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(2021)07ILR A1
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Appeal U/S 37 of Arbitration and Conciliation Act 1996 No. 8 of 2021

Bhartiya Rashtriya Rajmarg Pradhikaran ...Petitioner
Versus
Smt. Manju Dixit & Anr. ...Respondents

Counsel for the Petitioner:
Pranjal Mehrotra

Counsel for the Respondents:

Arbitration & Conciliation Act, 1996: Section 34 -The District Judge while considering the application under Section 34 of the Act has noticed that inspite of providing with the an ample evidence to demonstrate that the land in question was a commercial land, the arbitrator did not consider any of the evidences and rejected the claim of the respondent no. 1. Thus, the District Judge has not committed any error or illegality in concluding that the award is against the public policy and non-speaking and therefore falls within the ambit of Section 34 of the Act, 1996. (Paras 26-30)

Assessment of compensation of land acquired - National Highway Act, 1956: Section 3-A, 3-G(5), 3G(7) - U.P. Roadside Land Control Act, 1942 - The competent authority or the arbitrator in determining the compensation is only to consider the market value of the land on the date of notification under Section 3A of the Act, 1956 and the nature of land recorded in the revenue record is not relevant for determining the compensation. (Para 36)

The District Judge was right in considering the unrebutted pieces of evidence which establishes that land in question is commercial. It further held that the simply because the land is recorded as agricultural land in the revenue record, that does not mean that the claimant would be entitled to compensation on the rates applicable to agricultural land. The best way to determine the market value of the land is the amount which a willing purchaser would pay to the owner of the land. (Para 35)

The provision of arbitration in the Act,1956 has been inserted with an intention to provide a quick remedy to the landowners, therefore in such circumstances, it cannot be said that the court is denuded of the power to modify the awards for the ends of justice to provide relief to the landowner so that he may not suffer indefinitely. (Para 40)

Appeal Rejected. (E-8)

List of Cases cited:

1. Dyna Technologies Pvt. Ltd. Vs Crompton Greaves Ltd. (2019) 20 SCC 1

2. Swan Gold Mining Ltd. Vs Hindustan Copper Ltd. (2015) 5 SCC 739

3. M/s Navodaya Mass Entertainment Ltd. Vs M/s J.M. Combines (2015) 5 SCC 698

4. MMTC Limited Vs Vedanta Ltd. (2019) 4 SCC 163

5. Oil & Natural Gas Corporation Ltd. Vs Saw Pipes Ltd. (2003) 5 SCC 705

6. Digamber & ors. Vs St. of Mah. & ors. (2013) 14 SCC 406

7. Attar Singh & anr.Vs U.O.I. & anr. (2009) 9 SCC 289

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

1. Heard Sri Pranjal Mehrotra, learned counsel for the appellant.

2. The appellant, Bhartiya Rashtriya Rajmarg Pradhikaran has preferred the present appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996') praying for setting aside the order dated 06.08.2020 passed by the District Judge, Shahjahanpur in Arbitration Case No.16 of 2016 under Section 34 of the 'Act, 1996'.

3. The brief facts of the case are that the appellant in the exercise of power under Section 3-A (1) of the National Highway Act, 1956 (hereinafter referred to as) issued notification dated 16.11.2009 with respect to the lands situated in the number of villages for the widening of NH-24 to four-lanes. By the said notification, Gata No.193 area 0.1260 hectare (hereinafter referred to as 'land in question') situated in village Maujampur, Tehsil Sadar, district Shahjahanpur owned by respondent no.1 was also acquired.

4. The declaration under Section 3-D of the 'Act, 1956' in respect of the land in question was issued on 08.10.2010. The competent authority while disposing of the objection of respondent held that since land in question is recorded as agriculture land, therefore, compensation be calculated and paid as per circle rates applicable to agriculture land. Accordingly, it calculated compensation based on circle rates applicable to agriculture land and declared the award on 05.10.2012 under Section 3-G of the Act, 1956.

5. Feeling aggrieved by the award, respondent no.1 preferred application under Section 3-G (5) of the Act, 1956 for referring the matter to the Arbitrator. Accordingly, the application of respondent no.1 was referred to the Sole Arbitrator/Collector, Shahjahanpur for deciding the claim of respondent no.1.

6. The Sole Arbitrator/Collector, Shahjahanpur by order dated 30.06.2016 dismissed the application of respondent no.1 holding that he could not prove that the land in question was outside the purview of U.P. Road Side Land Control Act, 1942, therefore, the competent authority rightly computed the compensation treating the land to be agriculture land. Accordingly, it held that there is no illegality or infirmity in the award passed by the competent authority.

7. Feeling aggrieved by the order of the Sole Arbitrator/Collector, Shahjahanpur in Arbitration Case No.27 of 2012, the respondent no.1 preferred application under Section 34 of the Act, 1996 before the District Judge, Shahjahanpur which was numbered as 16 of 2016. The District Judge, Shahjahanpur by order dated 06.08.2020 rejected the objection of the appellant against the application of the respondent under Section 34 of the Act, 1996. It set aside the award dated 30.06.2016 passed in Arbitration Case No.16 of 2016 and directed for payment of compensation treating the land to be commercial land.

8. The District Judge, Shahjahanpur in allowing the application of respondent no.1 after noticing in detail the scope of Section 34 of the Act, 1996 concluded that the award of the Arbitrator is against the public policy and principles of natural justice. Accordingly, it found no merit in the objection of the appellant and rejected the same. Thereafter, the District Judge proceeded to consider the issue as to whether respondent no.1 is entitled to compensation on the basis of agriculture land or commercial land. After examining the evidence led by respondent no.1, the District Judge found that the land in

question was commercial land, and accordingly, it directed for payment of compensation of the land in question on the basis of the commercial rate applicable on the date of notification under Section 3-A of the Act, 1956.

9. Challenging the order dated 06.08.2020 passed by the District Judge, Shahjahanpur, learned counsel for the appellant has contended that the District Judge in passing the order on the application under Section 34 of the Act, 1996 has acted as an appellate authority and has reappraised the evidence on record which is beyond the scope of Section 34 of the Act, 1996. He submits that Section 34 of the Act, 1996 stipulates certain preconditions which if present would entitle the court to interfere under Section 34 of the Act, 1996. He submits that in the case on hand, the District Judge has travelled beyond jurisdiction in interfering with the award under Section 34 of the Act,1996 as no condition envisaged under said Section empowering the courts to invoke its jurisdiction is present in the present case. Thus, he submits that the order of the District Judge, Shahjahanpur is without jurisdiction and deserves to be set aside.

10. He further submits that it is established from the evidence on record that land in question is recorded as agriculture land on the date of notification under Section 3-A of the Act, 1956, therefore, merely because land in question was being used for commercial purposes, it would not become commercial land. Accordingly, he submits that the District Judge has committed a manifest error of law apparent on the face of the record in treating the land to be commercial land and directing for payment of compensation on the basis of commercial land. Thus, the submission is that the impugned order is per se illegal and not sustainable in law.

11. I have heard learned counsel for the appellant and perused the record.

12. Before adverting to the first argument of learned counsel for the appellant in respect of the scope of Section 34 of the Act, 1996, it would be appropriate to reproduce Section 34 of the Act, 1996:-

"34. Application for setting aside arbitral award. *--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).*

(2) An arbitral award may be set aside by the Court only if--

(a) the party making the application furnishes proof that--

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.]

Explanation 2.--For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.]"

13. At this point, it would be appropriate to refer to few judgments of the

Apex Court to appreciate the scope of Section 34 of the Act, 1996.

14. In ***Dyna Technologies Private Limited Vs. Crompton Greaves Limited (2019) 20 SCC 1***, the Apex Court has held that Section 34 of the Act, 1996 limits challenge to the award only on the grounds stipulated therein. Paragraphs 24 & 25 of the said judgment are being extracted herein below:-

"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.

25. Moreover, umpteen number of judgments of this Court have categorically held that the courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists. The courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Section 34 of the Arbitration Act."

15. The Apex Court in the case of ***Swan Gold Mining Limited Vs. Hindustan Copper Limited (2015) 5 SCC 739*** held that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Paragraph 12 of the said judgment is being reproduced hereinbelow:-

"12. It is equally well settled that the arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

16. The Apex Court in the case of ***M/s Navodaya Mass Entertainment Limited Vs. M/s. J.M. Combines (2015) 5 SCC 698*** while considering the scope of Section 34 of the Act, 1996 reiterated that the scope of interference of the court is very limited. Court is not vested with the power to reappraise the material on record and substitute the view of Arbitrator by its view. Paragraph 8 of the said judgment is being reproduced hereinbelow:-

"8. In our opinion, the scope of interference of the court is very limited. The court would not be justified in reappraising the material on record and substituting its own view in place of the arbitrator's view. Where there is an error apparent on the face of the record or the arbitrator has not followed the statutory legal position, then and then only it would

be justified in interfering with the award published by the arbitrator. Once the arbitrator has applied his mind to the matter before him, the court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the arbitrator would prevail."

17. In the case of ***MMTC Limited Vs. Vedanta Limited (2019) 4 SCC 163,*** the Apex Court held that court does not sit in appeal over arbitral award while considering the application 34 of the Act, 1996. Paragraph 11 of the said judgment is being reproduced hereinbelow:-

"11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii), i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the "fundamental policy of Indian law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Furthermore, "patent illegality" itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract."

18. The Apex Court in the aforesaid judgments while explaining the scope of Section 34 of the Act, 1996 consistently held that the court does not act as the court of appeal in dealing with the arbitral award and should be slow in interfering with the arbitration award. It is also held in the aforesaid judgments that if two views are possible on an issue and one adopted by the arbitrator is possible then, the court should not substitute its view by the view of the Arbitrator. Thus, it can be elucidated from aforesaid that the existence of any one of the conditions specified under Section 34 of the Act, 1996 is a precondition for interference with the award by the court. In other words, the courts are devoid of the power to interfere with the award if conditions stipulated under Section 34 of the Act,1996 are lacking and not present.

19. The Apex Court, by and large, has approved the interference in the award by the court under Section 34 of the Act, 1996 if the award is perverse or so irrational that no reasonable man would have arrived at the same or it is bereft of reasons or against the public policy or in violation of the principles of natural justice or the Arbitrator has not followed the statutory legal provision of law or if there is something so shocking in the award which pricks the conscience of the Court.

20. The term "public policy" contained in Section 34 (2) (b) (ii) of the Act, 1996 has been defined by the Apex Court in paragraph 31 of the judgment in the case of ***Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705.*** Paragraph 31 of the judgment reads as under:-

"31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that

the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case (supra), it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to: -

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

21. At this stage, it would also be appropriate to refer to the judgment of ***Dyna Technologies Private Limited (supra)*** wherein the Apex Court in paragraphs 34 & 35 of the judgment has explained the necessity for passing reasoned award as mandated under Section 31 (3) of the Act, 1996. Paragraphs 34 & 35 of the judgment are being reproduced hereinbelow:

"34. The mandate under Section 31(3) of the Arbitration Act is to have reasoning which is intelligible and adequate and, which can in appropriate cases be even implied by the courts from a fair reading of the award and documents referred to thereunder, if the need be. The aforesaid provision does not require an elaborate judgment to be passed by the arbitrators having regard to the speedy resolution of dispute.

35. When we consider the requirement of a reasoned order, three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasonings in the order are improper, they reveal a flaw in the decision-making process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity cannot be stated in a precise manner as the same would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusions reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in

casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards."

22. It would also be apposite to reproduce Section 3-G (7) of the Act, 1956 which provides criteria for assessment of compensation of the land acquired. Section 3-G(7) of the Act, 1956 is being reproduced hereinbelow:-

"3-G. Determination of amount payable as compensation.--

(1)...

(2)...

(3)...

(4)...

(5)...

(6)...

(7). The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration--

(a) the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change."

23. On the touchstone of the parameters laid down by the Apex Court explicating when the court can interfere with the award under Section 34 of the Act, 1996 and the criteria provided in Section 3-G(7) of the Act, 1956 which the competent authority or the Arbitrator shall take into consideration in assessing the compensation, the legality of the arbitral award passed by the Collector is being tested, and whether in the facts of the present case, the District Judge was justified in setting aside the award and directing for payment of compensation treating the land to be commercial land.

24. The fact as emanates from the record suggest that respondent no.1 being dissatisfied with the compensation awarded by the competent authority, raised an arbitration dispute under Section 3-G(5) of the Act, 1956. The case of respondent no.1 was that the land in question was commercial land, and therefore, he is entitled to compensation on the basis of rates applicable to commercial land on the date of notification under Section 3-A of the Act, 1956. In respect of the said contention, respondent no.1 has produced shreds of evidence; namely sale deed dated 01.11.1999 in respect of 168 square meter which was the part and parcel of Gata No.193, the evidence showing that M/s Manoj Kumar Dixit was running a transport office in the shop constructed over the land in question, copy of registration certificate of the commercial establishment (वाणिज्यिक अधिष्ठान), copy of khasra in which land in question is recorded as 'Dukan/Abadi'. The other pieces of evidence adduced by respondent

no.1, which establishes that the land was Abadi land, was Rashion Card and Voter I.D. Card. Besides above, respondent no.1 also adduced evidence to establish that there was a petrol pump, Hyundai showroom, tractor agency, Nainital Dhaba, Fauji Dhaba, Shahjahanpur Dhaba, Urea and Pesticides shop in the surrounding area of the land in question on the date of notification which proves that commercial activity is also being carried on in the vicinity of land in question.

25. The aforesaid pieces of evidence were filed by respondent no.1 before the Arbitrator, but the Arbitrator did not consider any of the evidence adduced by respondent no.1 and rejected the claim of respondent no.1 on the ground that respondent no.1 could not produce any evidence that land in question was outside the limits of the U.P. Roadside Land Control Act, 1942. The Arbitrator further recorded a finding that respondent no.1 has not adduced any evidence to prove that construction over land was made after taking necessary approval from the authority.

26. The District Judge while considering the application under Section 34 of the Act, 1996 of respondent no.1 has noticed that there was ample evidence adduced by respondent no.1 which proves that land in question was commercial land and the Arbitrator did not consider any of the evidence led by the respondent no.1 while rejecting his claim. Accordingly, the District Judge concluded that the award is against the public policy and non-speaking, hence, the application under Section 34(2) of the Act, 1996 is maintainable.

27. From the facts detailed above, it is clear that the arbitral award is perverse for want of consideration of any of the evidence adduced by respondent no.1 proving that land in question was commercial on the date of notification under Section 3A.

28. At this point, it is worth pointing that Section 3-G(7) of the Act, 1956 cast a duty upon the Arbitrator to follow the criteria provided in the said Section for determining the compensation. Accordingly, the Arbitrator shall determine the compensation as per the market value of the land on the date of publication of the notification under Section 3-A of the Act, 1956 whereas in the present case, the Arbitrator has failed to assess the compensation as per the market value of the land in question on the date of the notification under Section 3-A of the Act, 1956. Thus, the Arbitrator has failed to follow the criteria provided in Section 3-G (7) of the Act, 1956 for determining the compensation and the arbitral award is in violation of Section 3-G (7) of the Act, 1956.

29. Therefore, in the light of the above discussion, this Court finds that the District Judge, Shahjahapur has not committed any error or illegality in concluding that the present case falls within the ambit of Section 34 of the Act, 1996 and has rightly interfered with the award.

30. Now coming to the next submission of learned counsel for the appellant that since the land in question is recorded as agricultural land in the revenue record, therefore, merely because the land in question is in use for commercial

purpose, it would not become commercial land, and, the compensation awarded the competent authority treating the land to be agriculture land is just and proper and does not warrant interference by the Court.

31. It is worth pointing out that it is evident from the record that overwhelming evidence as detailed above was adduced by respondent no.1 to demonstrate that the land in question was commercial land on the date of notification under Section 3A of the Act, 1956. Those pieces of evidence were not rebutted by the appellant. Section 3-G(7)(a) provides that compensation shall be determined on the basis of the market value of the land on the date of notification under Section 3-A of the Act, 1956. So, the criteria for determination of compensation in respect of land acquired is the market value of the land which it could fetch on the date of notification under Section 3-A of the Act, 1956.

32. At this stage, it would be worth noticing few judgments of the Apex Court where Apex Court has explained with reference to the Land Acquisition Act, 1894 as to what criteria should be adopted by the courts in fixing the 'market value' of land. Paragraphs 16.3 and 16.4 of the judgment of the Apex Court in the case of ***Digamber and Others Vs. State of Maharashtra and Others (2013) 14 SCC 406*** are being reproduced hereinbelow:-

"16.3 Also paras 16 and 17 from Sabhia Mohammed Yusuf Abdul Hamid Mulla v. Land Acquisition Officer, (2012) 7 SCC 595 are quoted hereunder:

"16. We have considered the respective arguments and carefully perused the record. It is settled law that while fixing the market value of the acquired land, the Land Acquisition Collector is required to keep in mind the following factors:

(i) Existing geographical situation of the land.

(ii) Existing use of the land.

(iii) Already available advantages, like proximity to National or State Highway or road and/or developed area.

(iv) Market value of other land situated in the same locality/village/area or adjacent or very near the acquired land.

17. In Viluben Jhalejar Contractor v. State of Gujarat (2005) 4 SCC 789 this Court laid down the following principles for the determination of market value of the acquired land: (paras 17-19)

"17. Section 23 of the Act specifies the matters required to be considered in determining the compensation; the principal among which is the determination of the market value of the land on the date of the publication of the notification under sub-section (1) of Section 4.

18. One of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefor. It is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not.

19. Market value is ordinarily the price the property may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase. Where definite material is not forthcoming either in the shape of sales of similar lands in the neighbourhood at or about the date of notification under Section 4(1) or otherwise, other sale instances as

well as other evidences have to be considered.

16.4. Further, it would be worthwhile to refer to the portion which is extracted from Atma Singh Vs. State of Haryana (2008) 2 SCC 568 which paragraph is referred to at para 18 in Sabhia Mohammed Yusuf Abdul Hamid Mulla v. Land Acquisition Officer, (2012) 7 SCC 595 which reads thus:

"5. For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality. It is well settled that market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when led out in its most advantageous manner. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, uses to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like water, electricity, possibility of their further extension, whether nearabout town is developing or has prospect of development have to be taken into consideration."

33. In the case of ***Attar Singh and Another Vs. Union of India and Another (2009) 9 SCC 289,*** the Apex Court explained in paragraphs 7 to 9 of the judgment the norms to be applied for the determination of the market value of the land. Paragraphs 7 to 9 of the said judgment are being reproduced hereinbelow:-

"7. It is now a well-settled principle of law that determination of the market value of the land acquired indisputably would depend upon a large number of factors including the nature and quality thereof. The norms which are required to be applied for determination of the market value of the agricultural land and homestead land are different. In given cases location of land and in particular, closeness thereof from any road or highway would play an important role for determination of the market value wherefor belting system may in appropriate cases may be resorted to. The position of the land, particularly in rainy season, existence of any building, etc. also plays an important role. A host of other factors including development in and around the acquired land and/or the potentiality of development will also have a bearing on determination of the fair market value of the land.

8. Determination of the market value of the land may also depend upon the facts and circumstances of each case, amongst them would be the amount of consideration mentioned in a deed of sale executed in respect of similarly situated land nearabout the date of issuance of notification in terms of Section 4(1) of the Act; in the absence of any such exemplars, the market value can be determined on yield basis or in case of an orchard on the basis of number of fruit-bearing trees.

9. It is also well settled that for the purpose of determination of price of acquired land, the courts would be well advised to consider the positive and negative factors, as has been laid down by this Court in Viluben Jhalejar Contractor v. State of Gujarat 2005 (4) SCC 789:

"Positive factors
Negative factors
(i) smallness of size
(i) largeness of area
(ii) proximity to a road
(ii) situation in the interior at a distance from the road
(iii) frontage on a road
(iii) narrow strip of land with verysmall frontage compared to depth
(iv) nearness to developed area
(iv) lower level requiring the depressed portion to be filled up
(v) regular shape (v) remoteness from developed
locality
(vi) level vis-a-vis land under
(vi) some special disadvantageous acquisition factors which would deter a purchaser
(vii) special value for an owner of an adjoining property to whom it may have some very special advantage."

34. The Apex Court has consistently held in the above judgments that the best method to assess the market value of land would be the amount that a willing purchaser would pay to the owner of the land. In the absence of any direct evidence, the other method as elucidated by the Apex Court in the judgements referred above may be taken recourse to.

35. The District Judge in concluding that the land in question was commercial land has considered unrebutted pieces of evidence adduced by respondent no.1 which established that the land in question is commercial. It further held that simply because the land is recorded as agricultural land in the revenue record, that does not mean that the claimant would be entitled to compensation on the rates applicable to agricultural land. Applying the principle laid down by the Apex Court that the best method to determine the market value of the land is the amount which a willing purchaser would pay to the owner of the land, this court finds that the view taken by the District Judge that the respondent no. 1 is entitled to compensation as per commercial rate of the land is correct and in conformity with the criteria provided for determination of compensation under Section 3G(7) of the Act, 1956 for the reason that in the present case, the land in question is commercial land, therefore, it is obvious that the willing purchaser would offer the price of commercial land to purchase the land in question which means that the market value of the land in question is the price of commercial land in the area where land is situated.

36. Thus, it can be concluded that the competent authority or the arbitrator in determining the compensation is only to consider the market value of the land on the date of notification under Section 3A of Act, 1956 and the nature of land recorded in the revenue record is not relevant for determining the compensation. Therefore, the court finds that the District Judge has rightly issued direction to pay compensation of the land treating it be commercial land. Consequently, the contention of the counsel for the appellant that the District Judge has acted illegally and beyond its jurisdiction in directing the appellant to pay compensation on the commercial rate is devoid of substance and rejected.

37. Now another question that arises for consideration is whether the District Judge was justified in directing payment of compensation treating the land to be

commercial land instead of remanding the matter back to the Arbitrator or leave it open to the parties to approach the Arbitrator again.

38. In this respect, it is useful to notice that Section 3-A to 3-F of the Act, 1956 provides a mechanism for acquisition of land where the Central Government is satisfied that for public purposes any land is required for building, maintenance, management or operation of a national highway or part thereof, it can acquire the land by following the procedure provided under Section 3-A to 3-F of the Act, 1956 and take possession of the land. Section 3-G (7) of the Act, 1956 provides for a mechanism for the determination of compensation. Section 3-G (5) of the Act, 1956 provides that if the party is dissatisfied with the amount of compensation, it can approach the Arbitrator. Thus, under the scheme of the Act, 1956, land is acquired compulsorily if the conditions envisaged in Section 3(A) of the Act, 1956 exists. After the acquisition of the land, competent authority shall determine the compensation and pass an award. If the landowner is not satisfied with the award, the only remedy available to the landowner is to seek arbitration under Section 3-G (5) of the Act, 1956 before an Arbitrator appointed by the Central Government.

39. The legislature has provided criteria under Section 3-G (7) of the Act, 1956 for determining the compensation with an object that the landowner shall be compensated adequately for the loss suffered by him on account of compulsory acquisition of his land. Section 3-G (7) of the Act, 1956 is a benevolent provision for the benefit of the landowner; and if the claimant is not satisfied with the compensation, the remedy to raise arbitration dispute by the landowner is contemplated under the Act with a purpose to grant quick relief to the landowner to save the landowner from being dragged into long drawn routine litigation. It is also to bear in mind that the Arbitration Proceedings under the Act,1956 does not arise of commercial contract where the parties have agreed to go in arbitration in case of any dispute arising out of the contract rather a mechanism of Arbitration conceived under the Act,1956 is to provide speedy remedy to landowners. Thus, it is obvious that the legislature while inducting the provision of arbitration under Section 3-G(5) of the Act, 1956 must have been conscious of the fact that the Arbitrator appointed by the Central Government would act fairly and independently and follow the criteria given in Section 3-G (7) of the Act,1956 in determining the compensation.

40. Thus, it is manifest that the provision of arbitration in the Act,1956 has been inserted with a purpose to provide a quick remedy to landowners, therefore in such circumstances, it cannot be said that the court is denuded of the power to modify the award for the ends of justice to provide relief to the landowner so that he may not suffer indefinitely to get just compensation as per law else any other conclusion would thwart the object of providing the remedy of Arbitration in the Act,1956. At this point, it would again be useful to refer to paragraph 37 of the judgment of Apex Court in the case of ***Dyna Technologies Private Limited (supra)*** wherein the Apex Court did not find it proper in the interest of justice to remand the matter to the Tribunal as the case has taken 25 years for its adjudication. Paragraph 37 of the said judgment is being reproduced hereinbelow:-

"37. In case of absence of reasoning the utility has been provided under of Section 34(4) of the Arbitration Act to cure such defects. When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34 (4) of the Arbitration Act to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication. It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced."

41. On perusal of judgments in respect of quantum of compensation mentioned in the memo of appeal on which reliance has been placed by the appellant, I find that none of them is applicable in the facts of the present case since those judgments have been referred under the Indian Stamp Act whereas the present case is under the Act, 1996 wherein Section 3-G (7) stipulates the criteria which the Arbitrator shall consider in determining the compensation.

