review since every Court of plenary jurisdiction inheres the power to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But Apex Court held that there are definitive limits to the exercise of the power of review which are as follows:-

(i). The power of review may be exercised on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the person seeking review or could not be produced by him at the time when the order was made;

(ii). It may be exercised where some mistake or error apparent on the face of the record is found;

(iii). It may also be exercised on an analogous ground.

35. While limiting the power of review by the High Court, the Apex Court in the aforesaid judgements have also held that the power of review may not be exercised on the ground that the decision was erroneous on merit. A power of review is not to be confused with the appellate power since the power to correct all manner of errors committed by the subordinate court lies with the Appeal Court. The Apex Court while explaining as to when an error committed by the court would entitle the parties to seek the review of the judgment explicated that error must be one which should occur at the first site and not an error that can be found by adopting the process of reasoning or which has to be fished out and searched.

36. It is also settled in law that while exercising the power of review, Court is not acting as an appellate court and cannot rehear the matter.

37. In the light of principles enunciated by the Apex Court limiting the power of review of the High Court, the argument of learned Senior Counsel for the NOIDA that the Court can exercise its power of review to correct the record of the court based on facts brought on record through review petition for the ends of justice is analysed.

38. In the case in hand, the Court has proceeded to decide the case on the basis of the pleadings and record. This Court by order dated 23.01.2019, extracted above, directed the NOIDA to give details as to who are the allottees and whether any plot is still available for allotment under the scheme of 2010 pursuant to an advertisement dated 05.03.2010.

39. In response to the said affidavit, NOIDA filed a second supplementary counter affidavit in which in paragraph 8, it has made the specific assertion that there were total 27 plots available under the old scheme at a given point of time. In paragraph 9, it further averred that total 95 applications were received out of which 65 applications were found unsuccessful and 15 plots were allotted meaning thereby that 12 plots remained unallotted under the old scheme.

40. This Court again on 22.05.2019 passed an order directing learned counsel for the NOIDA to seek instruction as to why petitioner was not called for interview

coupled with the fact that some plots remained with the NOIDA for allotment which may be considered for allotment to the petitioner. Under the order of this Court dated 22.05.2019, learned counsel for the NOIDA again on instruction submitted that there are still 8 plots with the NOIDA and claim of the petitioner can be considered if so directed by the Court.

41. The aforesaid statement of learned counsel for the NOIDA based on the instruction of NOIDA has been recorded by the Court in the judgement while allowing the writ petition. The relevant extract of the judgement dated 31.07.2019 wherein this Court has recorded the aforesaid statement is reproduced hereinbelow:-

"Treating the petitioner to be the two applicants whose representatives were not called for interview and the fact that the counsel for the NOIDA accepted that there exists no reason why its representative was not called for interview, the Court on 22.5.2019 directed the counsel for the NOIDA to take instructions if the applications of the petitioner can still be considered for allotment of plots from amongst the remaining unallotted plots. In response to the above direction of the Court Sri Shivam Yadav submits that 8 plots still remain unallotted and that the NOIDA will consider the allotment of plots to the petitioner if the Court so directs.

42. Thereafter, Court proceeded to decide the writ petition and passed an order for consideration of the claim of the petitioner.

43. Now by the review application, the petitioner wants to correct the facts which have been wrongly stated in the second counter affidavit on the ground that if incorrect facts remain on record, that would result in grave injustice to the NOIDA.

44. It is further averred in the review application that the concerned officer, who had supplied incorrect instructions to the counsel, was issued a show-cause notice on 12.06.2020 which is Annexure 4 to the review application. A perusal of show cause notice reveals that it was issued as a formality to make out a case for review as no action has been taken against the officer under the show cause notice by the NOIDA. When learned counsel for NOIDA was confronted as to what disciplinary action is proposed against the concerned officer, he submitted that power to initiate disciplinary proceeding is with the State Government, but he could not place any material on record whereby NOIDA has recommended to the State Government for taking disciplinary action against the officer concerned whose negligence has put the NOIDA in a precarious situation.

45. Facts which NOIDA wants to bring on record by review application if allowed to be brought on record through review application would reopen the rehearing of the case inasmuch as if NOIDA is allowed to take a total contrary stand that it has no plots to offer to petitioner under the scheme 2010, a new issue would crop up as to whether the assertion as regards to the non-availability of plots with NOIDA under the old scheme is correct or not for which rehearing of the matter is required, thus, it is evident that under the garb of review of the judgement, NOIDA is trying to reopen the matter which is beyond the scope of review.

46. Learned counsel for the NOIDA could not point out from the judgement as

to what is the patent error committed by the Court to review the judgement.

47. Now, this Court deals with the judgements on the scope of review relied upon by the learned counsel for the NOIDA and states the reasons as to why those judgments do not come to the rescue of NOIDA.

48. In the case of ***S.Nagaraj (supra),*** the fact which led to the review or reconsideration of earlier orders passed by the Apex Court was peculiar. The order passed by the Apex Court in the said case had created right in favour of stipendiary graduates, who succeeded in getting orders for absorption of all of them numbering thousands and jumped in higher scale without any adjudication of their claims on merits either in the special leave petition or even in the writ petition on assumption drawn from a vague and incorrect affidavit filed by the State. The order passed by the Apex Court in the said case had resulted in the grave injustice to those stipendiary graduates who had been selected by appearing in the competitive examination conducted by the Commission for the post of Second Division Assistants because there were no vacancies amongst First Division Assistants and they would not only become junior to petitioners, but they may never get a chance to be promoted. Paragraph 14 of the said judgement is being extracted hereinbelow:-

"14. Despite the failings of the Government to apprise this Court, timely of correct facts, what has been agitating us how to even the balance. On one side are the orders of this Court passed on vague and incomplete affidavit, creating right and hope in favour of 5000 stipendiary graduates to be absorbed as First Division Assistants with some of them even deriving the benefit whereas on the other hand there are others the likely injustice to whom due to implementation of the orders had already been explained in the affidavit of the Secretary, the Deputy Secretary and in the Writ Petition filed by different section of the employees. No less is the hurdle arising out of principle of finality of orders and the binding nature of directions issued by this Court. But what stands above all which persuaded us to take a fresh look is the injustice inherent in it. Many of the stipendiary graduates who either appeared in the competitive examination conducted by the Commission, under 1982 Rules or were selected under 1987 Rules for the post of Second Division Assistants because there were no vacancies amongst First Division Assistants would not only become junior to the petitioners but they may never get a chance to move up higher on the ladder as the rules of 1982 and 1987 specifically provide that a stipendiary graduates appointed under the rule would not be eligible for recruitment again under it. Further if a stipendiary graduate is entitled by virtue of graduate qualification to be absorbed as First Division Assistant then Rule 3 of 1982 Rules permitting absorption of stipendiary graduates both against Second and First Division Assistants is rendered meaningless. Nor there can be any rationale to disregard the claim of those large number of stipendiary graduates who are working as Second Class Assistants. Moreover possessing minimum qualification prescribed under rules does not mean appointment on that post. It only provides eligibility. For instance a holder of SSLC certificate cannot be considered as eligible for the post of First Division Assistant as the minimum qualification for it is graduate. A graduate can apply for either. But being

graduate does not mean that any stipendiary graduate is liable to be absorbed as First Division Assistant. No employees can claim higher post or scale of pay commensurate with his qualification. It may be ideal but not practical. Appointment of a graduate or a post-graduate to a post which carries lower qualification by itself, does not amount to exploitation nor it is violative of any constitutional guarantee or principle."