42. Accordingly, this Court for the reasons given above finds that the District Judge has rightly modified the award and directed for payment of compensation treating the land to be commercial land.

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

(2021)07ILR A14
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2021

BEFORE

THE HON'BLE JASPREET SINGH, J.

Civil Misc Review Application Defective No. 86 of 2021

Smt. Rajeshwari & Ors.(In Sapl 375/2001)
...Applicants
Versus
Smt. Meharunnishan & Ors.
...Opposite Parties

Counsel for the Applicants:
Uma Shankar Sahai

Counsel for the Opposite Parties:

Practice &Procedure - Review Application - Re-hearing of the appeal is not within the scope ofthe review. (Para 16)

Application Rejected. (E-8)

List of Cases cited:-

1. Rakesh Vs St. of U.P. Jail Appeal No 242 of 2013

2. C.S. Venkatesh Vs A.S.C. Murthy (D) by L.Rs. & ors. Civil Appeal No. 8425 of 2009

3. Kanailal & ors. Vs Ram Chandra Singh & ors. Civil Appeal No. 4165 of 2008

4. P. Meenakshisundaram Vs P. Vijayakumar & ors. Civil Appeal Nos. 3353-3354 of 2018

5. Sukhvinder Singh Vs Jagroop Singh & ors. Civil Appeal No. 760 of 2020

6. Ram Sahu & ors. Vs Vinod Kumar Rawat & ors. 2020 SCC Online SC 896

7. Dalla Vs Nanhu 2019 (1) ADJ Page 246

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

1. Heard Sri U.S. Sahai, learned counsel for the review-petitioner.

2. The instant review-petition has been preferred against the judgment and order dated 24.02.2021 passed in Second Appeal No. 375 of 2001. The said review is also accompanied by an application seeking condonation of delay.

3. Having considered the application and the ground mentioned therein seeking condonation of delay, this Court finds that in view of the decision rendered by the Apex Court in the case of Suo Moto Writ Petition No. (Civil) 3 of 2020 In Ref: (Cognizance for Extension of Limitation) the period of said delay is to be excluded, hence, the review-petition shall be treated to be filed within time.

4. The Court has heard the learned counsel for the review-petitioner on admission of the aforesaid review-petition.

5. The submission of learned counsel for the appellant is that the instant second appeal was argued by Sri Nirmal Tiwari, Advocate. Since, thereafter he left for his heavenly abode and in the aforesaid circumstances, the appellants had contacted the counsel who has preferred the instant review-petition.

6. Sri U.S. Sahai while pressing the application for review submits that in the instant case, in a suit for specific performance of contract which was dismissed by the Trial Court, but has been decreed by the Lower Appellate Court. The appellants of the Second Appeal No. 375 of 2001 are the legal heirs of the original defendant namely Sri Darshan who was (the bonafide purchaser for valuable consideration) of the property having purchased the same from Sri Chedua, (the original owner).

7. It has been submitted that after the sale deed was executed in favour Sri Darshan (the predecessor-in-interest of the present review-petitioners), there was no cause of action which survived to the plaintiffs to press the suit for specific performance of contract without assailing the sale deed in question which was in favour of the predecessor-in-interest of the review-petitioner. In absence of any subsisting cause of action, the proceedings itself were bad and this aspect of the matter has not been noted by the Court while passing the impugned judgment dated 24.02.2021.

8. It is further urged that the issue of readiness and willingness of the plaintiffs has not been considered and no issue to the aforesaid effect was framed. The issue regarding the defendant (Darshan-the predecessors-in-interest of the review-petitioners) being the bonafide purchaser for valuable consideration without notice has also not been considered in the correct perspective so also the fact that the original owner of the property namely Chhedua has not denied the execution of the sale deed in favour of Sri Darshan (predecessor-in-interest of the present review-petitioner), hence, the plaintiff's suit could not have been decreed by the lower appellate court. The aforesaid aspect also escaped the attention of he Court, hence, putting the impugned judgment dated 24.02.2021 at a vulnerable status, capable of being reviewed.

9. The learned counsel for the review-petitioner has relied upon the following

decisions in the case of ***Rakesh Vs. State of U.P.*** decided on ***18.05.2018 in Jail Appeal No. 242 of 2013; C.S. Venkatesh Vs. A.S.C. Murthy (D) by L.Rs. and Others*** decided on ***07.02.2020 in Civil Appeal No. 8425 of 2009; Kanailal and Others Vs. Ram Chandra Singh and Others*** decided on ***23.08.2017*** in ***Civil Appeal No. 4165 of 2008; P. Meenakshisundaram Vs. P. Vijayakumar and Others*** decided on ***28.03.2018 in Civil Appeal Nos. 3353-3354 of 2018*** as well as in the case of ***Sukhvinder Singh Vs. Jagroop Singh and others*** decided on ***28.01.2020*** in ***Civil Appeal No. 760 of 2020.***

10. Before dealing with the aforesaid submissions, it will be worthwhile to notice a recent decision of the Apex Court in the case of ***Ram Sahu and Others Vs. Vinod Kumar Rawat and Others reported in 2020 SCC Online SC 896*** wherein the scope of the review has been considered in fair degree of depth also considering earlier decisions of the Apex Court on the point. The relevant paragraphs of the aforesaid report is reproduced as under:-

.....25. While considering the aforesaid question, the scope and ambit of the Court's power under Section 114 read with Order 47 Rule 1 CPC is required to be considered and for that few decisions of this Court are required to be referred to.

26. In the case of Haridas Das v. Usha Rani Banik (Smt.), (2006) 4 SCC 78 while considering the scope and ambit of Section 114 CPC read with Order 47 Rule 1 CPC it is observed and held in paragraph 14 to 18 as under:

"14. In Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170 it was held that:

"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 CPC. 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, this Court, in Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389 speaking through Chinnappa Reddy, J. has made the following pertinent observations:

"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 20 all manner of errors committed by the subordinate court.'"

15. A perusal of Order 47 Rule 1 shows that review of a judgment or an order could be sought : (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or

evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of the record or any other sufficient reason.

16. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389 : AIR 1979 SC 1047, this Court held that there are definite limits to the exercise of power of review. In that case, an application under Order 47 Rule 1 read with Section 151 of the Code was filed which was allowed and the order passed by the Judicial Commissioner was set aside and the writ petition was dismissed. On an appeal to this Court it was held as under : (SCC p. 390, para 3)

"It is true as observed by this Court in Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909 there is nothing in Article 226 of the Constitution to preclude a 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 21 powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

17. The judgment in Aribam case has been followed in Meera Bhanja. In that case, it has been reiterated that an error apparent on the face of the record for acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any long-drawn process of reasoning. The following observations in connection with an error apparent on the face of the record in Satyanarayan Laxminarayan Hegde v. Millikarjun Bhavanappa Tirumale, AIR 1960 SC 137 were also noted:

"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."

18. It is also pertinent to mention the observations of this Court in Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715. Relying upon the judgments in Aribam and Meera Bhanja it was observed as under:

"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 CPC 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'."

27. In the case of Lily Thomas v. Union of India, (2000) 6 SC 224, it is observed and held 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.

28. It is further observed in the said decision that the words "any other sufficient reason" appearing in Order 47 Rule 1 CPC must mean "a reason sufficient on grounds at least analogous to those specified in the rule" as was held in Chhajju Ram v. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius, AIR 1954 SC 526.

29. In the case of Inderchand Jain v. Motilal, (2009) 14 SCC 663 in paragraphs 7 to 11 it is observed and held as under:

7. Section 114 of the Code of Civil Procedure (for short "the Code") provides for a substantive power of review by a civil court and consequently by the appellate courts. The words "subject as aforesaid" occurring in Section 114 of the Code mean subject to such conditions and limitations as may be prescribed as appearing in Section 113 thereof and for the said purpose, the procedural conditions contained in Order 47 of the Code must be taken into consideration. Section 114 of the Code although does not prescribe any limitation on the power of the court but such limitations have been provided for in Order 47 of the Code; Rule 1 whereof reads as under:

"17. The power of a civil court to review its judgment/decision is traceable in Section 114 CPC. The grounds on which review can be sought are enumerated in Order 47 Rule 1 CPC, which reads as under:

"1. Application for review of judgment.--(1) Any person considering himself aggrieved--

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the 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, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the court which passed the decree or made the order.'"

8. An application for review would lie inter alia when the order suffers from an error apparent on the face of the record and permitting the same to continue would lead to failure of justice. In Rajendra Kumar v. Rambai this Court held : (SCC p. 514, para 6)

"6. 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."

9. The power of review can also be exercised by the court in the event discovery of new and important matter or evidence takes place which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. An application for review would also lie if the order has been passed on account of some mistake. Furthermore, an application for review shall also lie for any other sufficient reason.

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 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."

30. 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. In the case of Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji, (1971) 3 SCC 844, this Court has 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.

31. What can be said to be an error apparent on the face of the proceedings has been dealt with and considered by this Court in the case of T.C. Basappa v. T. Nagappa, AIR 1954 SC 440. It is held that such an error is an error which is a patent error and not a mere wrong decision. In the case of Hari Vishnu Kamath v. Ahmad Ishaque, AIR 1955 SC 233, it is observed as under:

"It is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated."

32. In the case of Parsion Devi v. Sumitri Devi, (Supra) in paragraph 7 to 9 it is observed and held as under:

7. It is well settled that review proceedings have to be strictly confined to the ambit and scope of Order 47 Rule 1 CPC. In Thungabhadra Industries Ltd. v. Govt. of A.P., AIR 1964 SC 1372 this Court opined:

"What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is an "error apparent on the face of the record'). The fact that on the earlier occasion the Court held on an identical state of facts that a substantial question of law arose would not per se be conclusive, for the earlier order

itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an "error apparent on the face of the record', for there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error."

8. Again, in Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170 while quoting with approval a passage from Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (supra) this Court once again held that 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 CPC.

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 CPC 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".

33. In the case of State of West Bengal v. Kamal Sengupta, (2008) 8 SCC 612, this Court had an occasion to consider what can be said to be "mistake or error apparent on the face of record". In para 22 to 35 it is observed and held as under:

"22. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

23. We may now notice some of the judicial precedents in which Section 114 read with Order 47 Rule 1 CPC and/or Section 22(3)(f) of the Act have been interpreted and limitations on the power of the civil court/tribunal to review its judgment/decision have been identified.

24. In Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao (1899-1900) 27 IA 197 the Privy Council interpreted Sections 206 and 623 of the Civil Procedure Code and observed : (IA p.205)

"... Section 623 enables any of the parties to apply for a review of any decree on the discovery of new and important matter and evidence, which was not within his knowledge, or could not be produced by him at the time the decree was passed, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. It is not necessary to decide in this case whether the latter words should be confined to reasons strictly ejusdem generic with those enumerated, as was held in Roy Meghraj v. Beejoy Gobind Burral, ILR (1875) 1 Cal 197. In the opinion of Their Lordships, the ground of amendment must at any rate be

something which existed at the date of the decree, and the section does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event."

(emphasis added)

25. In Hari Sankar Pal v. Anath Nath Mitter, 1949 FCR 36 a five-Judge Bench of the Federal Court while considering the question whether the Calcutta High Court was justified in not granting relief to non-appealing party, whose position 28 was similar to that of the successful appellant, held : (FCR p. 48)

"That a decision is erroneous in law is certainly no ground for ordering review. If the court has decided a point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it. When, however, the court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47 Rule 1, Civil Procedure Code."

26. In Moran Mar Basselios Catholicos v. Mar Poulose Athanasius (supra) this Court interpreted the provisions contained in the Travancore Code of Civil Procedure which are analogous to Order 47 Rule 1 and observed:

"32. ... Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein.

It may allow a review on three specified grounds, namely, (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record and (iii) for any other sufficient reason.

It has been held by the Judicial Committee that the words ''any other sufficient reason' must mean ''a reason sufficient on grounds, least analogous to those specified in the rule'."

27. In Thungabhadra Industries Ltd. v. Govt. of A.P. (supra) it was held that a review is by no means an appeal in disguise whereof an erroneous decision can be corrected.

28. In Parsion Devi v. Sumitri Devi (Supra) it was held as under : (SCC p. 716)

"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 CPC it is not permissible for an erroneous decision to be ''reheard and corrected'. 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. A review petition has a limited purpose and cannot be allowed to be ''an appeal in disguise'."

29. In Haridas Das v. Usha Rani Banik, (supra) this Court made a reference to the Explanation added to Order 47 by

the Code of Civil Procedure (Amendment) Act, 1976 and held:

"13. In order to appreciate the scope of a review, Section 114 CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the court since it merely states that it "may make such order thereon as it thinks fit'. The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason'. The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection.

30. In Aribam Tuleshwar Sharma v. Aribam Pishak Sharma (Supra) this Court considered the scope of the High Courts' power to review an order passed under Article 226 of the Constitution, referred to an earlier decision in Shivdeo Singh v. State of Punjab (Supra) and observed : (Aribam Tuleshwar case (Supra), SCC p. 390, para 3)

"3. ... It is true as observed by this Court in Shivdeo Singh v. State of Punjab (Supra), there is nothing in Article 226 of the Constitution to preclude a 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 powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

31. In K. Ajit Babu v. Union of India, (1997) 6 SCC 473, it was held that even though Order 47 Rule 1 is strictly not applicable to the tribunals, the principles contained therein have to be extended to them, else there would be no limitation on the power of review and there would be no certainty or finality of a decision. A slightly different view was expressed in Gopabandhu Biswal v. Krishna Chandra Mohanty, (1998) 4 SCC 447). In that case it was held that the power of review granted to the tribunals is similar to the power of a civil court under Order 47 Rule 1.

32. In Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596, this Court reiterated that power of review vested in the Tribunal is similar to the one conferred upon a civil court and held : (SCC p. 608, paras 30-31)

"30. The provisions extracted above indicate that the power of review available to the Tribunal is the same as has been given to a court under Section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the restrictions indicated in Order 47. The power can be exercised on the application of a person on the 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it. It may be pointed out that the expression "any other sufficient reason' used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the Rule.

31. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 47, would amount to an abuse of the liberty given to the Tribunal under the Act to review its judgment."

33. In State of Haryana v. M.P. Mohla, (2007) 1 SCC 457 this Court held as under : (SCC pp. 465-66, para 27)

"27. A review petition filed by the 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."

34. In Gopal Singh v. State Cadre Forest Officers' Assn., (2007) 9 SCC 369 this Court held that after rejecting the original application filed by the appellant, there was no justification for the Tribunal to review its order and allow the revision of the appellant. Some of the observations made in that judgment are extracted below : (SCC p. 387, para 40)

"40. The learned counsel for the State also pointed out that there was no necessity whatsoever on the part of the Tribunal to review its own judgment. Even after the microscopic examination of the judgment of the Tribunal we could not find a single reason in the whole judgment as to how the review was justified and for what reasons. No apparent error on the face of the record was pointed, nor was it discussed. Thereby the Tribunal sat as an appellate authority over its own judgment. This was completely impermissible and we agree with the High Court (Sinha, J.) that the Tribunal has travelled out of its jurisdiction to write a second order in the name of reviewing its own judgment. In fact the learned counsel for the appellant did not address us on this very vital aspect."

35. The principles which can be culled out from the abovenoted judgments are:

(i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the

power of a civil court under Section 114 read with Order 47 Rule 1 CPC.

(ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise

(iii) The expression "any other sufficient reason" appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.

(iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).

(v) An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

(vi) A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

(vii) While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

(viii) Mere discovery of new or important matter or evidence is not sufficient ground for review. The party 33 seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier."

34. To appreciate the scope of review, it would be proper for this Court to discuss the object and ambit of Section 114 CPC as the same is a substantive provision for review when a person considering himself aggrieved either by a decree or by an order of Court from which appeal is allowed but no appeal is preferred or where there is no provision for appeal against an order and decree, may apply for review of the decree or order as the case may be in the Court, which may order or pass the decree. From the bare reading of Section 114 CPC, it appears that the said substantive power of review under Section 114 CPC has not laid down any condition as the condition precedent in exercise of power of review nor the said Section imposed any prohibition on the Court for exercising its power to review its decision. However, an order can be reviewed by a Court only on the prescribed grounds mentioned in Order 47 Rule 1 CPC, which has been elaborately discussed hereinabove. An application for review is more restricted than that of an appeal and the Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rule 1 CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power can be exercised in the guise of power of review.

35. Considered in the light of the aforesaid settled position, we find that the High Court has clearly overstepped the jurisdiction vested in the Court under Order 47 Rule 1 CPC. No ground as envisaged under Order 47 Rule 1 CPC has been made out for the purpose of reviewing the observations made in para 20. It is required to be noted and as evident from para 20, the High Court made observations in para 20 with respect to possession of the plaintiffs on appreciation of evidence on record more particularly the deposition of the plaintiff (PW1) and his witness PW2 and on appreciation of the evidence, the High Court found that the plaintiff is in actual possession of the said house.

Therefore, when the observation with respect to the possession of the plaintiff were made on appreciation of evidence/material on record, it cannot be said that there was an error apparent on the face of proceedings which were required to be reviewed in exercise of powers under Order 47 Rule 1 CPC. At this stage, it is required to be noted that even High Court while making observations in para 20 with respect to plaintiff in possession also took note of the fact that the defendant nos. 1 and 2 - respondents herein themselves filed an application being I.A. No. 1267 of 2012 which was filed under Section 151 CPC for getting the possession of the disputed house from the appellants and the said application was dismissed as withdrawn. Therefore, the High Court took note of the fact that even according to the defendant nos. 1 & 2 the appellants were in possession of the disputed house. Therefore, in light of the fact situation, the High Court has clearly erred in deleting para 20 in exercise of powers under Order 47 Rule 1 CPC more particularly in the light of the settled preposition of law laid down by this Court in the aforesaid decisions.

11. In view of the scope as discussed above, if the submissions of the learned counsel for the review-petitioner is tested in light of the material available on record including from the perusal of the impugned judgment dated 24.02.2021, it would indicate that while deciding the substantial questions of law which have been noted in the judgment, it would be seen that the aforesaid aspects of the matter has been duly considered by the Court and findings have been given.

12. The Court has considered the pleadings, issues framed and the evidence available on record and finds that the issue of readiness and willingness has been noticed so also the issue of review-petitioner being a bona fide purchaser for valuable consideration has been considered with sufficient particularity.

13. The ground raised regarding cause of action having been exhausted upon execution of sale deed is frivilous and moreover no such plea was raised by the review-petitioner in his pleadings before the courts below.

14. The ground raised relating to Order 41 Rule 31 C.P.C. was neither raised or argued nor any substantial question of law was framed in respect thereto. Moreover, the said ground is an afterthought and also not sustainable in light of the decision of the Court in the case of Dalla Vs. Nanhu reported in reported in ***2019 (1) ADJ Page 246.*** Neither the learned counsel for the review-petitioner could show any prejudice caused as required to be indicated as per the decision of the Dalla (Supra).

15. The decisions cited by the learned counsel for the review-petitioner do not relate to the scope of review. Since the judgment under review has been passed by the Court considering the substantial questions of law, the arguments made and the material available on record. No error apparent on the face of record could be pointed out by the learned counsel for the review-petitioner, hence, the decisions do not render any support.

16. The review-petitioner is trying to seek a re-hearing of the appeal which is not within the scope of the review. The learned

counsel could not point out any error apparent on the face of the record and the submissions made do not fall within the parameters of Section 114 read with Order 47 Rule 1 C.P.C.

17. Having considered the matter, this Court finds that no grounds of review is made out. The Review-Petition is absolutely devoid of merits and is dismissed with costs.

(2021)07ILR A26
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.07.2021

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Appeal No. 1244 of 1987

Shri Pal & Ors. ...Appellants
Versus
State ...Respondent

Counsel for the Appellants:
Sri S.P.S. Raghav, Sri Gopal Sahai Srivastava, Sri Indra Kumar Chaturvedi, Smt. Rekha Pundir, Sri Hari Mohan Kesarwani

Counsel for the Respondent:
A.G.A.

A. Criminal Law - Code of Criminal Procedure,1973-Section 374(2) - Indian Penal Code,1860-Sections 302/34, 201,307/34-challenge to- conviction-accused came with lathi, danda, farsa and gun with common object and they brutally murdered the deceased and cutting his head threw the body in canal, would show the occurrence could not be carried out by one person alone-they succeeded in executing their plan successfully-ocular version stands corroborated by the medical evidence-presence of PW-1 and PW-2 was natural, their testimony is consistent in respect of time and place of occurrence-merely because witnesses are close relatives of victim, their testimonies can not be discarded-relationship with one of the parties is not a factor that affects credibility of witness-more so, a relative would not conceal the actual culprit and make allegation against an innocent person-they were subjected to lengthy cross examination, but the defence could not succeed in impeaching their creditworthiness by extracting anything suspicious.(Para 2 to 45)

B. It is a settled legal proposition that the evidence of closely related witness or interested witness is required to be carefully scrutinized and appreciated. there is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court. it will always depend upon the facts and circumstances of 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.(Para 44)

The appeal is dismissed. (E-5)

List of Cases cited:

1. Sampath Kumar Vs Inspr. of Police, Krishnagiri (2012) 4 SCC 124

2. Sachin Kumar Singhraha Vs St. of M. P. (2019) CRLA 473-474

3. Smt. Shamim Vs St. (NCT of Delhi)(2018) CRLA 56

4. Yogesh Singh Vs Mahabeer Singh & ors. (2017) 11 SCC 195

5. Lokesh Shivakumar Vs St. of Karn. (2012) 3 SCC

6. Dalip Singh Vs St. of Punj. (1953) AIR SC 364

7. Dharnidhar Vs St. of U.P. (2010) 7 SCC 759

8. Jayabalan Vs U.T .of Pondicherry (2010) 1 SCC 199

9. Ganga Bhawani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

10. Bhagalool Lodh & anr. Vs St. of U.P.(2011) AIR SC 2292

11. Dhari & ors. Vs St. of U.P.(2013) AIR SC 308

12. Anil Rai Vs St. of Bih. (2001) SCC 456

13. Raju@ Balachandran & ors. Vs St. of T.N. (2012) 12 SCC 701

14. Jodhan Vs St. of M.P.(2015) 11 SCC 52

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. The present Criminal Appeal has been filed by accused-appellants, namely, Shripal, Vijaypal, Kiranpal and Rishipal against the judgement and order dated 30.04.1987 passed by III Additional Sessions Judge, Meerut in Sessions Trial No.420 of 1982, Police Station Sardhana, District Meerut, whereby trial Court convicted the accused appellants under Sections 302/34, 201 and 307/34 IPC and sentenced them for life imprisonment and fine of Rs.200/- each with default clause.

2. According to prosecution story in brief, one Rajpal was shot dead on 25.08.1982 at about 11:00 AM in Village Kapsar, Police Station Sardhana, District Meerut by accused-appellants Shripal, Vijaypal, Kiranpal and Rishipal and accused persons took away his dead body towards Rajwaha. Informant was also injured by shrapnel. Incident was reported to police station concerned telephonically by informant PW-1 Jagdish.

3. On the basis of information received telephonically, a chik FIR Ex.Ka-14 was registered by Head Constable Moharrir Rajpal Singh at Crime No. 256 of 1982, under Sections 302, 201 and 307 IPC. Entry was made by same Constable in G.D. of police station concerned.

4. The then S.H.O. Roshan Lal Verma PW-5 undertook investigation of the case and took relevant papers, proceeded to spot along-with S.I. V.S. Sharma and other police officials. Recorded the statement of PW-1 Jagdish, PW-2 Smt. Ummed (W/o deceased) and other witnesses, visited the spot, prepared site plan Ex.Ka-2 at the pointing out of informant, found signs of dragging the dead body up to Gang Naher, prepared site plan of that place i.e. Ex.Ka-3, collected blood stained earth and simple earth of place of incident, prepared fards thereof and searched the body on the bank of river but found it nowhere. Investigating Officer collected blood stained soil and some pieces of wound there from and prepared fards thereof.

5. On the next day, Investigating Officer received information from one Mohd. Yaseen regarding dead body that was entered into G.D.15. Investigating Officer visited there with S.I. V.S. Sharma and other officials, directed S.I. to hold inquest over the dead body which was beheaded. Sri Sharma held inquest Ex.Ka-6 and prepared relevant papers thereof. Dead body was sent for postmortem. On the very same day, Investigating Officer recorded the statement of Mohd. Yaseen.

6. Further investigation was done by PW-7 S.I. A.K. Chaudhary due to transfer of former Investigating Officer.

7. PW-3 Dr. Prempal Singh medically examined PW-1 Jagdish on 25.08.1982 and found one lacerated wound on scalp of right parital measuring 0.8 x 0.2 cm muscle deep and clotted blood was also found over the injury. Doctor prepared medico legal report Ex.Ka-1.

8. PW-8 Dr. Vijay Singh held autopsy over the dead body of Rajpal and prepared postmortem report Ex.Ka-13, noting ante mortem injuries therein.