49. In such a piquant situation, the Apex Court in paragraphs 18 & 19 has held that the Court can always rectify its error if it finds that order was passed under a mistake and would result in irreparable injury to any party. Paragraphs 18 & 19 of the judgement of Apex Court in the case of ***S.Nagaraj (supra)*** are being extracted herein below:-

"18. Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness. If the Court finds that the order was passed under a mistake and it would not have exercised the jurisdiction but for the erroneous assumption which in fact did not exist and its perpetration shall result in miscarriage of justice then it cannot on any principle be precluded from rectifying the error. Mistake is accepted as valid reason to recall an order. Difference lies in the nature of mistake and scope of rectification, depending on if it is of fact or law. But the root from which the power flows is the anxiety to avoid injustice. It is either statutory or inherent. The latter is available where the mistake is of the Court. In Administrative Law the scope is still wider. Technicalities apart if the Court is satisfied of the injustice then it is its constitutional and legal obligation to set it right by recalling its order. Here as explained, the Bench of which one of us (Sahai, J.) was a member did commit an error in placing all the stipendiary graduates in the scale of First Division Assistants due to State's failure to bring correct facts on record. But that obviously cannot stand in the way of the Court correcting its mistake. Such inequitable consequences as have surfaced now due to vague affidavit filed by the State cannot be permitted to continue.

19. Review literally and even judicially means re-examination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithvi Chand Lal Choudhury v. Sukhraj Rai, the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh, that an

order made by the Court was final and could not be altered:

".....nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

Basis for exercise of the power was stated in the same decision as under:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed and substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

50. In the case of ***S.Nagaraj (supra)*** because of filing of a vague affidavit by the State Government, the Apex Court passed an order which, if implemented, would have resulted in grave injustice to those who have been selected on the post of Second Division Assistants as they would not get any chance to move higher ladder as the petitioners in the said case without getting selected through competition as per the procedure prescribed for appointment on the post of First Division Assistants had blocked the avenues of promotion of selected candidates from the post of Second Division Assistants to the post of First Division Assistants.

51. In such circumstances, the review petition was referred to the larger Bench because injustice has been mated out to one set of the person if the order of the Court is not revised or reviewed. It would be apt to

reproduce the starting paragraph of the judgement of B.P. Jeevan Reddy, J:-

"These matters were referred to a three-judge-Bench so that it can, if necessary, revise, review and recall the earlier orders of this Court made by a Bench of two Judges or a Bench of three Judges, as the case may be. The reference to three-Judge Bench was made because it was felt by my learned brother Sahai, J. and myself that some of the earlier orders of this Court may require to be reconsidered."

52. There is no quarrel with the proposition of law laid down by the Apex Court in paragraphs 18 & 19 of the judgement of ***S.Nagaraj (supra)***, but said judgement was rendered in a very peculiar fact which is not the case here.

53. The Apex Court in the case of ***Sunil Vasudeva and Others (supra)*** has affirmed the order of the High Court whereby the High Court has recalled the order by which it had relegated the parties to the remedy of the civil suit in respect of property situated at Delhi without noticing Section 293 of Income Tax Act which put a complete bar of filing suit in any civil court against revenue/income tax authority. In such a fact situation, the Apex Court found that High Court has rightly reviewed its earlier order. In this respect, the Apex Court in paragraph 28 of the judgement has laid down parameters on which the review petition can be entertained. Paragraph 28 of the said judgement is being reproduced hereinbelow:-

"28. The basic principles in which the review application could be entertained have been eloquently examined by this Court in Kamlesh Verma v. Mayawati, (2013) 8 SCC 320 wherein this Court held as under:-

"20. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

20.1. When the review will be maintainable:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

(ii) Mistake or error apparent on the face of the record;

(iii) Any other sufficient reason.

The words "any other sufficient reason" have been interpreted in Chhajju Ram v. Neki 1922 SCC Online PC 11 and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius AIR 1954 SC 526 to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India v. Sandur Manganese & Iron Ores Ltd. (2013) 8 SCC 337.

20.2. When the review will not be maintainable:

(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.

(ii) Minor mistakes of inconsequential import.