9. PW-7 S.I. A.K. Chaudhary, after completing entire formalities of investigation, found sufficient evidence against accused persons and submitted charge sheet Ex.Ka-12 against the accused-appellants before CJM concerned who took cognizance of the case.

10. CJM, after making sufficient compliance under Section 207 Cr.P.C., case being triable by Court of Sessions, committed it to Court of Sessions for trial.

11. Session trial came to be heard by III Additional Sessions Judge, Meerut. Trial Court framed the charges under Sections 302/34, 201 and 307/34 IPC against the accused-appellants, who denied the charges and pleaded not guilty and claimed to be tried.

12. In support of its case, prosecution examined nine witnesses, namely, PW-1 Jagdish, PW-2 Smt. Ummed, PW-3 Dr. Prem Raj Singh, PW-4 Dharampal, PW-5 S.H.O. Roshan Lal Verma, PW-6 Constable Shaukat Ali, PW-7 S.I. A.K. Chaudhary, PW-8 Dr. Vijay Singh and PW-9 Moharrir Rajpal Singh out of which PWs 1 Jagdish and PW-2 Smt. Ummed are witnesses of fact and rest are formal witnesses.

13. On closure of evidence by prosecution, Court recorded the statements of accused persons under Section 313 Cr.P.C. explaining entire evidence and incriminating circumstances. Accused persons denied the prosecution story in toto. Statements of witnesses are alleged to be wrong, they claimed false implication but they did not set up any defence story. They did not choose to lead any evidence in their defence.

14. Trial Court after hearing counsel for parties and appreciating entire evidence available on record has found accused-appellants guilty and convicted and sentenced as stated above.

15. We have heard Sri Indra Kumar Chaturvedi, learned Senior Council assisted by Sri Hari Mohan Kesarwani for the appellants and Sri S.A. Murtaza, learned AGA for State and we have gone through the record with the valuable assistance of learned Counsel for the parties.

16. Learned Senior Counsel appearing for appellants has challenged conviction of accused-appellants, advancing his submissions in the following manner :

i. Accused-appellants are innocent, they have committed no offence and they have been falsely implicated in the present case.

ii. There was no sufficient and prompt motive to accused-appellants to commit murder of deceased Rajpal in the presence of witnesses who are the close

relative of deceased, enabling them to give video-graphic version.

iii. As per prosecution evidence, dragging of dead body is alleged but postmortem report does not indicate any sign of dragging over dead body of deceased. Body was found beheaded, there is no injury of any fire arm over the dead body. It seems that story of opening fire on head has been developed by prosecution after postmortem report is received because body was beheaded.

iv. Sripal is alleged to have gun with him but there is no fire arm injury on deceased or alleged injured PW-1.

v. Medical evidence does not go with the prosecution case and it is not sufficient to prove the guilt of the accused-appellants.

vi. Medical report of PW-1 also does not support the story of PW-1 as injury found was of hard blunt object while it is stated to have been caused by fire arm.

vii. Police failed to recover the head of the deceased or any offending arms allegedly used in the commission of offence from the possession of any of the accused.

viii. PWs 1 and 2 being close relative of deceased is not worthy of credence. There is no public witness whereas incident is said to have taken place in the light of day.

ix. Incident is said to have taken place in the broad daylight and PW-2 stated that more than 100 persons had gathered there but nobody came forward to support the prosecution case.

x. No independent witness has been produced from the side of prosecution.

xi. There is material contradiction in the evidence of witness so as to disbelieve the prosecution case.

xii. Deceased had previous litigation with other persons besides accused-appellants. He might have been murdered by someone else.

xiii. Place of standing buggi has neither been shown in site plan nor any recovery memo has been prepared by Investigating Officer.

xiv. Trial Court, without appreciating proper evidence and in haphazard manner, passed impugned order of conviction which is liable to be quashed.

17. On the other hand, learned AGA supporting the impugned judgement submitted that it is a daylight murder. PW-1 has been injured in the incident and it is settled legal position that evidence of injured persons cannot be ignored lightly unless it is proved otherwise. Relationship of the witnesses to victim/deceased is not a ground for ignoring their evidence. This is a case of direct evidence where motive has no relevance although motive shown by prosecution for committing murder of Rajpal has been established by prosecution. Body was identified by PW-2 wife of deceased and father of deceased (not examined). Evidentally Rajpal was brutally murdered and there was no reason for the witnesses to falsely implicate the accused persons. Prosecution story is fully supported by medical evidence. Trial Court has rightly convicted the accused-appellants.

18. Before adverting to submission made by learned Counsel for the accused-appellants, we would like to consider the evidence of witnesses on the point of time of incident, weapon and manner in which incident took place.

19. PW-1 informant Jagdish deposed that incident took place at 11:00 AM on 25.08.1982. He (informant), his cousin Rampal (deceased) and Smt. Ummed PW-2 wife of Rajpal (deceased) were returning to his house taken Mayar in Buggi from his field, when they reached at the patri of Rajwaha (Canal) accused Sripal, Vijaypal, Kiranpal and Rishipal came there with their respective weapons. Sripal and Rishipal were armed with gun, Kiranpal was armed with Katta and Vijaypal having farsa. Accused took down Rajpal from Buggi saying that he was head of the opposite party whereupon he and Smt. Ummed raised alarm. Accused Sripal hit fire on the head of Rajpal. Sripal also fired on him, all the accused persons assaulted Rajapal with their respective weapons. All the accused persons tied the hands of Rajpal by his own shirt and his leg by bed sheet and took him away towards Canal. Informant ran away to his village leaving Smt. Ummed on spot. Statement further recites that Rajpal (deceased) sustained head injury by fire arm. He was also injured in head by shrapnel. In cross examination, PW-1 states that all the accused persons are his family member, he ran away from spot leaving his Bhabhi PW-2 there, he made telephone call from post office. He further deposed that when he again reached on spot, Buggi was there but Bhabhi was not there. He did not know how long after the incident his Bhabhi came there. In entire cross examination, neither place, date and time of incident nor the murder of Rajpal has been challenged by the accused persons. It appears that cross examination has been made for the sake of cross examination.

20. PW-2 Smt. Ummed deposed that at the time of occurrence she, her husband Rajpal and her Dewar Jagdish were coming from Jungle, when they reached on the parti of Canal, accused Sripal, Vijaypal, Kiranpal and Rishipal met there. All the accused persons told Rajpal that he was the head of opposite party and took him down, when they raised alarm accused Sripal hit first fire on Rajpal and second fire on Jagdish. Her husband fell down on the earth having sustained fire-arm injury and all the accused persons started cutting him, accused persons tied the hands of her husband with his own shirt and his legs with bed sheet. They took him towards Canal. She further deposed that her Dewar PW-1 ran away to village and gave information to Police through telephone. She further deposed that at the time of incident only she and her Dewar was there, no other family member was there. Telu and Santa who were the outsider have come, who witnessed the incident. She further stated that dead body of her husband was recovered from Gang Naher next day at 07:00 AM. She further states in her examination-in-chief that there was an enmity between her husband and his family (accused persons) from before her marriage. In her cross examination she had gone to her field one day before the incident. She did never go to field before. She is not in position to tell whose fields are near the field of Jagdish and her. She specifically stated in paragraph 8 of her statement that accused persons took off her husband and Sripal opened fire. Accused Vijaypal attacked with farsa. Where incident took place, her husband's blood was spilled. Nobody chased the accused. In paragraph no.12 of statement, she admits that dead body was recovered before her. Suggestion put before her that she had not seen the incident has been denied by the witness. Defence did not put any suggestion challenging the time, date of incident and murder of Rajpal.

21. Both the witnesses withstood the lengthy cross examination but nothing could be brought so as to disbelieve their statements.

22. Statement of PW-2 and her presence on spot with her husband is quite natural. Presence of PW-1 Jagdish got cemented with the statement of PW-2. Time, place and manner in which Rajpal has been murdered is unchallenged from the statement of PWs 1 and 2, incident stands corroborated.

23. Now only question remains for consideration before us is that who are responsible for causing murder of Rajpal and whether trial Court has rightly convicted the accused-appellants under the aforesaid sections or not?

24. PW-8 Dr. Vijay Singh conducted the autopsy over the dead body of Rajpal at about 02:20 PM on 27.08.1982. He opined that death was possible at 11:00 AM on 25.08.1982 as a result of ante mortem injuries. Doctor found following antemortem injuries on his person at the time of postmortem:-

i. Incised wound amputating the head from trunk at the lower part of neck. 38 cm in circumference and 13 cm from interior to back. Borders were incised and interrupted. All the soft tissues including trachea, esophagus and large vessels were cut underneath, VI cervical vertebrae was also cut into half.

ii. Incised wound 2 cm x 2 cm Skin deep left side front of chest upper part.

iii. Incised wound 2 cm x 2 cm muscle deep with tailing at lower end on inner part of front of lower chest.

iv. Incised wound 1 cm x ¾ cm x skin deep on left base of neck.

v. Incised wound 11 cm x 6 cm muscle and bone deep both on top of left shoulder cutting the head left humorous and achromion process.

vi. Incised wound 6 cm x 2 cm bone deep of back chest 5 cm from midline tailing present on outer end.

Vii. Two incised wound 4 ½ cm x 2 cm and 3 ½ cm x 1 ½ cm both muscle deep and parallel each other and also parallel to injury no. 6, 4 cm above injury no.6.

Viii. Incised wound 7 cm x 2 cm bone deep upper part of back of left chest, tailing present on the outer end.

ix. Incised wound 5 cm x 1 cm x skin deep 2 cm interior to injury no.8.

x. Contusion 14 cm x 2 cm on back and ineer side of right arm extending from upper end of right arm to back of right elbow.

25. PW-5 S.I. Roshan Lal Verma deposed that on 25.08.1982, he was posted as S.H.O. at police station Sardhana . On the very same day on the basis of telephone call made by Jagdish, case was registered in his presence. He under-took investigation, visited spot along-with S.I. V.S. Sharma and Constable Shaukat Ali, recorded the statement of PWs 1 and 2, on the pointing out of PW-1 inspected the spot, prepared site plan Ex.Ka-2. He found the sign of dragging the dead body up to Gang Naher, prepared site plan Ex.Ka-3. Collected blood stained and simple earth from spot and prepared fard thereof. He searched the dead body and found blood stained earth and some pieces of wound at the bank of Canal. On 26.08.1982, on the information made by Mohd. Yaseen, he reached at Gang Naher and directed S.I.

V.S. Verma to hold inquest over the dead body which was found in Gang Naher. Ultimately after completing entire formalities of prosecution, charge sheet was submitted by S.I. A.K. Chaudhary.

26. From the statement of PWs 1 and 2 discussed above and perusal of statements of witnesses PWs 8 and 5, complicity of accused persons in commission of offence stands proved.

27. One of the argument advanced by learned Senior Counsel for appellants is that as per prosecution, accused persons opened fire on the deceased Rajpal but there was no fire arm injury found on the dead body of deceased while conducting postmortem by doctor, thus prosecution case is not supported by medical evidence and statements given by PWs 1 and 2 inspires no confidence.

28. So far as the argument advanced by learned Counsel for accused-appellants, we are not convinced for the reasons that witness PW-1, alleged eye witness, specifically deposed that accused Shree Pal fired on the head of Rajpal. Accused Shree Pal fired on him also and other accused persons assaulted Rajpal with their respective weapons.

29. It is also noteworthy that dead body of Rajpal was recovered beheaded and his head could not be traced out by police. When head of Rajpal could not be recovered by police, panchayatnama and postmortem of his head could not be conducted, therefore, there was no accused of any fire-arm injury in the postmortem report, argument is misconceived and not worthy to be accepted.

30. Certainly, there is minor contradictions or development in their evidence but they are not of such nature so as to disbelieve the entire story of prosecution and they are not so serious and sufficient that accused could be acquitted. Each and every contradiction and development appeared in cross examination do not affect the root of case.

31. In so far as discrepancies, variations and contradictions in the prosecution case are concerned, we have analysed entire evidence in consonance with the submissions raised by learned counsel's and find that the same do not go to the root of case.

32. In ***Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,*** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

33. In ***Sachin Kumar Singhraha v. State of Madhya Pradesh, (2019) 8 SCC 371,*** Hon'ble Supreme Court has observed that the Court will have to evaluate the evidence before it keeping in mind the rustic nature of the depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

34. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to ***Smt. Shamim v. State (GNCT of Delhi), (2018) 10 SCC 509.***

35. In ***Yogesh Singh vs. Mahabeer Singh & Other, 2017 (11) SCC 195,*** Supreme Court has held that minor inconsistencies or insignificant embellishments in the statement of witnesses should yield to the fallibility of human faculties and be ignored if the evidence is otherwise trustworthy and corroborates in material particulars: -

"29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions. (See Rammi @ Rameshwar Vs. State of M.P. (1999) 8 SCC 649; Leela Ram (dead) through Dulli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796)."

36. There is no suggestion from the side of accused persons that witnesses were not present on spot. In statement under Section 313 Cr.P.C., accused persons simply stated that they have been falsely implicated on account of rivalry. No evidence was adduced from the side of defence. They denied the prosecution case and statement of witnesses is said to be of rivalry. No specific plea has been taken by accused persons as to why they have been trapped in so serious matter. Time, date and murder of Rajpal has not been challenged by the accused persons in cross examination or statement under Section 313 Cr.P.C.

37. So far as motive is concerned, it is well settled that where direct evidence is worthy of credence, can be believed, then motive does not carry much weight. It is also notable that mind-set of accused persons differs from each other. Thus, merely because there was no strong motive to commit the present offence, prosecution case cannot be disbelieved.

38. In ***Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196,*** Court held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular

evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

39. Another limb of argument is that PW-1 and PW-2 are closely related to each other and because of enmity they have falsely implicated the accused. The law on this point is well settled. The evidence of such witness is to be closely scrutinized, with extra care and caution. It cannot be rejected merely for the reason that they are closely related to the complainant. If on a careful scrutiny, their testimony is found to be intrinsically reliable and trustworthy, then nothing prevents the court from placing reliance upon the same, it is now well settled law laid down in **Dalip Singh v. State of Punjab, AIR,1953, SC 364,** where Court has held as under :-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

40. In Dharnidhar v. State of UP (2010) 7 SCC 759, Court has observed as follows :-

"There is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of ***Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199,*** *this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"*

41. In ***Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,*** Court has held as under :-

"11. It is a 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. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon.

*(Vide: **Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308).**"*

42. In **Yogesh Singh (Supra)**, the Supreme Court summarized the legal position on the above issue as follows:

"28. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52)."

43. We have held that the presence of PW-1 and PW-2 was natural. Their testimony is consistent in respect of time and place of occurrence, the manner in which occurrence took place, witnesses were subjected to lengthy cross examination, but the defence could not succeed in impeaching their creditworthiness by extracting anything suspicious.

44. It is settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out that whether it is cogent and credible evidence.

45. The result of above discussion is that there is concrete evidence to prove the prosecution case. The ocular version stands corroborated by the medical evidence. Accused persons had come with lathi, danda, farsa and gun and in prosecution of common object, brutally murdered Rajpal. The circumstances that accused shot fire on Rajpal, dragged him to canal where they caused serious injuries by cutting his head and threw the dead body in the canal, would show that occurrence could not be carried out by one person alone, therefore, involvement of all accused persons seems to be in incident. They succeeded in executing their plan successfully. They were rightly found guilty of offences by the Trial Court. There is no mitigating circumstance or evidence for taking a different view on the conviction and sentence awarded by the trial Court. The appeal is devoid of merit and is **dismissed.** Accused-appellants shall be taken in custody forthwith to serve out their sentence.

46. Let a copy of this judgment be sent to the trial court concerned forthwith.

(2021)07ILR A36
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2021

BEFORE

THE HON'BLE SURESH KUMAR GUPTA, J.

Criminal Appeal No. 1265 of 2020

Shivam Tiwari ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Kaushal Tiwari

Counsel for the Respondents:
G.A.

A. Criminal Law - Code of Criminal Procedure,1973-Section 374(2) - Indian Penal Code,1860-Sections 323,504,506 & SC/ST Act-Section 3(1)(d)(dha)-seeking bail-rejection-accused casted abusive words and inflicted injury to the son of complainant-six injuries with hard and blunt object was found in the medical of the complainant's son who was handicapped-prima facie sufficient material is available on the record against the accused- no irregularity found in the order passed by the trial court at the stage of framing charge.(Para 1 to 14)

B. 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.charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the court must come to a prima facie finding that there exist some materials therefor. suspicion alone, without anything more, cannot form the basis therefor or held to be sufficient for framing charge.(Para 9 to 11)

The appeal is rejected. (E-5)

List of Cases cited:

1. P. Vijayan Vs St of Ker. & ors. (2010) 2 SCC 1398

2. Soma Chakravarty Vs St.(2007)AIR SC 2149

3. Sajjan Kumar Vs C.B.I. JT (2010) 10 SC 413

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

1. As per report of CJM, Ambedkarnagar dated 04.03.2021, notice was duly served on respondent no.2 but no one has put in appearance on his behalf.

2. This criminal appeal has been filed by the appellant against the judgement and order dated 07.10.2020 passed by learned Special Judge, SC/ST Act, Ambedkarnagar in SC/ST Case No.107 of 2019, Crime No.0125 of 2019, under Sections 323, 504, 506 IPC & Section 3(1)(d)(dha) of SC/ST Act, P.S.- Malipur, District-Ambedkarnagar.

3. The brief fact of the case is that according to the prosecution story, the complainant namely Udayraj lodged the F.I.R. on 11.06.2019 with allegation that the son of the complainant, Amarjeet who is handicapped was going to Malipur for repairing his bicycle. When he reached near Budhawa Baba temple, then one Shivam Tiwari, S/o Jagdish Tiwari started casting abusive words and when the son of the complainant objected, then the accused-appellant inflicted injury to him. The F.I.R. was lodged against the accused-appellant under Sections 323, 504, 506 IPC. During investigation, the son of the complainant,

Amarjeet was examined medically on 13.06.2019 and following injury was found on the body of the injured:

1. Contusion of size 3.0cm x 2.0cm present on partial region of skull, 4.0cm above from Lt. ear. Colour- Bluish Black.

2. Contusion of size 3.0cm x 1.2cm present on Lt. deltoid region. Colour- Bluish black.

3. Abraded contusion of size 6.0cm x 2.8cm present on dorsal aspect of Rt. index finger.

4. Abrasion of size 1.5cm x 1.0cm present on dorsal of Rt. middle finger, 2.5cm below from back of Rt. middle finger. Colour- Reddish brown scab present.

5. Contusion of size 4.0cm x 1.5cm present on dorsal aspect of Rt. thigh, 15.0cm above from Rt. knee joint. Colour- Bluish black.

6. Abrasion of size 3.0cm x 2.0cm present on front of Rt. knee joint. Colour- Reddish brown scab present.

Opinion- All injuries are simple in nature caused by any hard and blunt object, duration about 2-4 days old.

4. Learned counsel for the appellant submits that the investigating officer without collecting the credible evidence wrongly submitted the charge-sheet and learned trial court without applying judicial mind convicted the accused-appellant. Learned counsel further submits that earlier the appeal was filed by the appellant in which he got interim protection to move application for discharge under Section 227 Cr.P.C. before the trial court. But the learned trial court without hearing the accused-appellant wrongly rejected the discharge application filed under Section 227 Cr.P.C. and summoned the accused-appellant.

5. The main contention of the learned counsel for the appellant is that the appellant is innocent and has falsely been implicated due to parti-bandi. Learned counsel further submits that the complainant is a local leader of ruling party and he always doing the local politics and in the Lok Sabha election, he made pressure upon the villagers to cast their votes in favour of ruling party candidates, but the appellant opposed the activities of the complainant and denied to cast his and his family votes in favour of the ruling party.

6. Learned counsel further submits that the complaint against the accused-appellant is frivolous and no offence is made out against the appellant. Therefore, the accused-appellant may be granted bail.

7. Learned AGA opposes the prayer for grant of bail to the accused-appellant and submits that after collecting the credible evidence, the investigating officer submitted the charge-sheet. It is also transpired from the injury report, six injuries were inflicted on the body of son of the complainant, Amarjeet. Therefore, the bail application of the accused-appellant is liable to be rejected.

8. I have heard learned counsel for the parties and perused the record. It transpires that the investigating officer after collecting the sufficient evidence submitted the charge-sheet against the appellant. On perusal of the entire record, I am of the view that inference cannot be drawn that no

offence is made out against the appellant. Prima facie, sufficient material against the appellant is available on record and the allegation shall be tested when the prosecution witnesses are examined before the court.

9. The Hon'ble Supreme Court in the judgment passed in the matter of ***"P. Vijayan vs. State of Kerala and Ors. reported in 2010 (2) SCC 1398 "*** held that :-

"10. Before considering the merits of the claim of both the parties, it is useful to refer 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.

(12) The scope of Section 227 of the Code was considered by this Court in the case of State of Bihar vs. Ramesh Singh, wherein this Court observed as follows:-

"4. ... 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 the trial Judge in order to frame a charge against the accused.

10. In a recent decision, in ***Soma Chakravarty vs. State, AIR 2007 SC 2149*** this Court has held that :-

"The settled legal position 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.... 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. Whether, in fact, the accused committed the offence, can only be decided in the trial. (Para 11)

Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the Court must come to a prima facie finding that there exist some materials therefor. Suspicion alone, without anything more, cannot form the basis therefor or held to be sufficient for framing charge."

11. Apart from the aforesaid cases, in the case of ***Sajjan Kumar vs. Central Bureau of Investigation, JT 2010(10) SC 413,*** the Apex Court has formulated the following guidelines with regard to the question as to how a matter for framing a charge against the accused is to be dealt with:

"(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."

12. The aforesaid decisions have almost settled the legal position that at the stage of charge the court is not required to consider pros and cons of the case and to hold an enquiry to find out truth. Marshaling and appreciation of evidence is not in the domain of the court at that point of time. What is required from the court is to sift and weigh the materials for the limited purpose of finding out whether or not a prima facie case for framing a charge against the accused has been made out. Even in a case of grave or strong suspicion charge can be framed. The court has to consider broad probabilities of the case, total effect of the evidence and the documents produced including basic infirmities, if any. 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, but the court should not weigh the evidence as if it were holding trial. Accused can be discharged only when the charge is groundless. In my opinion, the learned Special Judge, SC/ST Act has taken into account all the relevant materials and passed the impugned order keeping in view the parameters laid down by the Apex Court in the aforesaid cases. Therefore, the submission of the counsel for the appellant that no charge was made out has no substance.

13. Since prima facie evidence against the appellant is available, it cannot be said that the impugned order dated 07.10.2020 is devoid of merit. The said order is legal and based on evidence available against the appellant. There is no irregularity, illegality or perversity in the impugned order dated 07.10.2020 passed by learned Special Judge, SC/ST Act.

14. In view of the above, the appeal is accordingly **rejected.**

15. However, if the accused-appellant is surrendered before the court below, his bail application shall be decided in accordance with law.

16. A copy of this order be communicated to the trial court for necessary compliance.

(2021)07ILR A41
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.07.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE RAJEEV SINGH, J.

Criminal Appeal No. 1959 of 2016

Ramanand @ Nandlal Bharti ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Jail Appeal, Rajesh Kumar Dwivedi

Counsel for the Respondent:
Govt. Advocate

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 302-challenge to-conviction-accused committed pre-planned and premeditated murder of his wife and 4 minor children with banka and thereafter buried the deadbodies by pouring kerosene oil in the mid-night-accused had developed illicit relationship with other woman and wanted to marry her-no eye witness of the incident nor previously convicted-the case is based on circumstantial evidence- the testimony furnished by PW-1,PW-2, recovery of banka, motive of murdering the deceased, post mortem report, blood stained cloth of the accused, report of FSL, all shows the intention of accused-trial court rightly convicted the accused-the instant case falls in the category of 'rarest of rare case'-death sentence awarded to the appellant is confirmed.(Para 1 to 110)

The appeal is dismissed. (E-5)

List of Cases cited:

1. Marudanal Augusti Vs St. of Ker. (1980) SCC (Cri) 985

2. Aher Raja Khima Vs St.of Saurashtra(1956) AIR SC 217

3. Harjit Singh & ors. Vs St.of Punj.(2002) AIR SC 3040

4. Joydeb Patra & ors. Vs St. of W. B.(2013) 3 JIC 548 SC

5. Najeem Miyan Vs St. of U.P.(2020) 3 JIC 125

6. Manoj Suryavanshi Vs St. of Chhattisgarh (2020) 2 JIC 491 SC

7. Vijay Kumar Vs St. of J&K (2019) 107 ACC 731 SC

8. Sharad Birdhichand Sarda Vs St. of Mah. (1984) AIR SC 1622

9. Golakonda Venkateswara Rao Vs St. of A. P. (2003) AIR SC 2846

10. Ombir Singh Vs St. of U.P. & ors. (2020) AIR SC 2609

11. St. of Karnataka Vs Suvarnnamma (2015) 88 ACC 317

12. Zahira Habiullha Sheikh (5) Vs St. of Guj. (2006) 3 SCC 374

13. Balwinder Singh Vs St. of Punj.(1995) Supp. 4 SCC 259

14. Pakkirisamy Vs St. of T.N[(1997) 8 SCC 158

15. Kavita Vs St. of T.N. (1998) 6 SCC 108

16. St. of Raj. Vs Raja Ram(2003) 8 SCC 180

17. Aloke Nath Dutta Vs St.of W.B.(2007) 12 SCC 230

18. Sansar Chand Vs St. of Raj. (2010) 10 SCC 604

19. Ramesh bhai Chandu bhai Rathod Vs St. of Guj.(2009) 5 SCC 740

20. S.K. Yusuf Vs St. of W.B. (2011) 11 SCC 754

21. Pancho Vs St. of Har. (2011) 10 SCC 165

22. Bachan Singh Vs St. of Punj. (1980) AIR SC 898

23. Ramnaresh & ors. Vs St. of Chhattisgarh (2012) 4 SCC 257

(Delivered by Hon'ble Ramesh Sinha, J.)
&
Hon'ble Rajeev Singh, J.