(iii) Review proceedings cannot be equated with the original hearing of the case.

(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.

(v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.

(vi) The mere possibility of two views on the subject cannot be a ground for review.

(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.

(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.

(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."

54. The fact situation of ***Sunil Vasudeva and Others (supra)*** is not akin to the fact situation of the present case, and accordingly, the said judgement is not applicable in the facts of the present case.

55. In the case of ***Mohammad Azizul Rahman Khan (supra)***, the Court issued a commission for examination of witness in Pakistan without noticing the fact that there was no reciprocal arrangement between India and Pakistan with regard to the examination of witnesses on commission. In such a fact situation, the Court reviewed its order for appointing commission for examining the witness in Pakistan which was upheld by this Court holding that Court is competent to undo something the effect of which was likely to cause embarrassment if put in effect. Thus, said case is distinguishable on facts, therefore, the law propounded in the said judgement has no application in the present case.

56. The case of ***Sureshkumar Kanhaiyalal Jethlia (supra)*** was also being rendered in a different fact situation since in the said case, the order removing the President of Municipal Council from his post and disqualify him for a period of six years was upheld by the High Court. However, on the discovery of certain facts which could not be placed at the time of the hearing, it was revealed that charge no.2 which was the basis of removal of the petitioner in the said case was based upon an assumption which in fact did not exist, accordingly, High Court reviewed its order and set aside the order upholding the removal of the petitioner. Paragraph 9 of the said judgement is being extracted hereinbelow:-

"9. The result of dismissal of writ petition by upholding finding recorded by the respondent No. 2 on the charge No. 2 has dethroned the petitioner from the post of President and also denied him to be a Councillor. Not only that but he is debarred from contesting the election for the post of Councillor for the next six years. If the position is allowed to be perpetrated, by upholding as proved, a charge levelled which could not have been levelled but for incorrect assumption of fact, would certainly result into miscarriage of justice.

The review petition, therefore, in the light of observations of the Apex Court in para No. 170, in the matter of Common Cause, a registered Society (AIR 1999 SC 2979) (supra) will have to be allowed. Consequently, the judgment delivered in Writ Petition No. 5022 of 2000 dated 16-12-2000 will have to be modified.

The writ petition will also have to be allowed, since the action under Section 55-A read with S. 55-B(b) would be unsustainable on the basis of faulty charge No. 2, the same having been already held unsustainable on the basis of remaining two charges."

57. Thus, the case of ***Sureshkumar Kanhaiyalal Jethlia (supra)*** is different

from the facts of the present case, accordingly, this judgment also does not come to the aid of the NOIDA.

58. The facts of the present case, detailed above, clearly reflects that NOIDA had been given the opportunity twice to place correct facts before the Court in respect of the availability of plots under the old scheme, but NOIDA chooses to remain dormant and had slept over the matter. It came out of slumber only when the sword of contempt lay over its head.

59. At this stage, one more fact is to be noticed that NOIDA does not dispute the fact in the review application that the application of the petitioner was ignored for no fault of him nor he was called for interview. Now, under the garb of review petition, NOIDA wants rehearing of the writ petition to frustrate the right of allotment of plot to the petitioner accrued to him in the year 2010 on the ground that correct facts could not be placed before the Court. We are afraid that such a ground is not open to NOIDA to seek the review of a judgment to defeat the lawful right of the petitioner.

60. Now coming to the second submission of learned Senior Counsel for the NOIDA that despite the exercise of due diligence, the facts stated in the review petition regarding non-availability of plots under the old scheme could not be brought on record, therefore, the present review petition falls within the parameters of Order 47 Rule 1 of C.P.C., hence, it is a fit case where the Court should exercise its power to review its judgement.