The instant Criminal Appeal is **dismissed** vide our order of date passed on separate sheets contained in Capital Sentence No. 1 of 2016 : *State of U.P. Vs. Ramanand @ Nand Lal Bharti.*

Hon'ble Ramesh Sinha, J.

1 The appellant Ramanand *alias* Nandlal Bharti was charged by the Sessions Judge, Lakhimpur Kheri in Sessions Trial No. 379 of 2010 for offence punishable under Section 302 Indian Penal Code. Vide judgment and order dated 04.11.2016, learned Sessions Judge convicted and sentenced him under Section 302, I.P.C. to death and fine of Rs.20,000/- and in default of payment of fine to undergo imprisonment for one year.

2 Aggrieved by his conviction and sentence, Ramanand *alias* Nandlal Bharti has preferred, in this Court, Criminal Appeal No. 1959 of 2016 from jail.

3 Capital Sentence Reference No. 1 of 2016 arises out of the reference made by the learned trial Court under Section 366 (1) of the Code of Criminal Procedure, 1973 to this Court for confirmation of the death sentence of Ramanand *alias* Nandlal Bharti.

4 Since Criminal Appeal No. 1959 of 2016 and Capital Sentence Reference No. 1 of 2016 arise out of a common factual matrix and impugned judgment, we are disposing them of by this judgment.

5 Shortly stated, the prosecution case runs as under:

On 22.01.2010, when informant Shambhu Raidas (P.W.1) was present at his home situate in Village Namdarpurwa, Police Station Dhaurhara, District Lakhimpur Kheri, his brother-in-law (sala) Ramanand *alias* Nand Lal (accused/appellant herein), who is the resident of Namdarpurwa, hemlate of Amethi, Police Station Dhaurhara, Lakhimpur Kheri, came at his house at about 06:30 a.m. and told him that in the intervening night of 21/22.01.2010, he (accused/appellant Ramanand *alias* Nand Lal) along with his wife (Smt. Sangeeta) and daughters were sleeping in his house. In the night, at 1:00 a.m., someone knocked his door. Thereupon, accused/appellant asked that who was knocking his door but there was no response. Thereafter, he (accused/appellant) went at the roof of his house and saw that among them one person was a resident of Village Basheda, who fired a shot upon him (accused/appellant), however, he escaped unhurt. Thereafter, accused/appellant jumped at the ground floor. At the same time, one of the miscreant gave a blow at his head with the butt of gun. Thereupon, he (accused/appellant) ran away from there and by concealing himself in the field, saw that the miscreants have jumped in to his house and thereafter smoke was coming out from his house. He (Ramanand) reached at

Behman Purwa at the crusher of Khalik as well as at Ram Nagar Lahbadi and told about the incident but no one came to help him.

After hearing the aforesaid narrated version from accused/appellant, the informant-Shambhu Raidas (P.W.1) along with his nephew Pratap reached at the house of the accused/appellant and saw that Sangeeta, wife of accused/appellant and his daughters Tulsi aged about 7 years, Lakshmi aged about 5 years, Kajal aged about 3 years and another daughter aged about one and a half month, have been murdered and their dead bodies were burning. On seeing this, the informant and his nephew Pratap started pouring water in order to extinguish the fire. In the meanwhile, accused/appellant started enjoying heat by sitting near fire in the courtyard. The informant and his nephew snubbed him saying that his wife and children have been murdered and he was still enjoying the heat. On this, accused/appellant became angry and went away from there. The dead bodies were lying there. The informant Shambhu Raidas (P.W.1) went to P.S. Dhaurhara and narrated the said incident to the police and lodged the F.I.R. at police station Dhaurhara.

6 The Head Constable Dhani Ram Verma (P.W.10) deposed that on 22.01.2010, he was posted as Head Moharrir at Police Station Dhaurhara. On the basis of written report submitted by the informant Shambhu Raidas (P.W.1) on 22.01.2010, at 09.45 a.m., he registered the F.I.R., on the basis of which, case crime No. 49 of 2010, under Section 302, I.P.C. was registered against four unknown persons. A perusal of the chik F.I.R. also shows that the distance between the place of the incident and the police station was four and half kilometres. He sent the appellant Ramanand *alias* Nandlal Bharti to the Community Health Centre, Dhaurhara along with Constable Brij Mohan Singh for treatment.

7 The evidence of S.I. Yogendra Singh P.W. 7 reveals that on 22.01.2010, he was posted as Incharge Inspector at Police Station Dhaurhara. On the date itself i.e. on 22.01.2010, he took investigation of the case on its own. He immediately had recorded the statement of scriber of the F.I.R. Head Constable Dhaniram Verma (P.W.10) and informant Shambhu Raidas (P.W.1) and left for the place of the incident. On the pointing out of the informant Shambhu Raidas (P.W.1), he inspected the spot, prepared the site plan (Ext. Ka.6) and also recorded statements of Ahmad Hussain and Nizamuddin, who was present there. The inquest proceedings were also initiated. The panchanama of the deceased was also prepared. Thereafter, the deadbody of the deceased was sealed and the impression of seal was taken and the challan nash was prepared. On 23.01.2010, he recorded the statements of Chatrapal Raidas (P.W.2) and Rustam Raidas. On 24.01.2010, accused/appellant-Ramanand *alias* Nandlal Bharti was arrested and he recorded his statement. On the pointing out of the accused/appellant, the weapon of offence banka was recovered and also prepared site plan of the spot of recovery. Thereafter, on 25.01.2010, he recorded the statements of Chaila Bihari Raidas, Balgovind Raidas, Ram Kumar, Baburam Hans. The sample of blood stained as well as sample of earth were taken from the spot and were taken into possession vide Ext. Ka-9. The inquest papers of the deceased persons were prepared by S.I. Nand Kumar

in his supervision. P.W.7 has also proved the panchnama and other related document of deceased Sangeeta Devi as Ext. Ka-10 to Ext. Ka 15. The panchnama and other related papers of deceased Tulsi were proved as Ext. 16 to Ext.. 21. The panchnama and other related papers of deceased Kajal were proved as Ext. Ka 22 to Ext. Ka-27. The panchnama and other related papers of deceased Laxmi were proved as Ext. Ka-28 to Ext. Ka. 33. The panchnama and other related papers of deceased Km. Chhoti were proved as Ext. Ka-34 to Ext. ka 39. On 05.02.2010, he recorded the statements of witnesses of recovery memo S.I. Nand Kumar, S.S.I. Uma Shankar (P.W.6), Constable Usman, Constable Prabhudayal, Constable Santosh, Constable Shrawan Kumar.

8 P.W.7 Inspector Yogendra Singh has also deposed that after completion of the investigation, the accused/appellant was charge-sheeted vide charge-sheet (Ext. Ka-8).

9 The Sub-Inspector Uma Shanker Mishra P.W.6, in his deposition, before the trial Court stated that on 24.11.2010, he was posted as Senior Sub-Inspector at Police Station Dhaurhara. The appellant, who was arrested in the present case, was interrogated. Appellant Ramanand has confessed the crime and disclosed that he had concealed "banka' used in the incident and his blood stained shirt and paint at unknown place and can get recovered the same. Thereafter, at the instance of appellant, police officials along with public witness Chhatrapal and Pratap took the accused/appellant to Village Namdarpurwa. Appellant Ramanand took the police and witnesses on the road of village Bhakuraiya to Ram Nagar and at a distance of about 100 steps from his house, he took out one "Banka' and a blood stained shirt and paint from the shrubbery on the corner of the road opposite to field one Kafeel. Appellant Ramanand told that this "Banka' was used by him in committing the murder of his wife and children. The recovered "Banka', shirt and paint were sealed at the spot and were taken into police possession vide recovery memo Ext. Ka-5.

10 The injuries of accused/appellant Ramanand *alias* Nandlal Bharti was examined by P.W. 9 Dr. Ankit Kumar Singh on 22.01.2010 at 10:30 a.m. in Community Health Centre, Dhaurhara. He deposed that on 22.01.2010, he was posted as Medical Officer at Community Health Centre, Dhaurhara. After examination of accused/appellant Ramanand *alias* Nandlal Bharti, he found following injuries :

"**Injuries of Ramanand *alias* Nandlal Bharti (appellant)**

(1) C.L.W. on the left side of head 2 cm x 0.5 cm in length 10 cm above from left ear.

(2) C.L.W. on the middle of Head 5 cm x 0.5 cm in length 2 cm from injury No. (1).

(3) C.L.W. on the middle of Head 4.5 cm x 0.5 cm in length 1 cm from injury No. (2).

(4) Superficial burn injuries on the left side of neck in length 8 cm x 6 cm.

(5) Superficial burn injuries on the (Rt) side of neck in length 10 cm x 7 cm.

In the opinion of P. W. 9 Dr. Ankit Kumar Singh, all injuries are simple in nature. Injuries No. (1), (2) and (3) were caused by hard and blunt object, whereas injuries No. (4) and (5) were caused by burn. During examination, he also opined that smell of Kerosene Oil were coming from his body and cloth.

11 The post-mortem on the corpse of the deceased **Sangeeta aged about 35 years** and **Km. Tulsi, aged about 7 years** were conducted, on 23.01.2010 (on the next date of incident) at 4.00 p.m., by P.W.8 Dr. S.V. Singh at District Hospital, Kheri, who found on it the ante--mortem injuries enumerated below:-

"Ante-mortem injuries of deceased Sangeeta, aged about 35 years, wife of appellant Ramanand *alias* Nandlal Bharti

1. Incised wound 25 c.m. x 1 c.m. x cranial deep on Rt side of head 3 c.m. above (L) ear underlying (R) temporal and parietal bones found fractured and brain cut.

2. Incised wound 20 c.m. x 1 c.m. x brain deep (bone deep) over back of head Rt side of Neck below Lt. ear underlying muscles and vessels found cut.

Postmortem injuries of deceased Sangeeta

Superficial to deep burn all over body head, Neck.

Burn 90%.

In the opinion of P.W.8 Dr. S.V. Singh, deceased Sangeeta died due to shock and hemorrhage as a result of ante-mortem injuries.

Ante-mortem injuries of deceased Km. Tulsi, aged about 7 years, Daughter of appellant Ramanand *alias* Nandlal Bharti

Multiple incised wound in an area of 20 c.m. x 10 c.m. x cranial cavity deep on Rt. side of head including (R) ear and Rt eye largest 10 c.m. x 1 c.m. x cranial cavity deep. Smallest 4 c.m. x 0.5 c.m. x bone deep underlying vessels muscles and temporal bone (R), parietal bone found fracture, membrane & brain found cut (cooked).

Postmortem injuries of deceased Tulsi

Deep burn all over body charred and blackened.

In the opinion of P.W.8 Dr. S.V. Singh, deceased Tulsi died due to shock and hemorrhage as a result of ante-mortem head injuries.

12 In his deposition, in the trial Court, P.W.8-Dr. S.V. Singh has deposed that on 23.01.2010, he was posted as Senior Consultant, Orthopedic Surgeon at District Hospital, Lakhimpur Kheri and on 23.01.2010, at 4:00 p.m., he did post-mortem on the corpse of the deceased Km. Tulsi and post-mortem on the corpse of deceased Smt. Sangeeta Devi at 4:30 p.m. In his deposition, P.W.8 has stated that on external examination, he found that deceased Km. Tulsi was aged about 7 years; on account of burial, her body became charred and blackend and bones were exposed; lower part of both hands and foot were found missing; and her scalp hair was burnt. P.W.8 has further stated that on external examination on the corpse of deceased Smt. Sangeeta, he found that at the time of death, deceased Smt. Sangeeta was aged about 35 years; on account of burial, her body became charred and blackend; both foot and legs found missing; bones were exposed; her body was at fencing attitude; her scalp hair was burnt. He has also stated that injuries sustained by the deceased Km. Tulsi and Smt. Sangeeta as per the report of post-mortem may be caused by sharp edged weapon like banka. He categorically stated that on account of burial badly the body of the deceased, the time of death cannot be ascertained. He, in his cross-examination, has deposed that 90% of the body of the deceased Sangeeta

was burnt, whereas 100% of the body of the deceased Tulsi was burnt.

13 The post-mortem on the corpse of the deceased **Km. Laxmi, aged about 5 years, Kajal aged about 3 years** and **Chhoti *alias* Guddi, aged about 1/2 month** were conducted at 4.00 p.m., on 23.01.2010 (on the next date of incident) by P.W.5 Dr. A.K. Sharma at District Hospital, Kheri, who found on it the ante--mortem injuries enumerated below:-

"Ante-mortem injuries of deceased Km. Laxmi, aged about 5 years, daughter of appellant Ramanand *alias* Nandlal Bharti

1. Incised wound 20 c.m. x 1 c.m. x cranial cavity deep on left side of head 3 c.m. above left ear underlying left temporal and parietal bone membran and brain found cut.

2. Incised wound 15 c.m. x 1 c.m. x Brain deep over back of head right side just below left ear underlying occipital bone, membrane and brain found cut.

3. Incised wound 20 c.m. x 1 c.m. x cranial cavity deep over right side of neck face including Rt ear underlying muscles, vessels upper and lower row of right side, Rt ear found cut.

Postmortem injuries of deceased Laxmi

Superficial to deep burn all over body except head and neck and upper part of chest.

In the opinion of P.W.5 Dr. A.K. Sharma, deceased Laxmi died due to shock and hemorrhage as a result of Ante-mortem head injuries.

Ante-mortem injuries of deceased Kajal, aged about 3 years, daughter of appellant Ramanand *alias* Nandlal Bharti

Multiple incised wound in an area of 15 c.m. x 5 c.m. x cranial cavity deep on left side of head including left ear and left eye. Largest 10 c.m. x 0.5 c.m. x cranial cavity deep, smallest 6 c.m. x 0.5 c.m. x bone deep underlying muscle, vessels and left temporal and parietal bone, orbital bone, membrane and brain found cut.

Postmortem injuries of deceased Kajal

Post mortem deep burn all over body except forehead and left side of head.

In the opinion of P.W.5 Dr. A.K. Sharma, deceased Kajal died due to shock and Hemorrhage as a result of Ante-mortem head injuries.

Ante-mortem injuries of Km. Chhoti *alias* Guddi, aged about 1/2 month, daughter of appellant Ramanand *alias* Nandlal Bharti

1. Incised wound 8 c.m. x 1 c.m. x cranial cavity deep over Rt. side of Head above Rt. Ear. Underlying Rt. temporal and parietal bone membrane and brain found cut clotted blood present in cranial cavity and brain.

2. Incised wound 5 c.m. x 1 c.m. x scalp deep over left side of head 3 c.m. above left ear.

Postmortem injuries of Km. Chhoti *alias* Guddi

Deep burn all over body charred and blackened.

In the opinion of P.W.5 Dr. A.K. Sharma, deceased Km. Chhoti *alias* Guddi died due to comma as a result of ante-mortem head injury.

14 It is pertinent to mention that in his deposition before the trial court Dr. A.K. Sharma (P.W.5) reiterated the said cause of death and stated that the deceased could have died on account of the ante-mortem injury suffered by them. He also stated therein that on account of burial, the body

of the deceased Laxmi, Kajal and Chhoti *alias* Guddi became black and chard, therefore, time of the death of the deceased cannot be ascertained. He also stated that injuries sustained by the deceased as per the report of post-mortem may be caused by sharp edged weapon like banka.

15 The case was committed to the Court of Sessions by the learned Magistrate, where the appellant was charged for offence punishable under Sections 302 I.P.C. He pleaded not guilty to the charges and claimed to be tried. His defence was of denial.

16 During trial, in all, the prosecution examined ten witnesses, namely, P.W. 1 Shambhu Raidas, who is the informant and brother-in-law (Sala) of the accused-appellant, P.W.2 Chatra Pal Raidas, who is the brother-in-law (Sala) of the accused-appellant, and real brother of the deceased Sangeeta, P.W.3 Babu Ram Hans and P.W.4 Ram Kumar, before whom extra judicial confession has been made by the accused/appellant, P.W, 5 Dr. A.K. Sharma, who conducted the post-mortem on the corpse of Km. Laxmi, Kajal, Chhoti *alias* Guddi, P.W.6 Uma Shankar, who had prepared the fard recovery memo of blood stained weapon of assault i.e. banka and blood stained shirt of the accused/appellant, P.W.7 Yogendra Singh, who is the Investigation of the case, P.W.8 Dr. S.V. Singh, who conducted the post-mortem on the corpse of Km. Tulsi and Smt. Sangeeta Devi, P.W.9 Dr. Ankit Kumar Singh, who had examined the injuries of accused/appellant and P.W.10 Head Constable Dhani Ram Verma, who had registered the F.I.R. on the basis of written report of the informant P.W.1 Shambhu Raidas.

17 The accused/appellant was examined under Section 313 of the Code of Criminal Procedure, wherein he had denied the prosecution evidence and took the plea that earlier his brother Siyaram was murdered by one Ramakant, Kamalkant and Manua *alias* Ramakant. He had lodged a report about the said incident. His wife Sangeeta and daughter of Siyaram, namely, Gudiya, were eye-witnesses in that case. The accused persons of that case, in order to eliminate the evidence of that case, have burnt him and his wife by pouring kerosene. They wanted to kill him and have poured kerosene over him. Daughter of Siyaram, namely, Gudiya has died due to illness. The present incident was committed by Ramakant, Kamalkant and Manua *alias* Ramakant.

18 It is pertinent to mention that the accused/appellant had also filed a written statement under Section 233 of the Code of Criminal Procedure but no evidence was led by him in his defence.

19 We would first like to deal with the evidence of informant Shambhu Raidas P.W.1. Since in paragraph 5, we have set out the prosecution story primarily on the basis of recitals contained in his examination-in-chief, for the sake of brevity, the same is not reiterated. P.W.1 Shambhu Raidas has further deposed that about six months back, when he was present at his house, at about 06:30 a.m., accused/appellant Ramanand came there and told him that in the night, he along with his children and wife was sleeping in his house. At around 01:00 a.m., in the night, someone knocked his door. He awoke and asked as to who was knocking the door, but no one responded. Ramanand went at the

roof of his house and saw that four persons were standing outside his home and one of them was a resident of village Basdhiya. One of the miscreant fired a shot at the accused/appellant, however he escaped unhurt. Thereupon, Ramanand jumped on the ground floor. One of the miscreant gave a blow at the head of Ramanand with the butt of Gun. Ramanand further told the informant P.W.1 that he fled in to a field and saw that the alleged bandits have jumped into his house and thereafter smoke was coming out from his house. Ramanand further told him that he went to Behan Purwa, Kalikpurwa and Lehbadi and told about the incident but no one came from there. Thereafter, Ramanand came to P.W.1.

20 P.W.1 further stated that after coming to know the aforesaid facts from Ramanand, he along with Pratap and accused/appellant Ramanand went to the house of the accused/appellant Ramanand, where they saw that flame of fire were coming in the house. The deadbodies of Sangeeta and his four daughters including Tulsi were burning. There were signs of injuries on the dead bodies. P.W.1 and Pratap started extinguishing the fire by water, however, accused/appellant started enjoying heat in the courtyard by putting his Banyan in the fire. P.W.1 snubbed him saying that he was extinguishing the fire and he (Ramanand) was enjoying heat despite that his wife and children have to be murdered. Thereafter, P.W.1 left Pratap at the spot and went to police station Dhaurahara and submitted a written complaint against unknown persons.

21 P.W.1 Shambhu Raidas has further stated that accused Ramanand was having illicit relation with one Manju and due to this illicit relationship, Manju has sustained pregnancy. Thereafter, brother of Manju has fixed her marriage with accused Ramanand. The *"Chidna"* and "Tilak" ceremony have taken place. In the meanwhile, a case was registered under Section 307 I.P.C. against accused/appellant Ramanand. In that case, Ramanand was sent to jail, on account of which, the marriage of Manju with accused Ramanand could not be solemnized. Thereafter, the family members of Manju have married her at some other place. After marriage, Manju came to her parental home and thereafter she never returned back to her matrimonial home. Manju still wanted to marry with accused/appellant Ramanand only. For the marriage of Manju and Ramanand, the wife of the accused Ramamand, namely, Sangeeta was not ready. Accused Ramanand wanted to get compensation from the Government for which the accused/appellant Ramanand committed murder of his wife Sangeeta and his daughters and burned their dead bodies.

22 P.W.1 has also stated that earlier the murder of Siyaram, who was the brother of the accused/appellant, has taken place and the accused/appellant has got about Rs.4-5 Lakhs as compensation. He has stated that after filing of his report police came at the spot and the panchnama proceedings of the deceased persons were conducted. The deadbodies were sealed and were sent for post-mortem. The site plan of spot was also prepared.

23 P.W.1, in his cross-examination before the trial Court, has stated that earlier Ramanad resided at Basdhiya village. Siyaram was the real brother of Ramanand. Siyaram was murdered three years back, for which a report was lodged by Ramanand against Ramakant, Kamlakant and Munuwa at police station Basdhiya,

Ishanagar. At the time of murder of Siyaram, his daughter, Gudiya, was alive. The incident of murder of Siyaram was seen by Gudiya and wife of Ramanand, namely, Sangeeta. They were the eye-witnesses. Thereafter, Gudiya died due to illness. In the said case, daughter of Siyaram, namely, Gudiya had received compensation from the Government but he did not know how much amount the compensation was given to him. Prior to one month of the murder of Siyaram, Ramakant had lodged an F.I.R. against Ramanand and Siyaram under Section 307 I.P.C., in which Siyaram and Ramanand were sent to jail and after detaining 7-8 days in jail, they were released on bail.

24 P.W.1, in his cross-examination, has further deposed that Ramanand had two brothers and one sister, namely, Kushuma. The sister of Ramanand, namely, Kushuma, was married with him (P.W.1) and from their wedlock, four children were born, who are still alive and are with him. His wife Kushuma deserted him one year back and gone to village Bauri started living with Guddu in his house. P.W.1 has further deposed that prior to three months of the murder of the wife and children of Ramanand, his wife Kushuma deserted him and had gone to village Bauri to the house of Guddu and since then, she is residing there. P.W.1 has also stated that the case, which was lodged by Ramakant under Section 307 I.P.C. against Ramanand and Siyaram, he was doing pairvi and had spent 10-12 thousands rupees for the same. The said money was not returned by Ramanand till date and after the murder of Siyaram, Ramanand came to his village Namdarpurwa. This witness has further stated that he had given his field to Ramanand for construction of his house. He, however, denied the suggestion that the field, upon which Ramanand constructed the house, was sold by him to the Ramanand on taking Rs.50,000/- from him and inspite of repeated request, he has not executed a sale deed.

25 P.W.1, in his cross-examination, has further stated that Chatrapal resides in his village and is the brother of the deceased Sangeeta. Chatrapal had married his sister Sangeeta (deceased) in village Bahad with one Pairu. Sangeeta resided eight days in her in-law's house and, thereafter, she had fled from her in-law's house with Ramanand and performed Court marriage with him, due to which, Chatrapal faced great humiliation and since then Chatrapal is inimical to Ramanand. This witness has further stated that the distance of house of Ramanand from his house is one kilometre. On the date of incident, Ramanand came to his house in the morning at 6:30 a.m. and he reached to his house by foot. He (Ramanand) appeared to be in much perturbed condition. Ramanand told him (P.W.1) that 4-5 persons of village Basadiya had entered his house and set afire. He (Ramanand) had further told him (P.W.1) that he (Ramanand) came to his house stealthily. Thereafter, this witness along with Pratap went to the house of Ramanand, where he saw the door of the house of Ramanand was opened and in the house, corpses were burning in flames. Approximately 4-5 minutes, flames came out from the corpse. The corpses were burning in the kothari (closet) in the house. He along with Pratap started extinguishing the fire by water. Ramanand was taking the heat of fire in a courtyard. There was a tap at a distance of 4-5 steps, from which he carried 4-5 buckets (balti) of water and poured it over the fire and 4-5 buckets of

water were poured by Pratap over the fire. All corpses were completely burnt. Out of the burnt corpses, one girl from neck to the head was found half burnt, whereas in rest of the corpses, burnt bones were left only. This witness has further deposed that the distance of police station from village Namdarpurwa is 09 kilometers. He went to police station to lodge the F.I.R. by bicycle. He told the whole incident to the Inspector after reaching the police station. Thereafter, on the behest of the Inspector, report Ext. Ka.1 has been written. The tahriri report was not written at police station in his presence. He did not know the scriber of the tehriri report. The report was written at the chauraha (crossroads). The distance between the chaurha (crossroad) to police station is one mile. He put thumb impression at the chauraha (crossroad). This witness also stated that he did not know Manju. He had came to know about pregnancy of Manju when Ramanand told him. The marriage of Manju was performed prior to one year of the incident and since then, Manju is residing in law's house or he did not know whereabout she is. He also deposed that two months prior to the incident, Ramanand, his wife Sangeeta and his children has adopted Islam. The Inspector had not interrogated him at the police station. The Inspector reached at the police station with police van. He went at about 2:00 a.m. from the police station. He remained present at police station from lodging of the report till 2:00 a.m. and Ramanand was also present at police station. He was not present at the place where the police had sealed the corpses. The constable left him at 2 O'clock in the night in his house. Ramanand was stopped at the police station. The Inspector did not meet with Ramanand nor he was called. He went to police station along with Pratap and Chatrapal and in his presence, the Inspector did not put signature of Chatrapal and Pratap to any paper. Ramanand was challaned by the police after three days of the incident and since then, Ramanand was continuously at the police station. He denied the suggestion that he cultivated the field of Ramanand. He further denied the suggestion that after his wife deserted him, Ramanand has made a complaint against him to the police and due to this grudge, he is falsely deposing against the appellant.

26 P.W.2 Chhatrapal Raidas, who is the real brother of deceased Sangeeta Devi, has deposed that his sister Sangeeta Devi has solemnized Court marriage with accused/appellant Ramanand about 12 years prior to the incident. Thereafter, Ramanand started living with his wife at a distance of about 500 meters from his village, while originally he was a resident of village Basdhiya. Out of this marriage, there were five children of Ramanand and Sangeeta Devi. The name of the eldest one among them is B.R. Ambedkar, aged about 10 years. The remaining daughters were Tulsi aged 07 years, Laxmi aged 05 years, Kajal aged 03 years and the youngest one Guddi aged 1 ½ month. At the time of incident, B.R. Ambedkar was not present at the house. About 2 ½ years prior of the incident, accused/appellant Ramanand has started living in his village Naamdar Purwa as he has constructed a house at the land of his brother-in-law's Shambhu Raidas. Ramanand was a person of rakish and immoral character. About 02 years prior of the incident, he has developed illicit relationship with Km. Manju resident of village Pakariya, District Sitapur. Accused Ramanand used to visit there and due to his illicit relationship, Manju became pregnant. After coming to know about it, the father of Manju talked about her marriage with accused/appellant Ramanand. The marriage

was fixed with the accused/appellant. P.W.2 Chhatrapal Raidas further stated that his sister Sangeeta was an illiterate and simple lady and in the influence of her husband Ramanand, she became ready for marriage of Ramanand with Manju. Thereafter, "Tilak' and "Chhedna' ceremony has taken place. Accused Ramanand has incurred about Rs.80-90 thousands in "Tilak' ceremony. In the meanwhile, one Manua lodged a case under Section 307 I.P.C. against accused/appellant Ramanand. In that case, accused/appellant Ramanand was sent to jail, on account of which, his marriage with Manju could not be solemnized. Thereafter, father of Manju has married her at some other place. After release from jail, accused/appellant Ramanand again started contacting Manju and made talk for marriage with her. In the month of the incident itself, Manju Devi came to the house of accused/appellant Ramanand and after staying 2-3 days there, she went back to her house. This time, his sister Sangeeta was not ready for marriage of accused/appellant Ramanand with Manju. Accused/appellant has threatened her that if she (Sangeeta) does not became ready for his marriage with Manju, he would kill her and thereafter would marry with Manju.

27 P.W.2 has further deposed before the trial Court that about 10 days prior to the incident, Sangeeta came to his house and has told him about these facts. At that time, Ruttam and his neighbours Chhail Bihari and Bal Govind were also present. They tried to console Sangeeta and sent her back to her matrimonial home by saying that they would make Ramanand understand. On the next day, P.W.2 and above named persons went to the house of accused Ramanand and tried to make him understand but accused/appellant Ramanand paid no heed and went away. P.W.2 Chhatrapal Raidas has further stated that on the night of 21/22.01.2010, the accused/appellant Ramanand murderd his sister Sangeeta and her daughters Tulsi, Laxmi, Kajal and Guddi and burnt their deadbodies. Accused/appellant Ramanand has committed these murder due to the fact that his marriage could not take place with Manju.

28 P.W.2, in his cross-examination, has denied that he had married his sister Sangeeta with one Pairu. He further stated that Sangeeta had eloped from his house and gone with Ramanand. This incident is of 12 years back i.e. in the year 1998. He did not lodge any report for the said incident. He had denied the suggestion that he had married his sister Sangeeta with one Pairu twelve years back. He also denied the suggestion that Sangeeta had eloped with Ramanand after one year. He did not feel any humiliation when his sister Sangeeta eloped with Ramanand but he had married his sister with Ramanand. This witness has further stated that Ramanand was living in his village Naamdarpurwa prior to two years and before that he was living at village Bhasadiya. He, in his cross-examination, has stated that prior to 3-4 years, brother of Ramanand, namely, Siyaram, was murdered, for which Ramanand had lodged an F.I.R. against Ramakant, Kamlakant and Munuwa, who were the residents of village Bhasadiya and they were sent to jail in the said case. In the said case, daughter of Siyaram, namely, Guddi and wife of Ramanand, namely, Sangeeta were eye-witnesses as they were present at the time of the incident. After 1 ½ years of the murder of Siyaram, Gudia died on account of illness and after her

death, Ramanand had received compensation from the Government. He used to visit the house of Siyaram. Siyaram and Ramanand used to live in one house and in the said house, daughter of Siyaram, namely, Gudia, Ramanand, wife of Ramanand, namely, Sangeeta and their children also used to live. His sister Sangeeta had married 12 years back after she eloped with Ramanand and since then Sangeeta used to live with Ramanand. In the last 12 years, his sister Sangeeta had made several complaints against her husband (Ramanand) viz. not providing food, clothes and not permitting her to go elsewhere and also made illicit relationship, but she used to live with Ramanand as wife till the incident. However, he did not lodge any report to the police station against the complaint made by his sister. His sister used to visit his house and after staying about 1-2 months, she went back to the house of Ramanand. He had heard that Ramanand and his wife Sangeeta and their children adopted Islam prior to the date of incident. At that relevant time, he was outside the village for a period of one month and when he returned after one month, then, he came to know from the villagers that Ramanand, his wife and their children adopted Islam. Thereafter, he had much persuaded Sangeeta and Ramanand, then, they lived as such as it was.

29 P.W.2, in his cross-examination, has further stated that he had seen Km. Manju and she and her father used to visit the house of Ramanand six months prior to the incident. He did not know whether marriage of Manju had taken place prior to the incident. The fact that Ramanand and Manju had illicit relationship and Manju became pregnant, has been told to him by his sister Sangeeta when she came to his house. When she told the said fact, 10-20 persons were present in his house. Prior to 1-2 months of the incident, Sangeeta told the aforesaid fact outside the house where 20-25 persons were present. Thereafter, Sangeeta went to the house of Ramanand. Neither he nor Sangeeta had lodged any report in this regard. This witness has also stated that he came to know about the incident at 07:00 a.m. in the morning from Ramanand, who had came to his house at about 07:00 a.m. At that relevant time, Ramanand was alone and he told him that his wife and children have been burnt in the house and someone after murdering him burnt them. On saying the aforesaid, Ramanand went away to his house. Thereafter, Pratap and Shambhu and he reached to the house of Ramanand by bicycle and by foot, respectively. When he reached to the house of Ramanand, then, Pratap and Sambhu extinguishing the fire from water and Ramanand was taking the heat by sitting near fire and villagers were standing there. The cloth of Ramanand was blood stained. After sometime, the Inspector had arrived and other officials had also arrived at the place of occurrence. The police had taken Ramanand. When it was ascertained that Ramamanand had murdered his wife and their children and post-mortam has been conducted/completed, then, he reached to the police station. The report was lodged by Sambhu. This witness has stated that he did not aware of about the fact as to whether ceremony of Tilak of Ramanand with Manju had taken place or not. He denied the suggestion that Sangeeta had married with one Pairu prior to 12 years back. He further denied the fact that Sangeeta Devi had eloped from her in-law's house with Ramanand and married him due to which his family faced humiliation. He also denied the suggestion that he was inimical with Ramanand and Sangeeta and he did

not have any relationship with them because of which he had falsely deposed against the appellant.

30 P.W.3 Babu Ram Hans, in his examination-in-chief, has deposed that he is the leader of Bahujan Samajwadi Party and earlier he was the President of the said party in Dhaurahara Assembly Constituency. In the morning of 23.01.2010, at about 09:00 a.m., accused/appellant Ramanand *alias* Nand Lal came at his house and told him that a big mistake has taken place from him. He (accused/appellant) told him (P.W.3) that though he wanted to marry with one Manju r/o Pakariya, P.S. Tambaur, District Sitapur but his wife Sangeeta was not agreeable for the said marriage, therefore, he (accused/appellant), on 21/22.01.2010, at about 01:00 a.m., after committing brutely murder of his wife Sangeeta and daughters Tulsi, Laxmi, Kajal and Guddi with banka, burnt their deadbodies on bed in the house. Accused/appellant has further stated to P.W.3 Baburam Hans that he (P.W.3) is a big leader and there is Government of B.S.P. and that he has good hold in the Government and thus accused/appellant requested him (P.W.3) to save him from the alleged crime. Thereupon, P.W.3-Baburam Hans told the accused appellant that as he is a criminal, thus, he cannot help him and turned Ramanand out from his house. P.W.3 has also stated that his statement was recorded by the police.

31 In cross-examination, P.W.3-Baburam Hans has denied the fact that he has been informed by the accused/appellant to the fact that some miscreants entered in his house and committed the murder of his wife and children and also assaulted him. P.W.3, in his cross-examination, has deposed that when accused/appellant left his house, he immediately informed about the incident to the Incharge of police station Dhaurhara from his mobile number 9838278181. Thereafter, he reached at the place of occurrence at about 09.00 a.m. He also stated that deceased Sangeeta Devi was the daughter of his brother-in-law and wife of the accused/appellant. The marriage of deceased Sangeeta was held 12-13 years ago. Thereafter, deceased Sangeeta run off secretly and got married with accused/appellant Ramanand, upon which Chattrapal and father of Chattrapal, his brother-in-law and father of deceased Sangeeta felt insulted. Thereafter, there was no talk between Sangeeta and her father till the death of deceased Sangeeta. Earlier Ramanand resided at village Bhasadiya, where his brother Siyaram was murdered and at that time, he had gone there. For the murder of his brother Siyaram, appellant Ramanand had lodged a report against Ramakant and others.

32 P.W. 3 has denied the suggestion that Ramanand had not confessed his guilt before him and as Sangeeta was the daughter of his brother-in-law (Sadru), therefore, he is falsely deposing against Ramanand.

33 P.W.4- Ram Kumar, in his examination-in-chief, has deposed that about one year back, he was in B.S.P. Party and was a member of Zila Panchayat. In the morning at about 06.30 a.m., on which incident took place, accused/appellant Ramanand came at his home and stated that his wife and childrens have been murdered and asked P.W.4 to help him. P.W.4 asked him to disclose true facts and only then he

could help him. On inquiry, the accused/appellant Ramanand stated that he himself has committed the murder of his wife and children and has burn their bodies and asked P.W.4 to save him. On asking about the reason for committing murders, the accused/appellant Ramanand also told P.W.4 that he wanted to marry one Manju of Tambaur but his wife was opposing the same and due to this reason, he committed this incident. P.W.4 has further stated that the son of Ramanand used to live with a police man in District Mau. Only one week back, Ramanand has left his son at Mau. Son of Ramanand was brought by that constable and by that time after the post-mortem of the deceased persons, their dead bodies have been brought in the village. Seeing his son, accused Ramanand was wept bitterly and stated that he has committed the murder of his mother and sisters. P.W.4 has refused to help the accused. P.W.4 also stated that his statement was recorded by the police.

34 P.W.4, in his cross-examination has further deposed that he is residing at village Dhaurhara. The distance from the village of Ramanand to Dhaurhara is 6-7 kilometers. Ramanand reached to his house by foot. The police station Dhaurhara from his house is 40-50 steps. He was the elected Member of the Zila Panchayat from Bahujan Samaj Party. At that relevant time, Government of Bahujan Samaj Party was in the State of U.P. He had good relationship with the Inspector of police station Kotwali Dhaurhara and he used to visit every day to the police station. He knew Babu Ram Hans, resident of village Dhaurahara, who was the President of the Assembly Constituency Dhaurhara from Bahujan Samaj Party at the time of incident. He was told by Ramanand that his wife and children were done to death by some unknown persons. Thereafter, he questioned from Ramanand as to why the said persons had only killed his wife and children and not him. This witness has further stated that when Ramanand came to him, he bear pant and shirt and blood was oozing out from his head and his pant and shirt were blood stained. Ramanand came to him between 6 ½ to 7 and stayed there about 10 minutes and thereafter, he went from there on its own. This witness further deposed that he went to the police station Dhaurhara at 7 ½ a.m. on the date of incident, wherein he was informed that all officials had gone to the place of incident. He, thereafter, reached at the place of incident at about 09:00 a.m. and at that relevant time, Ramanand was gone for treatment to Dhaurhara hospital. He narrated the facts of Ramanand to the police officials, then, the police had arrested Ramanand at 9-9.15 a.m. This witness denied the suggestion that he is related to Chatrapal and Ramanand is connected to Bahujan Samaj Party and used to sing a song for Bahujan Samaj Party. He denied the suggestion that Ramanand wanted to contest the election against him for Zila Panchayat, due to which he has falsely deposing against him.

35 The learned trial Judge accepted the testimony furnished by P.W.1 Shambhu Raidas and P.W.2 Chatra Pal Raidas as also the extra judicial confession made by the accused/appellant before P.W.3 Babu Ram Hans and P.W.4 Ram Kumar, the post-mortem report furnished by P.W.5 Dr. A.K. Sharma and P.W.8 Dr. S.V. Singh, motive of murdering the deceased, recovery of banka and paint and shirt on the pointing out of the accused/appellant, the statement of P.W.9 Dr. Ankit Kumar Singh regarding presence of burn injury on the body of the accused/appellant and smell of kerosene oil

was coming out from the body and clothes of the accused/appellant and report of the FSL, which showed that samples of earth were put in envelop in the laboratory itself after examination of blood spots and the nature of earth of both the samples i.e. blood stained as well as of simple earth, was found identical. Accordingly, the trial Court convicted and sentenced the accused/appellant in the manner as stated in paragraph 1 hereinabove.

36 Hence, this appeal and reference.

37 We have heard Mr. Rajesh Kumar Dwivedi, Amicus Curiae for the convict/appellant and Sri Vimal Kumar Srivastava, learned Government Advocate, assisted by Sri Chandra Shekhar Pandey, learned Additional Government Advocate for the State of U.P. in Criminal Appeal No. 1959 of 2016 and Sri Vimal Kumar Srivastava, learned Government Advocate, assisted by Sri Chandra Shekhar Pandey, learned Additional Government Advocate for the State of U.P. and Mr. Rajesh Kumar Dwivedi, Amicus Curiae for the convict/appellant in Capital Sentence Reference No. 1 of 2016. We have also perused, the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution, the statement of the appellant recorded under Section 313, Cr.P.C.; and the impugned judgment of the trial Court.

38 While challenging the impugned judgment, Sri Rajesh Kumar Dwivedi, learned Amicus Curiae appearing on behalf of the accused/appellant has contended that there are several lacuna in conducting the investigation viz. F.I.R. is ante-dated and ante-timed; the F.I.R./Special Report was not forwarded to Magistrate concerned forthwith; the scribe of the written report was not produced in the witness box by the prosecution; blood stained and plain earth soil was not recovered by the Investigating Officer from the spot; and Investigating Officer also did not take and send the samples of blood stained and plain plaster from the room in which the dead bodies were allegedly burning after assault, for chemical examination to Forensic Science Laboratory. In the inquest reports of the deceased, the date and time when the corpses were dispatched to mortuary for autopsy is not mentioned. In support of his contention with regard to unexplained delay in dispatch of the F.I.R. to Magistrate, he has relied upon the judgment of the Apex Court in **Marudanal Augusti Vs. State of Kerala :** 1980 SCC (Cri.) 985.

39 Mr. Dwivedi has contended that there is no eye witness of the alleged incident. The prosecution case is based on circumstantial evidence and extra judicial confession of the accused before the P.W.3-Babu Ram Hans and P.W.4 Ram Kumar. He has contended that the alleged extra judicial confession made by the accused/appellant are not reliable for the reason that P.W.3-Babu Ram Hans is a related, interested and inimical witness, whereas there are variations, inconsistencies and major contradictions in the testimony of P.W.4-Ram Kumar, who is also an inimical witness. Thus, the trial Court has erred in relying the unreliable witnesses P.W.3 and P.W.4 while passing the impugned judgment. The extra-judicial confession cannot form the basis of conviction of the appellant since it has no corroboration and when examined in light of the settled principles of law, it is

inconsequential, thus, the appellant is entitled to the benefit of doubt.

40 Elaborating his submission, Mr. Dwivedi, learned Amicus Curiae appearing for the appellant has contended that the testimonies of P.W.1 and P.W.2 are not reliable as P.W.1 and P.W.2 are related, inimical and interested witnesses. He contended that P.W.1 was married to the sister of the accused/appellant and the sister of the accused/appellant has deserted P.W.1. Similarly, P.W.2 was the brother of deceased Sangeeta and he (P.W.2) was inimical to the accused/appellant as his sister has married the accused/appellant against the wishes of her family members.

41 It has further been contended by Sri Dwivedi that no motive has been established by the prosecution against the accused/appellant to commit the murder of his own wife and four minor daughters. He also contended that according to recovery memo, blood stained banka i.e. a weapon of assault and blood stained clothes (Pant & shirt) were recovered under Section 27 of the Evidence Act on 24.01.2010 at 09.50 a.m. on the pointing out of the accused/appellant but it is a fake recovery as it is not made in accordance to the provisions of Section 27 of the Evidence Act. The disclosure statement under Section 27 of the Evidence Act should be made voluntarily without any duress or coercion in the presence of independent witnesses. In support of his contention, he relied upon the judgments of the Apex Court reported in AIR 1956 SC 217 : **Aher Raja Khima Vs. The State of Saurashtra** and in AIR 2002 SC 3040 : **Harjit Singh and others Vs. State of Punjab.**

42 Sri Dwivedi has further contended that it has been alleged that appellant was arrested by the police on 24.01.2010 at 06:30 p.m. from Taxi Stand and the recovery was made under Section 27 of the Evidence Act on 24.01.2010 at 09:50 a.m. This shows that his arrest on 24.01.2010 at 06:30 p.m. is fake as no arrest memo of the accused/appellant has been prepared and no public witness has been mentioned before whom the arrest of the accused was made and in the Fard recovery, there is no signature of Senior Sub-Inspector, who scribed the fard Ext. Ka-5, witnesses of recovery as well as the signatures of the accused to whom the copy of the fard was given.

43 Mr. Dwivedi has also contended that the investigation of the case has been conducted in highly careless manner and the charge-sheet has been filed by the Investigating Officer P.W.7 S.I. Yogendra Singh without collecting sufficient evidence in support thereof. The trial Court has also erred to consider that the prosecution has not produced the best evidence to prove it's case and deliberately withheld the material witnesses, namely, Manju, her father Kandhai Raidas and husband of Manju to prove the guilt of the accused/appellant, for which presumption under Section 114 (g) of the Evidence Act was desired to be drawn against the prosecution. He has contended that the case of the prosecution is based on circumstantial evidence and chain of circumstances proved by the prosecution is not complete and the prosecution has miserably failed to establish the fact that only the accused/appellant and no one else except him could have committed the offence.

44 Learned Counsel for the appellant has further submitted that the trial Court had found conviction against the appellant in view of the provisions of Section 106 of the Evidence Act, 1972. He submitted that onus is on the prosecution to prove the case

beyond reasonable doubt against the appellant and the presumption, which has been raised against the appellant for recording his conviction in the present case, is not sustainable in the eyes of law. He has drawn the attention of the Court towards the judgments of the Apex Court reported in 2013 (3) JIC 548 (SC) : **Joydeb Patra & others Vs. State of West Bengal.**

45 Lastly, Mr. Dwivedi has contended that the extreme penalty of death awarded to the accused/appellant by the trial Court is too harsh and excessive in nature and as an alternate penalty the punishment of imprisonment for life would meet the ends of justice if this Court arrives at a conclusion otherwise as the case of the prosecution is solely based upon the extra-judicial confession, which confession is neither reliable nor has been recorded in accordance with law. In support of his argument, he has placed reliance upon the judgment of this Court reported in 2020 (3) JIC 125 (All HC DB) : **Najeem Miyan Vs. State of U.P.** and judgments of the Apex Court reported in 2020 (2) JIC 491 (SC) : **Manoj Suryavanshi Vs. State of Chhattisgarh, and in 2019 (107) ACC 731 (SC) : Vijay Kumar Vs. State of J & K.**

46 Per contra, learned Counsel appearing for the State, while supporting the impugned judgment of the trial and pleaded for confirmation of death penalty, argued that the appellant was living along with his wife and children in the same house, in which the incident had taken place. The appellant, in his statement under Section 313 Cr.P.C., has not denied his presence at the place of occurrence and on the other hand, injuries sustained on his person goes to show that he was present at the time of the incident and has committed the murder of his wife and four minor children. The motive for the appellant to commit the murder of the deceased has been proved by the evidence of P.W.2- Chatra Pal Raidas, who is real brother of the deceased Sangeeta. The recovery of blood stained banka and clothes of the appellant at his pointing out further shows the incriminating circumstance against the appellant for his involvement in the present incident. He has also submitted that extra-judicial confession made by the appellant before P.W.3-Babu Ram Hans and P.W.4-Ram Kumar goes to show that the said confession made by the appellant before the said witnesses is admissible one as the appellant was also the active member of a political party BSP, in which P.W.3-Babu Ram Hans and P.W.4-Ram Kumar were holding the good position and were able to help him out of the present case. He next submitted that the explanation given by the appellant for the death of his wife and children, in his statement under Section 313 Cr.P.C., is self-contradictory to his written statement under Section 233 Cr.P.C. He argued that the appellant had given a false explanation about the death of his wife and children and the trial Court has rightly rejected the defence version.

47 Learned Counsel for the State has further contended that the present case is of circumstantial evidence and the prosecution has succeeded in establishing every circumstance of the chain of events that would fully support the view that the accused/appellant is guilty of the offence. The trial court while dealing with the judgment under appeal, upon proper

appreciation of evidence, thus, has come to the right conclusion.

48 We have given a thoughtful consideration to the rival submissions advanced by learned Counsel for the parties and have gone through the lower Court record and the impugned judgment and order passed by the trial Court.

49 In the instant case, there is no eye-witness of the incident and it is a case of circumstantial evidence. In a case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra-judicial confession, the court has to examine the same with a greater degree of care and caution. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra- judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra- judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

50 The present case rests on circumstantial evidence and the appellant has been convicted and sentenced to death by the trial Court for murdering his wife and children vide impugned judgment. In respect to convict the person in a case of circumstantial evidence, the Apex Court in the celebrated case of **Sharad Birdhichand Sarda v. State of Maharashtra: AIR 1984 SC 1622,** has held that the following conditions must be fulfilled before a case against an accused can be said to be fully established:-

"1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;

2. The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3. The circumstances should be of a conclusive nature and tendency;

4. They should exclude every possible hypothesis except the one to be proved; and

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

51 The aforesaid principles of law, which have been laid down by the Apex Court, shows that while dealing with circumstantial evidence, the onus is on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea.

52 In a case of circumstantial evidence, conditions precedent before conviction could be placed on circumstantial evidence, must be fully established such as *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned*

"must' or "should' and not "may be' established; (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (3) the circumstances should be of a conclusive nature and tendency; (4) they should exclude every possible hypothesis except the one to be proved; and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

53 Keeping in mind the aforesaid principles of law, we proceed to examine the instant case whether the prosecution has been able to establish a chain of circumstances so as to not leave any reasonable ground for the conclusion that the allegations brought against the accused persons are sufficiently proved and established.

54 Learned Counsel for the appellant has raised an argument that the motive, which has been suggested by the prosecution to commit the murder of his wife and children by the appellant is absolutely a weak one as the prosecution has failed to prove the same but the said argument of the learned Counsel for the appellant does not appear to have much substance.