61. Learned Senior Counsel for the NOIDA submits that there are adequate pleadings in the affidavit which clearly demonstrates that despite the exercise of due diligence by the NOIDA, it could not bring on record the correct fact that no plot is available with the NOIDA under the old scheme. Accordingly, he submits that Court should adopt a liberal approach and not a pedantic approach in constructing the pleading. To buttress the said submission, he has placed various paragraphs of the affidavit to contend that if the pleadings of the affidavit are read as a whole, it is discernible that ample pleading in respect of the exercise of due diligence exercised by NOIDA has been stated. In support of his contention, he has placed reliance upon paragraphs 6 & 7 of the judgement of Apex Court in the case of ***Ram Sarup Gupta (dead) by L.Rs. (supra)*** which are being extracted herein below:-

"6. The question which falls for consideration is whether the respondents in their written statement have raised the necessary pleading that the license was irrevocable as contemplated by S.60(b) of the Act and, if so, is there any evidence on record to support that plea. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words which

may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal. In Bhagwati Prasad v. Shri Chandramaul, (1966) 2 SCR 286 : (AIR 1966 SC 735) a Constitution Bench of this Court considering this question observed (at p.738 of AIR):

"If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

7. Before we examine the pleas raised by the defendants in their written statement it is necessary to keep in mind that the plaintiff himself stated in paragraph 4 of the plaint that the property in dispute has been in occupation of the school as licensee under the permission of Raja Ram Kumar Bhargava erstwhile owner of the property. Defendants 11 to 17 in paras 10 to 16 of their written statement while dealing with the question of license expressly stated that the school had made pucca constructions and had been making various substantial additions and alterations in the building without any objection. Raja Ram Kumar Bhargava had given away the premises in dispute permanently to the school and they have been in occupation of the premises for the last 20 years and during that period they have been making substantial additions and alterations in the building including replastering, re-flooring etc., by incurring heavy expenses. In para 18 of their written statement they pleaded that the license was coupled with a grant and in any case it was a permanent and irrevocable license in favour of the school and the same could not be revoked by the plaintiff. The pleadings so raised make it apparently clear that the defendants had raised a specific plea that

the license was coupled with grant, it was a permanent and irrevocable license and in pursuance of the licence the licensee had carried out work of permanent character incurring expenses for the advancement of the purpose for which the license had been granted. In fact, issue numbers 4, 5 and 6 framed by the trial court relate to the question whether license was irrevocable. The issues so framed involved the question of irrevocability of the license under both the clauses (a) and (b) of the S.60 of the Act. The plaintiff went to trial knowing fully well that defendants' claim was that the license was irrevocable, on the ground that they had made permanent constructions and incurred expenses in pursuance of the license granted for the purpose of school. The plaintiff knew the case he had to meet, and for that purpose he produced Raja Ram Kumar Bhargava in evidence in support his plea that the license was a simple license and it was not irrevocable as pleaded by the defendants. This question has been considered in great detail by T.S. Misra, J. and we are in agreement with the view taken by him."

62. The other judgement on the said point relied upon by the learned Senior Counsel for the NOIDA is ***Bhagwati Prasad Vs. Chandramaul AIR 1966 SC 735***. Paragraphs 10, 12 & 14 of the said judgement are being reproduced hereinbelow:-

"10. But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issue, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

12. Turning then to the pleadings and evidence in this case, there can be little doubt that the defendant knew what he was specifically pleading. He had admitted the title of the plaintiff in regard to the plot and set up a case as to the manner in which he spent his own money in constructing the house. The plaintiff led evidence about the tenancy set up by him and the defendant led evidence about the agreement on which he relied. Both the pleas are clear and specific and the common basis of both the pleas was that the plaintiff was the owner and the defendant was in possession by his

permission. In such a case the relationship between the parties would be either that of a landlord and tenant, or that of an owner of property and a person put into possession of it by the owner's licence. No other alternative is logically or legitimately possible. When parties led evidence in this case, clearly they were conscious of this position, and so, when the High Court came to the conclusion that the tenancy had not been proved, but the defendant's argument also had not been established, it clearly followed that the defendant was in possession of the suit premises by the leave and licence of the plaintiff. Once this conclusion was reached, the question as to whether any relief can be granted to the plaintiff or not was a mere matter of law, and in deciding this point in favour of the plaintiff, it cannot be said that any prejudice had been caused to the defendant.

14. In support of its conclusion that in a case like the present a decree for ejectment can be passed in favour of the plaintiff, though the specific case of tenancy set up by him is not proved, the High Court has relied upon two of its earlier Full Bench decisions. In Abdul Ghani v. Mt. Babni (1903) ILR. 25 All. 256 (FB), the Allahabad High Court took the view that in a case where the plaintiff asks for the ejectment of the defendant on the ground that the defendant is a tenant of the premises, a decree for ejectment can be passed even though tenancy is not proved, provided it is established that the possession of the defendant is that of a licensee. It is true that in that case, before giving effect to the finding that the defendant was a licensee, the High Court remanded the case, because it appeared to the High Court that that part of the case had not been clearly decided. But once the finding was returned that the defendant was in possession as a licensee, the High Court did not feel any difficulty in confirming the decree for ejectment, even though the plaintiff had originally claimed ejectment on the ground of tenancy and not specifically on the ground of licence. To the same effect is the decision of the Allahabad High Court in the case of Balmakund v. Dalu (1903) ILR 25 All. 498 (FB)."

63. The last judgement relied upon by the learned Senior Counsel for the NOIDA on the said point is ***Brij Behari Lal Budholiya Vs. IVth Additional District Judge, Jalaun at Orai and Others 2000 (2) ARC 456.*** Paragraphs 7 & 8 of the said judgement are being extracted herein below:-

"7. It is well settled that no party should be allowed to succeed on technical objection relating to the pleading. This Court and Supreme Court consistently held that in case parties are fully aware of the controversy and the issues required to be adjudicated between the parties and if the parties had led evidence being conscious of those issues then in that case short coming in the pleadings will not vitiate the judgment. Pleadings have a definite role, i.e., to make aware the other side of the specific case which the other side has to meet. If a party is fully aware otherwise, led all the evidence as he desired and contested the case without raising objection at the first opportunity. Judgment passed by the Court below should not be allowed to be assailed on this ground.

8. The view taken by me is supported by the ratio decidendi laid down in the case of Sardul Singh v. Pritam Singh, 1999 (36) ALR 1."

64. It is no doubt true that Courts have time and again held that Court should

not adopt the pedantic approach in constructing pleading. In a given case it may be that pleadings are not expressed in words that may not expressly make out a case by the strict interpretation of the law. In such a case, the Court must ascertain the substance of the pleadings to determine the question. The Court should not give undue emphasis on the form of pleadings rather, it should find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they contested the trial on those issues by producing evidence, in that event, it would not be open to a party to raise the question of absence of pleadings.

65. Now, on the touchstone of the principles laid down by the Apex Court as well as by the High Court in respect of the construction of pleadings, the fact of the present case is being tested.

66. We have already extracted above the relevant paragraphs of the affidavit filed in support of the review application. A perusal of the averments in those paragraphs reveals that it lacks necessary pleadings as regards the exercise of due diligence adopted by the NOIDA in bringing the fact of non-availability of plots under the old scheme on record. At this stage, it would be apt to refer to the dictionary meaning of the word 'diligence'.

67. ***Chambers Encyclopedic English Dictionary*** explains the meaning of 'diligence' as *"careful and hard-working effort."*.

68. According to the ***Lexicon the Encyclopedic Law Dictionary with Legal Maxims Latin Terms Words & Phrase,*** *'Diligence' is such care and prudence as is usually exercised by persons of common or average care and prudence.! "Diligence', when the law imposes it as a duty, implies that we shall do those things we ought to do, and leave undone those things we ought not to do. It requires action, as well as forbearance to act."*

69. The ***Black's Law Dictionary Eighth Edition*** defines the word 'diligence' as 'Care, caution; the attention and care required from a person in a given situation.'