55 In the present case, as is apparent from the evidence on record that there appears to be a motive for the appellant to commit the murder of his wife Sangeeta along with her children, which is established from the evidence of P.W.2-Chatra Pal Raidas, who is the real brother of deceased Sangeeta. P.W.2, in his deposition before the trial Court, has stated that his sister Sangeeta, who used to come to his house and stayed there for about 1-2 months, had made a complaint to him about the illicit relationship of the appellant with Manju; Manju had become pregnant from the appellant; and the appellant wanted to marry with Manju, which was objected by his sister Sangeeta; and the appellant was adamant to marry with Manju, on account of which, the appellant committed the murder of his wife deceased Sangeeta along with four minor children, who was living along with the appellant in his house. P.W.2-Chatra Pal Raidas has further stated that when Sangeeta had come to his house, she told about the aforesaid fact. He also stated, in his evidence, that ten days prior to the incident, the deceased Sangeeta had come to his house and in the presence of his neighbours, namely, Chailbihari and Balgovind, had also disclosed about the illicit relationship of the appellant with Manju. Thus, the motive to commit the murder of the deceased Sangeeta along with her children stands proved from the evidence of P.W.2 and there is no reason for him to depose falsely against the appellant.

56 The fact that the evidence of witness P.W.2-Chatra Pal Raidas could not be relied upon on account of the fact that he happens to be the real brother of deceased Sangeeta and as Sangeeta had eloped the appellant Ramanand against the wishes of her family members, therefore, witness was falsely deposing against the appellant, cannot be accepted to the fact as quoted his testimony with respect to the motive, which has been categorically stated by him for the cause of murder of his wife Sangeeta and her four minor children.

57 Here it would also be pertinent to mention that another motive of the appellant to commit the murder of his wife and his children, as has been apparent from the evidence of P.W.1 and P.W.2, that the appellant, on taking advantage of the murder of his wife and children, wanted to get compensation from the State Government as earlier also the appellant had taken the compensation for the murder of his real brother Siyaram, which was paid by the State Government to the tune of Rs.4-5 Lakhs, and which was, in fact, given to the daughter of deceased Siyaram, namely, Gudiya but he managed to take the said compensation from Gudiya, who died on account of illness.

58 From the aforesaid analysis of the evidence on record, it is established that the prosecution has proved beyond doubt that the appellant has motive to commit the murder of his wife and his four minor children and, therefore, the contention of the learned Counsel for the appellant on this score is not sustainable and the same is rejected also.

59 The next contention of the learned Counsel for the appellant is that the appellant is innocent and he has falsely been implicated in the case on account of enmity and further the appellant has not committed any offence.

60 The circumstance, which shows the involvement of the appellant in the present case is that in the medical examination of the appellant, which was conducted by P.W.9-Dr. Ankit Kumar Singh on 22.01.2010, at 10:30 A.M., P.W.9 opined that the smell of kerosene oil are coming from the body of the appellant. The appellant, in his statement under Section 313 Cr.P.C., has stated that the miscreants of the incident have poured kerosene over his body so as to burn him, whereas in his statement under Section 233 Cr.P.C., the appellant has stated that when he reached at village Namdarpurwa for help, some villagers have poured kerosene over his injuries. Moreover, injuries no. 4 and 5, which were superficial burn injuries on the person of the appellant further goes to show that his presence at the place of occurrence is also established and the explanation, which he had given for the same, in his statement under Section 313 Cr.P.C. and written statement under Section 233 Cr.P.C., are self contradictory. The kerosene oil found on the body of the appellant along with superficial burn injuries on his person has further goes to show that he had committed the murder of his wife and children and after causing injuries to them, he had burnt their dead bodies as post-mortem burns are found on the person of all the deceased. Moreover, the prosecution has established that prior to the commission of crime, the appellant and the deceased were living together in their house and the explanation, which has been offered by the appellant regarding how the deceased died, is not at all substantiated in the facts and circumstances of the case. Thus, the contention of the appellant that he has not committed the murder of his wife and his four minor children is bogus and false and is also rejected.

61 The argument of the learned Counsel for the appellant that the recovery, which has been made of blood stained banka and blood stained clothes of the appellant on his pointing out, is not in accordance with Section 27 of the Evidence Act, hence the said recovery is a false one and the appellant be acquitted on this ground alone, is also not acceptable as it is apparent from the fard recovery memo of the two articles Ext. Ka.5, which was proved by P.W.6-Uma Shankar and P.W.7-Yogendra Singh. Moreso, the legal position regarding scrutiny of recovery memo, statement recorded under Section 27 of the Indian

Evidence Act is well settled by the Apex Court in the case of **Golakonda Venkateswara Rao vs. State of Andra Pradesh** : AIR 2003 SC 2846, wherein the Apex Court once again reconsidered the entire issue and held that merely because the recovery memo was not signed by the accused, will not vitiate the recovery itself, as every case has to be decided on its own facts. In the event that the recoveries are made pursuant to the disclosure statement of the accused, then, despite the fact that the statement has not been signed by him, there is certainly some truth in what he said, for the reason that, the recovery of the material objects was made on the basis of his statement.

62 From perusal of the record, it revealed that the police arrested him on 24.01.2010 and kept him in police lock up. On the interrogation, the appellant disclosed the P.W.7- Inspector Yogendra Singh, who was the Investigating Officer, that he can get the blood stained banka and his clothes, which was used in the crime and wearing at the time of the incident. On this information given by the appellant to P.W.7, the appellant was taken out from the lock up and on his pointing out, the appellant was taken along with other police personnel by P.W.7 with witnesses Chatra Pal Raidas (P.W.2) and one Pratap son of Basartilal Raidas to the field of one Kafil, from where blood stained banka and blood stained clothes were recovered by P.W.7, which was concealed in the shrubs and the appellant has also disclosed him that he had concealed the blood stained banka and blood stained clothes after the murder. The said recovery was made on the pointing out of the appellant on 24.01.2010 at 09.15 a.m. A fard recovery memo regarding the blood stained banka and blood stained clothes was prepared by P.W.7 at the place of occurrence and the same was also signed by the witnesses and the appellant and copy of the same was also given to the appellant. As per the Forensic Report of the recovered items, blood was found on the said recovered items.

63 In the light of the aforesaid facts and circumstances of the case and also keeping in mind the law laid down by the Apex Court in **Golakonda Venkateswara Rao vs. State of Andhra Pradesh (supra),** the plea of the learned Counsel for the appellant in this regard is not acceptable and the same is rejected.

64 The other circumstance, which goes against the appellant, is his conduct. The conduct of the appellant is apparent from the record as he had gone to the house of P.W.1 -Shambhu Raidas at 6:30 a.m., in the morning, who is his brother-in-law and informed him about the incident, wherein he stated that some unknown miscreants of village Bardhiya had come to his house in the mid night and knocked the door and when he gone to see them from roof, he identified one person of village Bardhiya and one of the miscreants had fired at him, upon which he came down from the roof and thereafter, one of the miscreants had assaulted him from butt of the gun and then he fled from his house in a field and by concealing himself, he saw that miscreants had jumped into his house and smoke coming out from his house. On receiving the said information, P.W.1-Shambhu Raidas along with his nephew Pratap reached the house of the appellant and saw the dead-bodies of his wife Sangeeta and four minor children burning. Thereafter, P.W.1 and Pratap extinguished fire by pouring water and the appellant was noticed by P.W.1-Shambhu Raidas taking the heat by sitting near fire in the courtyard, on which, P.W.1 Shambhu Raidas asked him that his wife and her minor children

has been burnt and he takes the heat of the fire, then, the appellant went away from his house as he felt annoyed. The said conduct of the appellant goes to show that he did not make any effort to save his wife Sangeeta and four minor children, firstly from the alleged miscreants and instead fled away from his house and watching the entire incident from a short distance of his house from a field and further when the miscreants had went away from his house after the incident, he did not make any effort to extinguish fire at the place of occurrence nor he went to the house of P.W.1-Shambhu Raidas or P.W.2-Chatra Pal Raidas immediately after the incident, who were living in the village (Namdarpurwa) of the appellant at a short distance from his house as it has come that P.W.1-Shambhu Raidas was living at a distance of one kilometer from the house of the appellant.

65 It further connects important feature which was inference against the appellant is that he was admittedly living in his house along with his wife Sangeeta and four minor daughters, who were murdered in a brutal manner and the appellant has failed to explain the death of his wife and his children and the explanation, which was given by him for their death was false, firstly on the ground that from perusal of the post-mortam report of the deceased shows that all the deceased had received injuries by sharp edged weapon as the incised wound were on their persons, which could be caused by Banka and the same has been recovered at the pointing out of the appellant. Secondly, after causing injuries to the five deceased persons, their deadbodies were burnt as there are post-mortam burn upon all the five deceased as it is apparent from their post-mortam report.

66 P.W.7- S.I. Yogendra Singh, in his deposition, has also deposed that after arrest of the appellant and on interrogation, appellant has disclosed that after the murder of his real brother, namely, Siyaram, he has started to even keeping the daughter of his real brother, namely, Gudiya as a wife and later on, daughter of Siyaram, namely, Gudiya, has committed suicide. This evidence of P.W.7 also shows the conduct of the appellant was immoral as has been apparent from the record that after eloping with two married ladies, he has not spared even his own niece.

67 Another strong circumstance, which appears against the appellant, is that the reason for the appellant for killing his minor daughters and his wife Sangeeta appears to be that he wanted to escape his responsibility of his four minor daughters of their clothing, studies and further their marriage after they would have grown up, therefore, the appellant thought to eliminate them along with his wife. It is noteworthy to mention here that the appellant had an elder son, who was aged about ten years and whom he had left at Mau with a police constable for studies one week ago from the date of the incident and he did not kill him for oblique motive being a male child. The appellant appears to be a very clever person and not innocent. He had earlier taken compensation for the murder of his brother, namely, Siyaram and now with a motive to take compensation for the death of his wife and minor children because of the present incident.

68 Had the incident been caused by the alleged unknown miscreants, who have entered the house of the appellant, as has been stated by the appellant Ramanand and who also saw the incident, but he has not stated that miscreants were armed with any sharp edged weapon and on the other hand, appellant has stated that one of the miscreants fired at him and also caused injuries by the butt of the gun but no cartridge was found from the place of occurrence when he saw them from the roof of his house. Thus, it

goes to show that the explanation, which has been given by the appellant, is absolutely bogus and false one.

69 The argument of the learned Counsel for the appellant that the F.I.R. is the ante-dated and ante-timed, has also not legs to stand as it is evident from the statement of P.W.10-HCP Dhani Ram Verma that the informant had come with his written report to the police station on 22.01.2010 and handed over to him, on the basis of which, he lodged the F.I.R. of the incident at concerned police station and thereafter police personnels visited the house of the appellant and conducted the inquest proceedings and sent the corpses for post-mortem etc. and at the same time, higher officials had reached at the place of occurrence. Thus, it is established from the evidence of P.W.10 that the F.I.R. has been lodged on the date and time as has been suggested by the prosecution.

70 The argument of the learned Counsel for the appellant that special report of the incident was sent to the Magistrate concerned after a great delay, also has no much bearing on the prosecution case as if there had been some lapses on the part of the investigating agency that cannot said to be a fatal one particularly that has not caused any prejudice to the appellant.

71 It is relevant to mention here that the legal effect of any delay in sending the special report of the incident to Magistrate has also been dealt with by the Apex Court in **Ombir Singh Vs. State of Uttar Pradesh and others :** AIR 2020 SC 2609. The relevant part of the report is reproduced as under :

"4. There was undoubtedly a delay in compliance of section 157 of the Code, as the FIR was received in the office of the Chief Judicial Magistrate with a delay of 11 days. Effect of delay in compliance of Section 157 of the Code and its legal impact on the trial has been examined by this court in Jafel Biswas v. State of West Bengal: (2019) 12 SCC 560 after referring to the earlier case laws, to elucidate as follows:

"18. In State of Rajasthan [State of Rajasthan v. Daud Khan, (2016) 2 SCC 607 : (2016) 1 SCC (Cri) 793] in paras 27 and 28, this Court has laid down as follows: (SCC pp. 620-21) "27. The delay in sending the special report was also the subject of discussion in a recent decision being Sheo Shankar Singh v. State of U.P. [Sheo Shankar Singh v. State of U.P., (2013) 12 SCC 539 :(2014) 4 SCC (Cri) 390] wherein it was held that before such a contention is countenanced, the accused must show prejudice having been caused by the delayed dispatch of the FIR to the Magistrate. It was held, relying upon several earlier decisions as follows: (SCC pp. 549-50, paras 30-31) "30. One other submission made on behalf of the appellants was that in the absence of any proof of forwarding the FIR copy to the jurisdiction Magistrate, violation of Section 157 CrPC has crept in and thereby, the very registration of the FIR becomes doubtful. The said submission will have to be rejected, inasmuch as the FIR placed before the Court discloses that the same was reported at 4.00 p.m. on 13-6-1979 and was forwarded on the very next day viz. 14-6-1979. Further, a perusal of the impugned judgments of the High Court [Sarvajit Singh v. State of U.P., 2003 SCC OnLine All 1214 : (2004) 48 ACC 732] as well as of the trial court discloses that no case of any prejudice was shown nor even raised on behalf of the appellants based on

alleged violation of Section 157 CrPC. Time and again, this Court has held that unless serious prejudice was demonstrated to have been suffered as against the accused, mere delay in sending the FIR to the Magistrate by itself will not have any deteriorating (sic) 1 (2019) 12 SCC 560 effect on the case of the prosecution. Therefore, the said submission made on behalf of the appellants cannot be sustained.

31. In this context, we would like to refer to a recent decision of this Court in Sandeep v. State of U.P. [Sandeep v. State of U.P., (2012) 6 SCC 107 : (2012) 3 SCC (Cri) 18] wherein the said position has been explained as under in paras 62-63: (SCC p. 132) "62. It was also feebly contended on behalf of the appellants that the express report was not forwarded to the Magistrate as stipulated under Section 157 CrPC instantaneously. According to the learned counsel FIR which was initially registered on 17-11-2004 was given a number on 19-11-2004 as FIR No. 116 of 2004 and it was altered on 20-11-2004 and was forwarded only on 25-11-2004 to the Magistrate. As far as the said contention is concerned, we only wish to refer to the reported decision of this Court in Pala Singh v. State of Punjab [Pala Singh v. State of Punjab, (1972) 2 SCC 640 : 1973 SCC (Cri) 55] wherein this Court has clearly held that (SCC p. 645, para 8) where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned be, in the absence of any prejudice to the accused it cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable.

63. Applying the above ratio in Pala Singh [Pala Singh v. State of Punjab, (1972) 2 SCC 640 : 1973 SCC (Cri) 55] to the case on hand, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the investigation is concerned, our earlier detailed discussion discloses that there was no dearth in that aspect. In such circumstances we do not find any infirmity in the case of the prosecution on that score. In fact the above decision was subsequently followed in Sarwan Singh v. State of Punjab [Sarwan Singh v. State of Punjab, (1976) 4 SCC 369 : 1976 SCC (Cri) 646] , Anil Rai v. State of Bihar [Anil Rai v. State of Bihar, (2001) 7 SCC 318 : 2001 SCC (Cri) 1009] and Aqeel Ahmad v. State of U.P. [Aqeel Ahmad v. State of U.P., (2008) 16 SCC 372 : (2010) 4 SCC (Cri) 11] "'

28. It is no doubt true that one of the external checks against antedating or ante-timing an FIR is the time of its dispatch to the Magistrate or its receipt by the Magistrate. The dispatch of a copy of the FIR "forthwith" ensures that there is no manipulation or interpolation in the FIR. [Sudarshan v. State of Maharashtra, (2014) 12 SCC 312 : (2014) 5 SCC (Cri) 94] If the prosecution is asked to give an explanation for the delay in the dispatch of a copy of the FIR, it ought to do so. [Meharaj Singh v. State of U.P., (1994) 5 SCC 188 : 1994 SCC (Cri) 1391] However, if the court is convinced of the prosecution version's truthfulness and trustworthiness of the witnesses, the absence of an explanation may not be regarded as detrimental to the prosecution case. It would depend on the facts and circumstances of the case. [Rattiram v. State of M.P., (2013) 12 SCC 316 : (2014) 1 SCC (Cri) 635] "

19. The obligation is on the IO to communicate the report to the Magistrate. The obligation cast on the IO is an

obligation of a public duty. But it has been held by this Court that in the event the report is submitted with delay or due to any lapse, the trial shall not be affected. The delay in submitting the report is always taken as a ground to challenge the veracity of the FIR and the day and time of the lodging of the FIR.

20. In cases where the date and time of the lodging of the FIR is questioned, the report becomes more relevant. But mere delay in sending the report itself cannot lead to a conclusion that the trial is vitiated or the accused is entitled to be acquitted on this ground.

21. This Court in Anjan Dasgupta v. State of W.B. [Anjan Dasgupta v. State of W.B., (2017) 11 SCC 222 : (2017) 4 SCC (Cri) 280] (of which one of us was a member, Hon'ble Ashok Bhushan, J.) had considered Section 157 CrPC. In the above case also, the FIR was dispatched with delay. Referring to an earlier judgment [Rabindra Mahto v. State of Jharkhand, (2006) 10 SCC 432 : (2006) 3 SCC (Cri) 592] of this Court, it was held that ***in every case from the mere delay in sending the FIR to the Magistrate, the Court would not conclude that the FIR has been registered much later in time than shown."*** (Emphasis supplied)

72 The issue whether the infirmities in investigation and discrepancies pointed out in the prosecution evidence make out a ground for rejecting the prosecution version was explained at length in the case of **State of Karnataka Vs. Suvarnnamma** : 2015 (88) ACC 317, wherein the Apex Court, after taking note of **Zahira Habiullha Sheikh (5) vs. State of Gujarat** : (2006) 3 SCC 374 and other reports, has held that mere lapses on the part of the Investigating Agency could not be enough to throw out overwhelming evidence clearly establishing the case of the prosecution.

73 In the instant case, from perusal of the record and the evidences brought on record, we are of the view that though there is some lapses on the part of the Investigating Agency in the investigation but the prosecution has established the case against the appellant beyond reasonable doubt. Therefore, the plea of the appellant in this regard is not sustainable and is, accordingly, rejected.

74 The argument of the learned Counsel for the appellant regarding the arrest of the appellant on 24.01.2010 at 06:30 a.m. and the recovery, which has been made on the same date at 09:50 a.m., is also of no significance as the same has been dealt with by the trial Court in the impugned judgment, which, in our view, has rightly been dealt with giving sound reasoning.

75 The other argument of the learned Counsel for the appellant that the evidence of P.W.1-Shambhu Raidas and P.W.2-Chatra Pal Raidas, who are highly interested and inimical to the appellant, is also of no significance as P.W.1-Shambhu Raidas narrated the facts about the murder of his sister and her children by the appellant himself in the morning at 06:30 a.m. at his house. Similarly, P.W.2-Chatra Pal Raidas, who is the real brother of the deceased Sangeeta, has categorically disclosed about the motive of the appellant in the murder of his wife and children, cannot be discarded on the ground that he happens to be the real brother of the deceased Sangeeta as it is well settled law that simply because a witness being related to the deceased or injured, his testimony cannot be thrown for this ground alone but

on the other hand, his evidence has to be examined minutely with a great caution. From the entire evidence of P.W.1 and P.W.2 goes to show that their testimony has been consistent one regarding the fact that the appellant had disclosed about the incident to P.W.1 and also P.W.2 and in their cross-examination, nothing has been carved out by the defense, which may come to this Court to discard their testimony.

76 Here, it is out of place to mention that the extra-judicial confession, which has been made by the appellant before P.W.3-Babu Ram Hans and P.W.4-Ram Kumar, is also relevant in order to determine the guilt of the appellant as the appellant himself was connected with a political party i.e. Bahujan Samaj Party. P.W.3 was the District President of the Bahujan Samaj Party and P.W.4 was the Member of Zila Panchayat of the Bahujan Samaj Party. Both these witnesses holding a good position in Bahujan Samaj Party, were competent enough to get the appellant exonerated from the charges, which he had committed and confessed before them but after hearing the accused/appellant that he himself had killed his wife and children in a brutal manner, they refused to help him and on the other hand, they informed the police about the incident, to which in the place of occurrence, the other high officials also reached there and the appellant was taken by the police after being satisfied that it was he (appellant), who had killed his wife and children, and was challaned in the present case and the recovery, thereafter, was made from him of the weapon of assault Banka along with his blood stained cloths. The suggestions, which have been given for disbelieving the extra judicial confession made by the appellant before P.W.3 and P.W.4, had happened to be related to P.W.2-Chatra Pal Raidas as the deceased Sangeeta was the daughter of his brother-in-law, hence, they were falsely deposing against him, is not at all acceptable and their evidence cannot be disbelieved on the said counts. Taking into account the other circumstances, which has been referred hereinabove, which speaks out the guilt of the appellant in the present case.

77 At this juncture, it would be apt to deal with some of the judgments of the Apex Court on this aspect.

78 In **Balwinder Singh v. State of Punjab** [1995 Supp. (4) SCC 259], the Apex Court stated the principle that an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

79 In **Pakkirisamy v. State of T.N**. [(1997) 8 SCC 158], the Apex Court held that it is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.

80 Again in **Kavita v. State of T.N.** [(1998) 6 SCC 108], the Apex Court stated the dictum that there is no doubt that conviction can be based on extrajudicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses to whom it is made.

81 While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, the Apex Court in the case of **State of Rajasthan v. Raja**

Ram [(2003) 8 SCC 180] stated the principle that an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The Apex Court, further expressed the view that such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.

82 In the case of **Aloke Nath Dutta v. State of W.B.** [(2007) 12 SCC 230], the Apex Court, while holding the placing of reliance on extra-judicial confession by the lower courts in absence of other corroborating material, as unjustified, observed:

"87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

XXX XXX XXX

89. A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof."

83 Accepting the admissibility of the extra-judicial confession, the Apex Court in the case of **Sansar Chand v. State of Rajasthan** [(2010) 10 SCC 604] held that :-

*"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide **Thimma and Thimma Raju V. State of Mysore, Mulk Raj V. State of U.P. Sivakumar V. State** (SCC paras 40 and 41 : AIR paras 41 & 42), **Shiva Karam Payaswami Tewari V. State of Maharashtra and Mohd. Azad v. State of W.B.***

In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."

84 Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Apex Court in the case of **Rameshbhai Chandubhai Rathod v. State of Gujarat** [(2009) 5 SCC 740], held as under :

"It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true."

85 Extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility. The extra-judicial confession should inspire confidence and the court should find out whether there are other cogent circumstances on record to support it. [Ref. **S.K. Yusuf v. State of W.B.** [(2011) 11 SCC 754] and **Pancho v. State of Haryana** [(2011) 10 SCC 165].

86 Upon a proper analysis of the above-referred judgments of the Apex Court, it would be apt to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused. The Principles, thus, comes out are that (i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution;(ii) It should be made voluntarily and should be truthful; (iii) It should inspire confidence; (iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence; (v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities; and (vi) Such statement essentially has to be proved like any other fact and in accordance with law.

87 Having regard to the aforesaid principles, while examining the acceptability and evidentiary value of the extra- judicial confession, we may now refer to the extra-judicial confession in the case before us. The extra-judicial confession is alleged to have been made by the accused/appellant before P.W.3-Babu Ram Hans and P.W.4-Ram Kumar.

88 As per the case of the prosecution, the deceased were murdered on 21/22.01.2010. The dead bodies of the deceased were taken into custody by the police in the morning of 22.01.2010. Both P.W.3-Babu Ram Hans and P.W.4 Ram Kumar had categorically made statement on oath that the accused/appellant Ramanand came to their house in order to get help from them as they are the members of the Bahujan Samaj Party in the morning of 23.01.2010 and told them that he (accused/appellant) did a mistake as he murdered his wife Sangeeta and his children with banka and thereafter he burned their deadbodies on bed in the house. The trial Court, after discussing this issue in detail, has opined that testimony of P.W.3 and P.W. 4 is consistent and credible. Both the witnesses were in such a position that it was natural on the part of the accused/appellant to think that they may help him from saving this crime. Both the witnesses have consistently deposed that the

accused/appellant has admitted before them that he had committed the murder of his wife and children in order to marry Manju and has sought their help. When P.W.3 has refused to help him, the accused /appellant had approached P.W.4 for the help. Both the witnesses were politically known to accused /appellant as earlier he was also in the same party. The trial Court has further found that there is absolutely nothing that these witnesses were inimical towards the accused /appellant nor there were any such reasons that why they would depose falsely against the accused. In these circumstances, the trial Court has rightly came to the conclusion that the admission of guilt by the accused before P.W.3 and P.W.4 falls in the category of extra judicial confession and the extra judicial confession made by the accused/appellant before P.W.3 and P.W.4 is found fully reliable and the same can safely be used against the accused /appellant.