70. According to ***The Black's Law Dictionary***, 'due diligence' means *"The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."*

71. The Apex Court in the case of ***Chander Kanta Bansal Vs. Rajinder Singh Anand (2008) 5 SCC 117*** while interpreting the word 'diligence and due diligence' in the context of the proviso to Order 6 Rule 17 of C.P.C. held as under:-

"16. The words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to

Words and Phrases by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

17. It is clear that unless the party takes prompt steps, mere action cannot be accepted and file a petition after the commencement of trial. As mentioned earlier, in the case on hand, the application itself came to be filed only after 18 years and till the death of her first son Sunit Gupta, Chartered Accountant, had not taken any step about the so-called agreement. Even after his death in the year 1998, the petition was filed only in 2004. The explanation offered by the defendant cannot be accepted since she did not mention anything when she was examined as witness."

72. From aforesaid, it is evident that when the law imposes a duty upon a person to act with due diligence which means that his action should exhibit candour which a prudent man would exercise in accomplishing his own affairs.

73. Now, in the present case, reading of affidavit filed in support of the review application does not disclose that there is any pleading concerning due diligence exercised by NOIDA to bring on record the fact of non-availability of plots, rather facts on record reveal that it slept over the matter as is evident from its action inasmuch as this Court twice granted opportunity by orders dated 23.01.2019 and 22.05.2019 to apprise the Court about the number of plots available with NOIDA under the old scheme, and on both the occasions, it informed the court that there are plots available under the old scheme. It woke up from slumber only when it found itself in an undefendable position after initiation of contempt proceedings by the petitioner.

74. This Court in the case of ***M/s Banaras Electric Light and Power Co. Ltd. Vs. The Collector, Varanasi and Others AIR 1982 Alld. 355 (DB)*** held that if exercise of due diligence adopted by parties seeking review is not stated in the affidavit, the review petition would not lie. Paragraphs 9 & 11 of the said judgement are being reproduced hereinbelow:-

"9. Coming to the facts of the instant case it would be seen that here the review is sough not on the ground that a glaring omission or a patent mistake or like grave error has crept in earlier by judicial infallibility nor on the ground that this Court committed by grave and palpable error in deciding the writ petition. It has been filed only on the ground of discovery of new and important evidence. As has been emphasised by the Supreme Court in A.T. Sharma's case (supra) which has been followed by the Full Bench of the Gujarat High Court in the case of Gujarat University (supra) before a review application can be entertained this ground it has to be established by the applicant in the review application that the additional evidence which is sought to be relied on was "after the exercise of due diligence not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made. In the instant case there is no averment to this effect either in the affidavit filed in support of the review application or even in the rejoinder affidavit. In the affidavit filed along with the review application what has been stated is that after the judgment was delivered in the writ petition the Superintending Engineer, Electricity

Supply Undertaking, State Electricity, Varanasi had the occasion to appear before the Special Officer (Electricity) to the State Government and in that connection while wading through the old files in the office of the Electrical Inspector to the State Government he found the document referred to in the review application. As pointed out above the sheet anchor of the review application is a notice sent by the petitioner to the State Government and the U.P. State Electricity Board itself on January 24, 1972. This notice, therefore, was apparently with the U.P. State Electricity Board which is an applicant in the review application even at the time when the counter-affidavit in the writ petition was filed and the writ petition was heard and decided. The only averment in this behalf in the rejoinder affidavit is that the officers dealing with the case had no knowledge and had no occasion to know about this notice given by the petitioner-Company and, therefore, could not bring it to the notice of this Court at the time when the writ petition was heard. It would thus be seen that neither in the affidavit filed along with the review application nor in the rejoinder affidavit it has been stated that even after exercise of due diligence these documents were not within the knowledge of respondents 2 and 3 or could not be produced by them at the time when the writ petition was heard and decided. The requirement of the "exercise of the diligence" at the appropriate "time constitutes the very basis for maintaining a review application filed on the ground of discovery of new and important matter of evidence. In Pyare Lal v. Chhotey Lal (AIR 1942 All. 82), while dealing with the power of review under O.47 R.1, C.P.C. on the basis of discovery of new or important evidence, it was held that O.47, R.1, C.P.C. requires a high standard of diligence and that the person who wants a review should prove strictly diligence he claims to have exercised. The same view was taken in an earlier decision in Kariya Mahto v. Ram Sarup (AIR 1987 All.107).