89 The fact that defense version, which has been pleaded by the appellant, is a plausible one or not, has been considered in great detail by the learned trial Court, which after going through the entire defense evidence found to be false one. Here, it would not be out of place to mention that the burden to prove his case lies on the prosecution and the accused /appellant is not expected to prove its case beyond doubt. From perusal of the post-mortem report of the deceased persons, it is apparent that they were done to death in a brutal and barbaric manner.

90 Thus, this Court comes to the conclusion that the accused/appellant Ramanand *alias* Nandlal Bharti had strong motive to commit the murder of his wife; at the time of the incident, the appellant and the five deceased were the only occupants in the house, in which they were living together; after the arrest of the appellant at his pointing out the weapon of murder i.e. "blood stained Banka' and his "blood stained clothes' were recovered which he had concealed; soon after the incident, the appellant made an extra-judicial confession before P.W.3-Babu Ram Hans and P.W.4-Ram Kumar admitting his guilty; the conduct of the appellant which is totally inculpatory as he never tried to inform the police about the incident but on contrary he concocted a false and baseless story of the occurrence; the appellant even did not inform about the incident to P.W.1-Shabhu Raidas and P.W.2-Chatrapal Raidas, who were the resident of the same village, where the accused/appellant had gone to seek help from other villagers; the defense taken by the appellant under Section 313 Cr.P.C. is self-contradictory to his written statement under Section 233 Cr.P.C.; the appellant has not even denied his presence at the place of occurrence, moreover, it found established as the appellant has sustained two burn injuries on his person and further the presence of kerosene oil over his body and clothes. These facts go to show that the appellant was involved in the incident and in that transaction, he sustained burn injuries and kerosene oil was found on his body and clothes.

91 Hence, from the totality of circumstances and entire evidence on record, it stands proved that it was none else but the appellant and he alone, who committed the murder of his wife and four minor daughters. The prosecution has been able to established the chain of circumstances, which are in themselves complete and the same are conclusive in nature and excludes all possible hypothesis

except the fact that it was the appellant alone who is guilty of the crime.

92 Taking all these aspects of the matter, we are of the view that the trial Court was fully justified in convicting the accused appellant under Section 302 of IPC .

93 While upholding the conviction of the accused/appellant, we now proceed to consider the question of 'death sentence' awarded to him by the trial Court under Section 302 of IPC.

94 It is true that capital punishment has been the subject-matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one indisputable statement of law follows that it is neither possible nor prudent to state any universal form which would be applicable to all the cases of criminology where capital punishment has been prescribed. Thus, it is imperative for the Court to examine each case on its own facts, in the light of enunciated principles and before opting for the death penalty, the circumstances of the offender are also required to be taken into consideration along with the circumstances of crime for the reason that life imprisonment is the rule and death sentence is an exception.

95 Before going into the legality and propriety of question of sentence imposed upon the accused/appellant by the trial Court by means of the impugned order, we deem it apt to have a glance at the various decisions of the Hon'ble Supreme Court on the issue.

96 The decision pronounced by the Constitutional Bench of Hon'ble Supreme Court in the case of **Bachan Singh v. State of Punjab** : AIR 1980 SC 898 stands first among the class making a detailed discussion after the amendment of Code of Criminal Procedure in 1974. The Constitutional Bench of Hon'ble the Supreme Court in **Bachan Singh v. State of Punjab** (Supra), while upholding the constitutionality of death penalty under Section 302 of Indian Penal Code and the sentencing procedure embodied in Section 354 (4) of the Code of Criminal Procedure, struck a balance between the protagonists of the deterrent punishment on one hand and the humanity crying against death penalty on the other ane elucidated the strict parameters to be adhered to by the Courts for awarding death sentence. While emphasizing that for persons convicted of murder, life imprisonment is the "rule' and death sentence an "exception', the Hon'ble Supreme Court observed that a rule abiding concern the dignity of the human life postulates resistance in taking the life through laws instrumentality and that the death sentence be not awarded "save in the rarest of the rare cases" when the alternative option is foreclosed. The relevant paragraphs of the said judgment are reproduced herein below:-

"132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302 of the Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason,

learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware -- as we shall presently show they were -- of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235 (2) and 354 (3) in that Code providing for presentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302 of the Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19."

"200. Drawing upon the penal statutes of the States in U.S.A. framed after Furman v, Georgia, in general, and Clauses 2(a), (b), (c), and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":

"Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by suc member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

201. Stated broadly, there can be no objection to the acceptance of these

indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

204. Dr. Chitaley has suggested these mitigating factors:

"Mitigating circumstances":- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. It the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society. (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.

209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354 (3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the high-road of legislative policy outlined in Section 354 (3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

97 In **Machhi Singh v. State of Punjab** : (1983) 3 SCC 470, a Three Judges Bench of the Hon'ble Supreme Court formulated the following two questions to be considered as a test to determine the "rarest of rare' cases, in which death sentence can be inflicted. The same are reproduced hereinbelow :-

"(i) Is there something uncommon, which tenders sentence for imprisonment for life inadequate calls for death sentence ?

(ii) Rather the circumstances of the crime such that there is no alternative, but to impose the death sentence even after according maximum weightage to the mitigating circumstances which speaks in favour of the offender ?"

98 Hon'ble Supreme Court in **Machhi Singh v. State of Punjab (supra)**, then, proceeded to lay down the circumstances in which death sentence may be imposed for the crime of murder and has held as under :

"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I.Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II.Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when

(a) a hired assassin commits murder for the sake of money or reward

(b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or

(c) a murder is committed in the course for betrayal of the motherland.

III.Anti-social or socially abhorrent nature of the crime

35. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV.Magnitude of crime

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V.Personality of victim of murder

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

38. In this background, the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case.

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life Imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances

has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

99 In the aforesaid case i.e. **Machhi Singh Vs. State of Punjab (supra),** the Hon'ble Supreme Court has confirmed the death sentence awarded to Kashmir Singh, who was one of the appellants as he was found guilty of causing death to a poor defenceless child, namely, Balbir Singh, aged about 6 years. The appellant Kashmir Singh was categorized as a person of depraved mind with grave propensity to commit murder.

100 The ratio laid down by the Hon'ble Supreme Court in **Bachan Singh v. State of Punjab (Supra)** and **Machhi Singh Vs. State of Punjab (supra),** continue to serve as the foundation-stone of contemporary sentencing jurisprudence though they have been expounded or distinguished for the purpose of commuting death sentence, mostly in the cases of (i) conviction based on circumstantial evidence alone; (ii) failure of the prosecution to discharge its onus re: reformation; (iii) a case of residual doubts; (iv) where the other peculiar "mitigating circumstances outweighed the "aggravating circumstances'.

101 The issue has again came up before Hon'ble Supreme Court in ***Ramnaresh & others v. State of Chhattisgarh :*** (2012) 4 SCC 257, wherein the Hon'ble Supreme Court reiterated 13 aggravating and 7 mitigating circumstances as laid down in the case of **Bachan Singh v. State of Punjab** (Supra) required to be taken into consideration while applying the doctrine of "rarest of rare" case. The relevant para of the aforeaid judgment of the Hon'ble Supreme Court reads as under :

"76. The law enunciated by this Court in its recent judgements, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh (supra) and thereafter, in the case of Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the "aggravating circumstances" while the other being the "mitigating circumstances". The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354 (3) of Cr.P.C.

Aggravating Circumstances:

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused."

102 Having noticed the legislative mandate laid down in Section 354 (3) of the Code of Criminal Procedure and the decisions of the Hon'ble Supreme Court on the aspect of imposition of death sentence

in the *"rarest of rare'* cases, we deem it expedient to revert to the factual position in the instant case in our quest for the appropriate sentence.

103 In the instant case, the accused/convict Ramanand has committed murder of his wife and four minor innocent daughters aged about 7 years, 5 years, 3 years and the youngest one aged about one and a half month. It transpires from the evidence on record that the criminal act of the accused/convict was actuated to pave a way to marry with one lady, namely, Manju, who was already married. It was the deceased Sangeeta (wife of the appellant), who opposed his marriage with Manju but the accused/convict was adamant to marry with Manju at any cost and in order to marry with Manju, accused/convict murdered not only murder his own wife but also his own four innocent minor daughters aged between one and half month to eight years in a most brutal and barbaric manner without their no fault and without any rhyme or reason. Before murdering the deceased, the accused/convict had also chopped of various parts of their bodies and inflicted severe incised wounds as is evident from the post-mortem report.

104 Keeping in mind the law laid down by the Apex Court in **Machhi Singh v. State of Punjab (Supra)** as well as various other pronouncement of the Hon'ble Supreme Court and also considering the law on the issue by the Hon'ble Supreme Court that a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised, the trial Court has recorded the aggravating circumstances looking to the evidences brought on record and we deem it appropriate to reproduce the same in order to reach logical end in respect of awarding the appropriate sentence. The same is reproduce as under :-

"1- The accused has committed murder of his wife and four minor daughters aged 7, 5, 3 years and the youngest one was just one and a half month old. The accused was in a dominant position and a position of trust as the head of family. The accused betraying the trust and abusing his position murdered his wife and children. Instead of protecting them, the accused himself became devourer of his own offspring.

2- The murders were committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. There were severe incised wounds on the bodies of all the accused persons. The various parts of their dead bodies like hands and feet were chopped off from their bodies. Some parts of their bodies were found missing. After committing the murders, all the deceased persons were put on fire. There were superficial to deep burns all over their bodies.

3- The callousness and depravity of the accused may also be seen from the fact that after the incident when the complainant/PW 1 reached at the spot and seeing the scene, started pouring water to extinguish the fire, the accused sat around fire and started enjoying heat as it was a winter season. When the complainant snubbed him saying that his wife and children have been murdered and he was still enjoying the heat, the accused went

away. His conduct show extreme depravity and diabolical nature.

4- The crime committed by the accused is enormous in proportion, as the accused has murdered as much as five members of his family. The murders of the deceased were cold blooded and without any provocation. The murders were committed so brutally that it shocks not only the judicial conscience but even the conscience of the society.

5- The deceased included four innocent children, who could not have provided even an excuse, much less a provocation, for the crime and a helpless woman, who was none but his own wife. Its beyond imagination that the deceased girls aged 3, 5 and 7 years might have given any excuse or provocation. The youngest deceased was an infant aged just one and a half month. The accused just butchered five persons to death including four minor girls in most inhuman, cruel and merciless way.

6- All the facts and circumstances go to show that the deceased were murdered in the mid night while they were in sleep.

7- The accused being married with the deceased Sangeeta since long, developed illicit relationship with another woman. He did not stop this relationship even after marriage of that woman and wanted to marry her. The accused committed murder of his wife and four hapless minor daughters to pave a way for his marriage with that lady. The murders were committed for a motive which evidences total depravity and meanness.

8- The evidence shows that the accused is a person of rakish, depraved and immoral character.

9- The victims were innocent, helpless and they relied upon the trust of relationship and social norms, as the victims included the four minor daughters of the accused, the youngest one aged one and a half month and a helpless woman, his wife, who loved the accused and was opposing his second marriage with another lady. The accused has betrayed their faith and hope.

10- The facts and circumstances show that the accused has deliberately planned crime and meticulously executed it to pave a way for his marriage with alleged Manju. He chose the time of midnight when there is no one around the spot and the victims were alseep. He arranged a "banka' to commit murders and also arranged kerosene to burn their dead bodies."

105 The mitigating circumstances as observed by the Trial Court is as under :

"1- The accused is not a previous convict.

2- There was no eye-witness of the incident and the case is based on circumstantial evidence."

106 From a perusal of the above, it is clear that the special reasons assigned by the trial Court for awarding extreme penalty of death are that the murder was horrifying as the accused-appellant was in a dominant position; victim was helpless being children aged about 7, 5, 3 years and the youngest one was just one and a half month old and the murder was pre-meditated and pre-planned one with a motive and committed in a cruel, grotesque and diabolical manner. The accused is a menace to the Society and, therefore, imposition of lesser sentence than that of death sentence, would not be adequate and appropriate. In these circumstances, the trial Court has held that the balance-sheet of the aggravating and mitigating

circumstances was heavily weighed against the appellant making it the rarest of rare cases and consequently awarded the death sentence.

107 Having gone through the facts and circumstances of this case, we find that there was ample evidence on record to establish that the accused/convict committed pre-planned and pre-meditated murder of his wife and minor innocent children and such evidence has been led by the prosecution to establish this fact. Moreso, the appellant cut the body of the deceased and inflicted severe incised wounds. Thus, it is beyond doubt that the manner in which crime is committed by banka and thereafter buried the deadbodies by pouring kerosene oil, is brutal, cruel and gruesome.

108 The trial Court also called for a report from the District Probation Officer who also reported that there was no possibility of reformation of the accused/appellant. From the facts and circumstances of the case particularly the report of the District Probation Officer, we are in agreement with the findings recorded by the Trial Court with regard to no possibility of the appellant of reformation. Moreso, learned Government Advocate, during the course of argument, has vehemently argued that there is no chance of the accused/appellant for reformation.

109 For the reasons aforesaid, we are of the view that we are in complete agreement with the view taken by the trial Court convicting and sentencing the accused for the offence punishable under Section 302 I.P.C. The instant case falls in the category of 'rarest of rare case', warranting capital punishment. Hence, the death sentence awarded to the appellant under Section 302 of IPC is liable to be confirmed.

110 In view of the above and for the reasons stated hereinabove, Criminal Appeal No. 1959 of 2016 filed by the appellant from jail fails and the same deserves to be dismissed and is, accordingly, **dismissed.** However, we **confirm the death reference** under Section 366 (1) of the Code of Criminal Procedure, 1973. made by the learned Sessions Judge, Lakhimpur Kheri in the light of discussions made above.

111 Before we part with the case, we must candidly express our unreserved and uninhibited appreciation for the distinguished assistance rendered by Mr. Rajesh Kumar Dwivedi, learned Amicus Curiae in the instant appeal and, therefore, we deem it appropriate to direct for payment to Mr. Rajesh Kumar Dwivedi, learned Amicus Curiae for his valuable assistance as per Rules of the Court.

112 Let Mr. Rajesh Kumar Dwivedi, learned Amicus Curiae be paid as per Rules of the Court within a month.

113 The Senior Registrar of this Court is directed to communicate this order to the District & Sessions Judge, Lakhimpur Kheri, who shall further communicate this order to the appellant, where he is confined in jail forthwith.

114 Registry is directed to transmit the original lower Court record to the Court concerned forthwith.

(2021)07ILR A80
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.02.2021

BEFORE

THE HON'BLE SUBHASH CHAND, J.

Criminal Appeal No. 4031 of 2019

Narendra Prasad ...Appellant(In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Kedar Nath Misra

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code, 1860-Section 326-A, 504, 506 - challenge to-conviction-prosecution story is not supported with the prosecution witnesses-witnesses turned hostile-delay of 4 days in lodging FIR seems to be afterthought-it casts doubt on the prosecution story-moreso, on the date of occurrence accused was in Delhi, far from the place of occurrence about 1000 km-father and mother of the victim are interested witnesses and their testimony cannot be relied upon-plea of alibi was also not considered by the trial court-plea of alibi is the plea of defence-prosecution failed to prove its case beyond reasonable doubt-even if the plea of alibi is taken by the accused, the burden of proving the same cannot be shifted upon the accused-trial court failed to appreciate the evidence.(Para 1 to 27)

B. Plea of alibi means presence at elsewhere. it is based on the physical impossibility of participation in the crime by the accused. burden of proving the same shifts upon the accused; if the prosecution succeeds in proving the case beyond reasonable doubt.(Para 24)

The appeal is allowed. (E-5)

List of Cases cited:

1. Maqbool Vs U.P. & anr.(2019) CRLA No. 1143

2. Jayanti Bhai Bhayankar Bhai Vs St. of Guj. (2002) AIR SC 3569

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

1. The instant Criminal Appeal is against the judgment and order dated 30.3.2019 in Sessions Trial No. 104 of 2015 (State vs. Narendra Prasad) arising out of Case Crime No. 1426 of 2014 under sections 326-A,504 and 506 of IPC, P.S. Gauri Bazar, District Deoria passed by IV Additional Sessions Judge (Essential Commodities Act) Deoria whereby the accused Narendra Prasad was held guilty and was punished for the offence under Sections 326-A of IPC with rigorous imprisonment of 10 years and a fine of Rs. 20,000/- in default of payment of fine, the additional rigorous imprisonment of 4 months was to be undergone; for the offence under section 504 of IPC was punished with rigorous imprisonment of one year and fine of Rs. 500/- in default of payment of fine, 10 days additional imprisonment was to be undergone; and for the offence under section 506 of IPC was punished with rigorous imprisonment of one year and fine of Rs. 500/- in default of payment of fine, 10 days additional imprisonment was to be undergone. All these sentences were directed to run concurrently and the amount of Rs. 15,000/- out of the imposed amount of fine was to be paid to the victim.

2. The brief facts of the prosecution case are that the informant Smt. Neeraj Devi moved a written information with the police station concerned with these

allegations that she was married with Narendra Prasad resident of village Patharhat, District Deoria four years ago. At present she had been residing at the parental house Village Chariaon Bujurg, P.S. Gauriganj, District Deoria. Her husband Narendra Prasad had thrown acid on her body and face on

22.10.2014 at 10, O clock of night while she was asleep whereby she was bitterly scorched. After having thrown acid on her and hurling filthy abuses her husband fled away extending life threat. Her husband had not permitted her to reside in the matrimonial house and had also criminally intimidated to her and her children. She was rushed to the hospital for treatment. After getting some relief this report was given to the police station concerned. It was written by Sanjay Kumar, son of Chandra Bhan, resident of village Chariaon Bujurg, P.S. Gauriganj, District Deoria and same was singed by the informant Smt. Neeraj Devi. On this written information Case Crime No. 247 of 2014 was registered against Narendra Prasad under sections 326-A, 504 and 506 of IPC with the Police Station Gauriganj, District Deoria on 26.10.2014.The Investing Officer after having concluded investigation filed charge sheet against the accused Narendra Prasad to the court of Chief Judicial Magistrate, Deoria, who took cognizance on the charge sheet and committed the same for trial to the court of Sessions.

3. The trial court framed the charge against the accused Narendra Prasad under sections 326-A, 504 and 506 of IPC. The charge was read over and explained to the accused who denied the charge and claimed to be tried.

4. On behalf of the prosecution to prove the charge against the accused in documentary evidence filed the written information Exb.Ka-1, site plan of the place of occurrence Exb.Ka-2, Charge-sheet Exb. Ka-3, injury report of victim Exb.Ka-4, GD entry in regard to registering the case crime Exb. Ka-5, recovery memo of taking into possession cloth of victim & *Laltain* Exb. Ka-6 and check FIR Exb. Ka-7.

5. In ocular evidence on behalf of prosecution the following witnesses were examined; PW-1 Smt. Neeraj Devi, PW-2 Smt. Subhawati Devi, PW-3 Chandra Bhan, PW-4 SI Vinay Kumar Singh, PW-5 Dr. Indra Dev Gaur and PW-6 H.C. Ram Chandra Yadav, PW-7 Yogendra Singh and CW-1 H.C. Brahma Nand Chaudhary.

6. The statement of accused Narenda Prasad under section 313 of Cr.P.C., was recorded in which he denied the incriminating circumstances in the evidence against him and stated that on the date of occurrence he was in Delhi where he had been residing since 2013 and he had been falsely implicated in this case due to enmity. On behalf of accused in defence evidence examined DW-1 Ram Kishan and DW-2 Ram Surat.

7. The trial court after hearing the submissions of learned counsel for the rival parties passed judgment on 30.3.2019 and convicted accused Narendra Prasad for the aforesaid offence and punished as stated above.

8. Aggrieved by the impugned judgment of conviction and sentence this criminal appeal has been preferred on behalf of the appellant Narendra Prasad on the ground that the impugned judgment is illegal and is based on perverse finding. The trial court did not appreciate the evidence on record in proper perspective. The prosecution story is not supported with the prosecution witnesses. On the date of occurrence appellant was in Delhi who had been residing Delhi which is at the distance of 1000 kms, from the place of occurrence. The appellant came to know in regard to occurrence at Delhi and reached Deoria. Thereafter, surrendered himself before the court on 23.1.2015 and since then has been languishing in jail but the court below did not believe in the defence evidence and convicted the appellant on the wrong appreciation of the evidence. Accordingly, prayed to allow this criminal appeal and set-aside the conviction and sentence passed by the court below.

9. Heard Sri Kedar Nath Mishra, learned counsel for the appellant and Sri Ashish Mani Tripathi, learned AGA for the State and perused the lower court record.

10. On behalf of prosecution, to prove the prosecution case in ocular evidence, adduced PW-1 Smt. Neeraj Devi who is victim of the occurrence, PW-2 Smt. Subhawati Devi who is mother of the victim and PW-3 Chandra Bhan, father of victim and PW-7 Yogendra Singh as a witness of fact.

11. **PW-1 Smt. Neeraj Devi** in her statement says that the occurrence is of 22.10.2014 at 10.00-O Clock of night. She was at her parental house in village Chariaon Bujurg. Her husband Narendra Prasad reached to her parental house at 10, O Clock of night. She was lying on the cot along with her child in the thatched roof-house. Her husband hurling abuses and extending life threat threw acid on her body whereby she was burnt bitterly. Her husband fled away from there. Her brother and father both made effort to catch hold of her husband. This occurrence was also seen by her mother, father and uncle Ram Sewak. She rushed to the hospital of Gauri Bazar. After getting some relief, the FIR was lodged and signed by her is Exb. Ka-1.

Again on 1.3.2016 this witness was further cross examined and says that on the date of occurrence she was sleeping in the room. **On throwing acid she cried, her family members attracted there. She could not know who had thrown acid on her and also could not know who hurled abuses and criminally intimidated to her and she lodged FIR at the behest of others.** This witness was declared hostile by the prosecution and was cross examined on behalf of prosecution and further says **that the report was written by her brother Sanjay Kumar and she put her signature thereon.** Her husband had illicit relation with other women and with this reason he usually beat her and ousted her from matrimonial house. This witness was also cross examined by the court below and further says that **accused Narendra Prasad is her husband and he had thrown acid on her. He never wanted to keep her with him in the in-laws house with this reason she had lodged the FIR.**

12. **PW-2 Smt. Subhawati Devi** in her statement says that at the time of occurrence *Laltain* was being lit. Accused Narendra Prasad came at 10, O Clock in night and threw acid on the body of her daughter. In the light of *Laltain* she identified Narendra and family members

also made effort to catch hold him. He fled away hurling abuses and extending life threat. In cross examination this witness also further says that Narendra Prasad had told to the Aunti of Smt. Neeraj Devi that he wanted to disfigure the face of Smt. Neeraj Devi and Aunti of Smt. Neeraj Devi also told her in regard to the same. Smt. Neeraj Devi remained in hospital over night and next day she was brought to the house. Due to financial duress no further treatment was taken.

13. **PW-3 Chandra Bhan** in his statement says that relation between Smt. Neeraj and her husband was strained with this reason, acid was thrown by Narendra Prasad on the body of her daughter Smt. Neeraj Devi. Her face, chest, eyes were burnt. On her screaming, he attracted there and made effort to catch Narendra Prasad but he fled away. This witness in his cross examination says that **he awoke on her screaming. He did not see throwing acid. His son-in-law resided in Delhi and he wants to get his daughter married with some other person because of poverty of Narendra Prasad.**

14. **PW-7 Yogendra Singh** is the witness of fact. This witness in his cross examination says that he came to know in regard to occurrence from the people of the village who had told him that the daughter of Chandra Bhan was burnt due to acid throwing. He also reached to see Smt. Neeraj Devi. Acid burnt injuries were also on her body. **He could not know by whom the acid was thrown** and this witness also declared hostile by the prosecution and denied to the statement given to the Investing Officer under section 161 Cr.P.C.

15. On behalf of prosecution to prove the case with medical evidence also examined **PW-5 Indra Dev Gaur**. This witness medically examined Smt. Neeraj Devi and proved the **injury report Exb.Ka-4** on 23.10.2014 at 2.10 p.m., and in examination he found the following injures:-

(1) Blue and black colour blisters were present on both sides of face, chin, both eyelids, front and left side of the neck, left chest region, left shoulder, left arm pit, left side of arm and occasional small blisters were also present on the upper lip and complaint was of pain and itching; and

(2) Complaint of diminishing eye vision. In his opinion these injuries were acid burnt. It was 15% and were likely to be caused at 10, O clock of night on 22.10.2014.

In cross examination this witness further says that after throwing acid the mark of injury will initially be red and blue and after six hours it will turn blue, black.

16. Learned counsel for the appellant submitted that the FIR of this was lodged belated of which there is no cogent explanation on behalf of prosecution and same makes the prosecution story dubious.

From the perusal of the FIR Exb. Ka-4 it transpires that **the occurrence is of 22.10.2014** at 10, O clock and the **FIR was lodged on 26.10.2014** at 10:30 hours with the police station Gauri Bazar and the distance of the police station from the place of occurrence is 8 kms. The FIR version itself explains the delay. It is noteworthy that this FIR was lodged by the victim herself and she says that due to acid burn injury she was rushed to the hospital and

after getting relief from the burn injuries, she moved the written information with the police station concerned.