11. In view of the foregoing we are of the opinion that no case has been made out for entertaining the present review application. In this view of the matter we find it unnecessary to go into the second objection raised by counsel for the petitioner that even on merits no case for review has been made out."

75. In the case of ***Divisional Superintendent Northern Railway Allahabad Vs. Second Additional District Judge, Allahabad and another 1997 AWC (Supp.) 298*** this Court held that review under Order 47 Rule 1 of C.P.C. would lie only if one of the grounds mentioned in Order 47 Rule 1 of C.P.C. is made out. Paragraph 10 of the said judgement is being extracted hereinbelow:-

"10. Now the question arises if the impugned order passed on a review application was well within jurisdiction of the IInd Additional District Judge or by exercising the review powers in the instant case, the learned IInd Additional District Judge has overstepped jurisdiction vested in him. It is well-settled that a review under Order XLVII, Rule 1, C.P.C. can only lie if one of the grounds mentioned is made out. Order XLVII, Rule 1, C.P.C. permits review only when there are discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. It is well-settled that

while exercising powers under Order XLVII, Rule 1, C.P.C., the reviewing court does not sit in appeal on the order of his predecessor and cannot reassess the evidence. It is also well-settled that the review powers cannot be exercised on the ground that the earlier decision was erroneous on merit or that a different view was possible than the one taken in the earlier decision. A reference in this regard may be made to the cases of Smt. Meera Bhanja v. Smt. Nirmala Kumari Choudhury, JT 1994 (7) SC 536; Aribam Tuleshwar Sharma v. Aribam Pishak Sharma and others, AIR 1979 SC 1047 ; Satyanarayan Laximinarana Hegde and others v. Mallikarjun Bhavanappa Tirumale, AIR 1960 SC 137 and M/s. Thunabhadra Industries Ltd. v. Government of A.P., AIR 1964 SC 1372."

76. Thus, from the facts detailed above, it is evident that the affidavit filed in support of the review application lacks necessary pleadings in respect of the exercise of due diligence adopted by the NOIDA to bring the fact regarding non-availability of plots under the old scheme on record. The submission of learned Senior Counsel for the NOIDA that if the affidavit is read as a whole, it demonstrates that there are ample pleadings in respect of the exercise of due diligence by the NOIDA to bring on record correct facts is misconceived.

77. It is also pertinent to mention that from the pleadings and prayer made in the review application, it is not clear as to which portion of the judgment is erroneous which calls for the review. The prayer is totally vague and if the facts which NOIDA wants to bring on record through review application is allowed, that would reopen the hearing of the case which is not the scope of the review petition.

78. It is also urged by the learned Senior Counsel that since there is no plot available with NOIDA under the old scheme, therefore, the claim of the petitioner cannot be considered in the year 2019-2020 under the old scheme.

79. The said submission cannot be accepted as it is beyond the scope of the review petition since this was not the case of the NOIDA in the counter affidavit. Another reason why this plea cannot be permitted to be raised by review petition is that for adjudication of said issue, the whole petition is to be reheard as fresh which is not the scope of the review petition. Accordingly, the said contention being misconceived is rejected.

80. Thus, for the reasons given above, the review petition lacks merit and is accordingly, ***dismissed*** with no order as to cost.

This judgment is being delivered in terms of the provisions as contained in Chapter-VII Rule 1 (2) of the Allahabad High Court Rules, 1952.