PW-2 Smt. Subhawati Devi in her statement says that **her daughter remained in hospital over night and next day she was brought to her house. No further treatment was given to her due to financial duress** and on the next day from the date of occurrence I.e. on 23.10.2014 the medical examination of her injuries was conducted by PW-5 Doctor Indra Dev Gaur and the FIR was lodged by the victim Smt. Neeraj Devi on 26.10.2014, 4 days belated from the date of occurrence which was also written by the brother of informant Sanjay Kumar who was also present at the house on the date of occurrence. **None of the family members did lodge the FIR on the very day of medical examination of victim. The delay of 4 days from the date of occurrence seems to be after thought and same casts doubt on the prosecution story.**

17. Learned counsel for the appellant also submitted that testimony of PW-1 Smt. Neeraj Devi who is the victim is tainted. There is contradiction in her statement. During examination before the trial court the statement of PW-2 Smt. Subhawati Devi and PW-3 Chandra Bhan who are the parents of the victim also did not corroborate the statement of victim. These three witnesses are interested witnesses and their testimony can not be relied upon. Moreover, the relations between the accused and his wife being strained also proves animosity and a ground for false implication of the appellant.

18. Learned AGA opposed the submissions made by learned counsel for the appellant and also submitted that the testimony of witness has to be read as a whole. Minor contradictions in the statement are natural due to back-ground of the witness in which he resides and also time gap between the date of examination of the witness and also the date of occurrence.

19. It is settled law that the testimony of witness has to be read as a whole. The court can not draw the inference of any single sentence uttered by the witness. In her statement PW-1 Smt. Neeraj Devi who is the victim of the occurrence accused her husband. This witness in her statement admits that **the relations between her and her husband were strained. Her husband did not permit her to reside with him. So she had been residing at her parental house and on the date of occurrence she was also at her parental house.** Although in examination-in-chief this witness supports the FIR case, yet in her cross examination this witness also says that **due to throwing acid on her she cried, her family members also attracted there. She could not know by whom the acid was thrown and abuses were hurled and who had extended threat also.** In cross examination by the court this witness also says that the acid was thrown by her husband **but her husband did not want to keep her with him and used to beat her. With this reason she has lodged FIR,** as such the statement of this witness bearing contradiction in itself becomes tainted and can not be said to be trustworthy.

So far as the statement of **PW-3 Chandra Bhan** is concerned, in examination-in-chief this witness supports the prosecution case but in cross examination this witness also says that **he woke up on hearing the screaming of her daughter. He did not see any one throwing acid as it was dark night he could see nothing.** He did not give

statement to Darogaji. His son-in-law resided in Delhi and **he wants to get his daughter married with some other person because of poverty of Narendra Prasad.**

As such, the statement of this witness also is tainted and same can not be said to be trustworthy.

So far as the statement of **PW-2 Smt. Subhawati Devi** is concerned, this witness supports the prosecution version and in cross examination also says due to throwing acid Smt. Neeraj Devi cried. Hearing her screaming she, her dewar Ram Kishun and her husband Chandra Bhan attracted there. First of all, she, her husband Chandra Bhan and Ram Kishun attracted there. Besides them, Yogendra and Ram Sewak also reached there. None could catch Narendra Prasad. Narendra Prasad hurled abuses and criminally intimidated. **She can not tell the reason why report was not lodged immediately after the occurrence.**

20. So far as the medical evidence is concerned, **PW-5 Dr. Indra Dev Gaur** has proved the **injury report** of victim **Exb. Ka-4** and says that blue and back colour blisters were present on the face, chin,eyelid, neck, chest region, shoulder, arm pit and complaint of diminishing vision was made by the victim and she was referred to expert opinion. Victim was 15% acid burn.

21. In this context the provision of section 326-A of I.P.C may be relevant to consider which reads as under:-

"Section 326-A Voluntarily causing grievous hurt by use of acid, etc.

Whosoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or cause grievous hurt by throwing acid 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 10 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:

***P*rovided further that any fine imposed under this section shall be paid to the victim."**

22. To attract the provisions of Section 326-A of IPC it is not necessary that the injury caused due to acid throwing should be grievous only as is mentioned in the heading of this section. In Section 326-A of IPC there are shown eight kinds of injuries, first seven injuries may be simple or grievous in nature.

The **Hon'ble Apex Court held in para 7 of the Criminal Appeal No. 1143 of 2019 arising out of SLP (Criminal) No. 7158 of 2019 Maqbool Vs. U.P. And another** vide judgment September 7, 2018.

"The first seven of the injuries referred to in the Sections are classified based on the normal aftereffect of acid attack whereas the eighth one is on the gravity of the effect. Under section 326-A and 326-B grievous hurt is only one among the eight injuries. In view of the explanation under Section 326-B, the resultant damage or deformity under 326-A, Section 326-A or 326B is not required to be irreversible. The other seven injuries

may be either simple or grievous. The nature of injury being simple or grievous, is irrelevant for distinguishing between Section 323 and Section 326-A of IPC or between Section 326-A and Section 326-A of IPC. If the injury referred to under Section 326-A or 326-B is one among the specified eight injuries, whether the seven of them be simple or grievous, the special provisions are attracted."

Therefore, even if the injuries caused due to acid throwing are simple in nature; but the same come within the periphery of the offence of 326-A of IPC. **As such, from the medical evidence the offence of 326-A of IPC is made out; but who is the perpetrator of this offence, same is not proved beyond reasonable doubt from the statement of victim PW-1 Smt. Neeraj Devi herself and also from the statement of PW-3 Chandra Bhan and PW-2 Smt. Subhawati Devi.**

23. Learned counsel for the appellant also submitted that the *plea* of alibi was also not considered by the trial court; while this defence was also taken by the appellant/convict in his statement under section 313 Cr.P.C and also adduced the defence witness who have deposed that the appellant had been residing in Delhi and was not present at the place of occurrence. The appellant in his statement under section 313 Cr.P.C., says that he had been residing in Delhi since 2013 and due to enmity he had been falsely implicated.

DW-1 Ram Kishan who is the defence witness and also the brother of PW-3 Chandra Bhan who is the father of victim in his statement says that on the date of occurrence Smt. Neeraj Devi was sleeping in her room. They are four brothers, Chandra Bhan is also his second brother. His house is adjoining to the house of Chandra Bhan who is the father of Smt. Neeraj Devi. **He awoke on hearing the screaming due to throwing acid on Smt. Neeraj Devi. Narendra Prasad had been residing in Delhi. No one saw throwing acid on Smt. Neeraj Devi and also hurling abuses and criminally intimidating her.**

DW-2 Ram Sewak in his statement says that he is the younger brother of Narendra prasad and on the date of occurrence Narendra Prasad was in Delhi but at the behest of the police they called Narendra Prasad from Delhi and on account of this case Narendra Prasad surrendered before the court. When the police came to his house in search of Narendra Prasad, at that time Narendra Prasad had been in Delhi.

24. The *plea* of alibi means presence at elsewhere. It is based on the physical impossibility of participation in the crime by the accused.

Here, it is also noteworthy that the ***plea* of alibi is the *plea* of defence. Burden of proving the same shifts upon the accused; if the prosecution succeeds in proving the case beyond reasonable doubt.**

The ***Hon'ble Apex Court held in Jayanti Bhai Bhanyankar Bhai Vs. State of Gujrat AIR 2002 SC 3569*** once the prosecution succeeds in discharging its burden, it is incumbent upon the accused taking *plea* of alibi to prove it with certainty so as to exclude the possibility of presence at the place and time of occurrence.

25. In the present case, since the prosecution has failed to prove its case beyond reasonable doubt, therefore, even if the *plea* of alibi which is taken by the

accused, the burden of proving the same can not be shifted upon the accused.

26. In view of re-appreciation of the evidence in this appeal the finding given by the trial court holding guilty to the appellant is perverse and bears infirmity.

27. Accordingly, this appeal deserved to be allowed.

28. The appeal is **allowed** and the judgment and order dated 30.3.2019 passed by IV Additional Sessions Judge(Essential Commodities Act) Deoria in Sessions Trial No. 104 of 2015 (State Vs. Narendra Prasad) arising out of Case Crime No. 1426 of 2014 under sections 326-A,504 and 506 of IPC, P.S. Gauri Bazar, District Deoria is set-aside. 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.

29. Let the copy of the judgment/order be certified to the court concerned for necessary information and follow up action.

(2021)07ILR A87
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.02.2021

BEFORE

THE HON'BLE SUBHASH CHAND, J.

Criminal Appeal No. 7466 of 2017

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

Counsel for the Appellant:
Sri Jagdish Prasad Mishra, Sri Mahendra Ram Maurya

Counsel for the Respondents:
A.G.A.

A. Criminal matter-Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code, 1860-Section 377 & POCSO Act, 2012-Section 5/6-challenge to-conviction-statement of PW-3 is not corroborated with medical evidence-testimony of PW-1 and PW-2 is based on hearsay evidence-victim a four year child could not give the answer during interrogation except telling his name-testimony of victim PW-3 appears to be tutored-accused/appellant gets benefit of doubt.(Para 1 to 19)

The appeal is allowed.

List of Cases cited:

1. Subhakar Narayanji Laddha Vs St. of Mah. (2006) 12 SCC pg.545

2. Ratan Singh Dilkhush Bhai Nayak Vs St. of Guj.(2004) 1 SCC 64

3. Suresh Chandra Jana Vs St. of W.B. (2017) 6 Supreme at Page 35

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

1. The instant Criminal Appeal has been preferred on behalf of the appellant-convict Mohit against the judgment dated 09.11.2017 passed by the Additional Sessions Judge, Court No. 8, Muzaffarnagar in Special Sessions Trial No. 123/9 of 2017 (State Vs. Mohit) arising out of Case Crime No. 238 of 2017 under Sections 377 I.P.C. And 5/6 of Protection of Children from Sexual Offences Act, 2012,

P.S. Kakrauli, District Muzaffarnagar whereby the learned trial court while acquitting the appellant for the offence under Section 377 of I.P.C, convicted him for the offence under Section 5/6 POCSO Act, 2012 and sentenced appellant Mohit with rigorous imprisonment for 10 years and a fine of Rs. 50,000/- and also ordered to undergo further imprisonment of two years in default of payment of fine.

2. The facts giving rise to this criminal appeal in brief are that the informant Dharmendra, son of Asharfi Lal, resident of village Bhuvapur, P.S. Kakrauli, District Muzaffarnagar moved a written information with the police station concerned with these allegations that on 20.04.2017 at 7:30 of evening his son Vasu 4 years old was sitting along-with other male and female kids in the buggi of Jaipal of his village. Jaipal asked all the children to get down from the buggi on reaching village, thereafter, Mohit 19 years of age of his village made attempt to lure the children giving gratification of Rs. 10. Other children went to their house but he lured to his son Vasu and took him near by the Government School of the village. When his son did not return to his house, all the family members made hectic search of him and found his child Vasu in unconscious condition near by the Government School and Mohit fled away from the place of occurrence having seeing them. The cloth of his son were blood stained, he has utter belief that Mohit had committed carnal intercourse against the order of nature to his child. He also made the complaint of the same to the family members of Mohit who also abused and did marpeet with him.

3. On this written information crime no. 238 of 2017 was registered under Section 377 I.P.C 3(a), 4 of POCSO Act, 2012 against Mohit with the Police Station Kakrauli, District Muzaffarnagar.

4. The I.O. after concluding the investigation filed charge sheet against the accused Mohit and the concerned court took cognizance on the same. The trial court framed the charge against the accused Mohit under sections 377 I.P.C. And under Section 3(a)/4 of POCSO Act, and the charge was read over and explained to the accused which was denied by him and claimed for trial.

5. On behalf of prosecution to prove the charge against the accused Mohit in documentary evidence filed the written information Exhibit Ka-1, medico legal examination report of victim Exhibit Ka-2, Supplementary report Exhibit Ka-3, chick F.I.R paper no. 4a/1 to 4a/3, site plan of the place of occurrence paper no. 7a and the charge sheet paper no. 3a/1 to 3a/4.

6. On behalf of prosecution in oral evidence examined P.W-1 Dharmendra, P.W-2 Pramita, P.W-3 Vasu, P.W-4 Dr. Mashkoor.

7. The statement of accused Mohit under section 313 Cr.P.C., was recorded in which he denied the incriminating circumstances in the evidence against him and stated that he has been falsely implicated in this case due to enmity. On behalf of accused no defence evidence was adduced.

8. The learned trial court after hearing the contentions of the learned counsel for the parties passed judgement on 09.11.2017 acquitting accused Mohit from the offence under Section 377 I.P.C; but held him guilty for the offence under Section 5/6 of

POCSO Act, 2012 and sentenced with rigorous imprisonment for 10 years and also fine of Rs. 50,000/-, in default of payment of fine the convict Mohit was also directed to undergo an additional rigorous imprisonment for two years.

9. Aggrieved from the impugned judgment of conviction and sentence, this criminal appeal has been preferred on behalf of the appellant-convict Mohit on the ground that the conviction of the appellant held by the trial court is against the weight of the evidence on record. The learned trial court committed manifest illegality apparent on the face of record & convicted the appellant. P.W-2 Pramita in her statement has narrated that she came to know in regard of occurrence from the people of village but none of the person of the village was examined. Even no person of the village was named by this witness from whom she had come to know in regard to the occurrence. Statement of P.W-4 also does not corroborate the prosecution story. The trial court convicted the appellant for the offence under Section 5/6 of POCSO Act on the basis of wrong finding which is not sustainable in the eye of law.

10. I have heard submissions made by the learned counsel for the appellant and also learned A.G.A. for the State, and perused the materials brought on record.

11. The learned counsel for the appellant has submitted that although the trial court has acquitted the appellant from the offence under Section 377 I.P.C but has convicted the appellant for the offence under Section 5/6 of POCSO Act relying upon the testimony of P.W-3 Vasu. This witness was child witness, his competency as a child witness was not properly testified by the court below to declare the witness as competent who was of the age of four years. Moreover, the statement of this witness P.W-3, Vasu is not corroborated by the statement of P.W-1, Dharmendra informant and P.W-2, Pramita who have denied in their statement in regard to commission of alleged crime by the appellant-accused Mohit. Moreover this single testimony of P.W-3, Master Vasu is also not corroborated with the medical evidence. As such the conviction and sentence passed by the learned trial court is illegal based on perverse finding and accordingly submitted to allow this appeal and to set aside the conviction and sentence of the appellant-accused Mohit .

12. Learned A.G.A opposed the contentions made by the learned counsel for the appellant and contended that the single testimony of P.W-3 is sufficient for the conviction of the appellant-accused. This witness P.W-3, Vasu before examination by the court was also testified by the court in regard to his competency as a witness and court after having satisfied that this witness was competent, examined this witness. Testimony of this witness is natural which shall be relied even if the medical evidence does not support the ocular evidence. The ocular evidence is to prevail to medical evidence which is simply an opinion of expert.

13. The trial court has acquitted the appellant Mohit from the offence under Section 377 of I.P.C but convicted the appellant-accused for the offence under Section 5/6 of POCSO Act, 2012 while the trial court had framed charge against the

appellant-convict Mohit under Section 3a/4 of POCSO Act, 2012. Therefore, it will be pertinent to mention her the provisions of Section 3a/4 and 5/6 of POCSO Act, 2012 which reads as under:

Section 3 of POCSO Act, 2012 defines **penetrative sexual assault** as under:

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

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

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

(c) .....

(d) .....

Section-4 provides **the punishment for penetrative sexual assault.--**

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

Section-5 defines the **aggravated penetrative sexual assault.**

Section-5(m) of POCSO Act, 2012 provides:

"who ever commits penetrative sexual assault on a child below 12 years" is said to commit aggravate penetrative sexual assault.

Section-6 provides **punishment for aggravated penetrative sexual assault--**

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

14. On behalf of prosecution to prove the prosecution case have examined **P.W-1, informant Dharmendra.** This witness in his examination-in-chief has stated that on the fateful day one unknown person had committed unnatural offence with his son Master Vasu near by the Government School of the village. He saw his son in an unconscious condition and that unknown person having seen him fled away from the place of occurrence. He could not recognize that person. After sometime some people of the village who had attracted there, told him that person was Mohit. This witness was declared hostile by the prosecution and was cross-examined, this witness denied the statement under Section 161 Cr.P.C given to the Investigating Officer.

P.W-2, Pramita in her examination-in-chief says that on the date, time and place of occurrence Mohit had committed unnatural offence with Vasu. They had seen Vasu in unconscious condition and Mohit fled away from the place of occurrence having seen them. In cross-examination this witness says at the time of occurrence when she reached at the school many persons of the village thronged there, she is telling the name of Mohit what the people of village had told her. Vasu also did not tell her in regard to the occurrence. She neither saw the occurrence nor saw Mohit running away from the place of occurrence.

So far as the testimony of **P.W-1, Dharmendra** and **P.W-2, Pramita** is concerned the testimony of both these witnesses is **based on hearsay evidence.**

The source of their knowledge is what the people of the village had told them. None of the person of the village was named by any of these witness, therefore, the testimony of both the witnesses is not admissible in evidence. Hon'ble Apex Court held in ***Subhakar Narayanji Laddha Vs. State of Maharashtra (2006) 12 SCC pg. 545.*** Statement of witness before the court on the basis of what the witness had known from her husband and had no direct knowledge of the occurrence, her statement was also held inadmissible in evidence; moreso when the husband was not examined.

15. So far as the testimony of witness **P.W-3, Vasu** is concerned; before examination of this witness, the court testified the competency of this witness and in regard to the same asked name of his father, brother. **This child could not tell the name of the school in which he was studying** and told to the court that telling lie is bad. Thereafter, the court declared him competent and examined him. During examination this witness said that **Mohit is his uncle and he put off his underwear, he inserted his finger in his anus whereby the blood also oozed.**

For testimony of child witness to be admissible one condition which is to be fulfilled is that the witness should be competent. To testify the child as a competent witness, it is very necessary to testify the intellectual of the child whether he understands the questions put to him or gives rational answers to those questions. The mental development of a child witness vary in different situations depending upon the conditions he lives in and nurtured.

The testimony of this child witness has to be relied upon cautiously. The court has to see whether the testimony of this child is trustworthy and is also corroborated with some other evidence on record or not. On behalf of the prosecution the two witnesses of the fact who is **P.W-1, Dharmendra** father of the victim and **P.W-2, Pramita** both have denied the commission of the offence by Mohit. As such the testimony of this witness is not corroborated with the statement of P.W-1, Dharmendra and P.W-2, Pramita.

P.W-4, Dr. Mashkoor in his statement says that on 21.04.2017 at 3:05 P.M, he conducted the medical examination of Vasu aged five years old. There was no external injury on any part of the body of this child. The child only complained pain on his neck. There was no injury on the neck also. **There was no injury or abrasion on the anus region.** For examination of sperm two slides were prepared by him which were sent to district hospital, Muzaffarnagar. This report is in his handwriting and signature, Exhibit KA-2 as marked there. Supplementary report was also prepared by him and in the slide no spermatozoa is seen. Exhibit Ka-3 is marked on the Supplementary report.

This witness could **not opine whether the carnal intercourse against the order of nature committed or not, there was no injury in the anus even there was no blood therein.** As such the statement of P.W-3, Vasu is not corroborated with medical evidence.

16. It is also pertinent here that the Investigating Officer **neither had recorded the statement of victim Vasu under Section 161 Cr.P.C, nor he got recorded the statement of victim Vasu under Section 164 Cr.P.C by the Magistrate. The reason in the case diary is shown by the Investigating Officer that the victim, except telling his name, could not give the answer of any question on interrogation during the investigation. The name of victim Vasu is also not figured in the list of witnesses in the charge-sheet.** It is appalling even then the learned trial court permitted the examination of victim Vasu during trial for the first time who was never interrogated by Investigating Officer.

17. Therefore, the testimony of victim P.W-3, Vasu appears to be tutored and does not inspire confidence. Hon'ble Apex Court held in **Ratan Singh Dilkhush Bhai Nayak Vs. State of Gujrat, 2004(1) SCC 64.** The child witness are amenable to tutoring. Child witness are liable to be influenced easily and moulded. Therefore, court should make careful scrutiny of the evidence of child witness.

As such the finding recorded by the trial court holding the appellant guilty of the offence of aggravated sexual assault under Section 5/6 of POCSO Act suffers from infirmity.

18. The reasonable view is to give benefit of doubt to the convict-appellant. The Hon'ble Apex Court held in ***Suresh Chandra Jana Vs. State of West Bengal, 2017(6) Supreme at page 35.*** The theory of adopting view beneficial to accused, if the two views are possible. If both the views are reasonable and plausible, the reasonable view being beneficial to the accused should be adopted.

19. As such in view of the reappreciating of the evidence in this appeal, the conviction and sentence passed by the trial court of the appellant-convict for the offence under Section 5/6 of POCSO Act deserves to set aside. Accordingly, this criminal appeal deserves to be allowed.

This criminal appeal is hereby **allowed.** The judgment of conviction and the sentence passed by the trial court in Sessions Trial No. 123/9 of 2017 (State Vs. Mohit) arising out of Case Crime No. 238 of 2017 under Section 5/6 of POCSO Act, 2012, P.S. Kakrauli, District Muzaffarnagar is set aside. Let the appellant be released from jail 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.

20. Let a copy of this judgment/order be certified to the court concerned for necessary information and follow up action.

21. The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked.

22. The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High

Court Allahabad and shall make a declaration of such verification in writing.

(2021)07ILR A93
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.07.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 170 of 2003

Lalta Prasad ...Petitioner
Versus
The Addl. Commissioner (Admin) Devi Patan Mandal Gonda ...Respondent

Counsel for the Petitioner:
Mohan Singh

Counsel for the Respondents:
C.S.C.

Stamp Act,1899 - Section 47 - Petitioner purchased land and paid stamp duty as per circle ratee-petitioner name also recorded in revenue records-later Ameen approached him for depositing some amount for deficiency in stamp duty and penalty-section 47 provides-collector/additional District Magistrate does not have power to impose penalty in such proceedings.

W.P. allowed. (E-7)

List of Cases cited:

1. Girjesh Kumar Srivastava & 6 anr.Vs St.of U.P. & ors., reported in 1998 (Supp) RD 523

2. Ram Khelawan @ Bachcha Vs St. of U.P. & ors.; 2005 (23) LCD 1681

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

1. Heard Sri Mohan Singh, learned counsel for the petitioner and Sri V.P. Nag, learned Standing Counsel for the State Respondent.

2. The petitioner has challenged the order dated 19.07.1999 passed by the Assistant Collector, Ist Class/ Sub-Divisional Magistrate, Kaiserganj, Baharich and also the order dated 26.11.2001 passed by the Additional Commissioner (Administration), Devi Patan Mandal, Gonda, rejecting his Appeal.

3. It is the case of the petitioner that he had purchased land of Gata No.522 ad-measuring 0.02 dec. situated in village Chakpihani, Pargana Hisampur, Tehsil Kaiserganj, District Bahraich, through a registered sale deed on 01.07.1995 and paid stamp duty @ Rs.15/- per sq. feet as per the circle rate of the area concerned. The sale deed was duly stamped and registered in the office of the Sub-Registrar Kaiserganj and the petitioner's name was also recorded in the revenue records. In the month of November, 1999, the Ameen of Kaiserganj Tehsil approached him for depositing an amount of Rs.24,691/- towards deficiency in stamp duty and penalty in pursuance of the order dated 19.07.1999 passed by the Sub Divisional Magistrate, Kaiserganj under the Stamp Act.

4. The petitioner inspected the file and after getting a certified copy of the order dated 19.07.1999, he preferred a Revision under Section 56 of the Stamp Act before the Additional Commissioner on the ground that the respondent no.2 has passed the ex parte order and at the time of spot inspection, the respondent no.2 has not given any information or notice to the

petitioner nor any spot inspection report or memo was made available on record. The petitioner disputed the findings recorded by the respondent no.2 that the land in question was siutated 800 mtrs. from Hanuman Mandir Tiraha on Kaiserganj Huzoorpur road.

5. It is the case of the petitioner that as per the P.W.D. Map, the land was situated 1.6 kms. away from Hanuman Mandir Tiraha on Kaiserganj Huzoorpur road and stamp duty was paid according to the circle rate of the area in question.

6. It was submitted that under Section 47-A of the Stamp Act, if the Collector after determination of the market value of the property, comes to the conclusion that its value has not been correctly set forth, he could only direct payment of deficiency in the amount of duty as a result of such determination, but he cannot impose any penalty on account of deficiency in Stamp Duty.

7. It has been submitted that respondent no.2 has determined the deficiency in stamp duty and has also imposed penalty equivalent to the amount of deficiency in Stamp Duty i.e. Rs.12,310.15/-. The deficiency in Stamp Duty + Penalty together amounted to Rs.24,691/-

8. It has been submitted by Sri Mohan Singh, learned counsel for the petitioner, that in the Appeal filed before the Additional Commissioner all such grounds were taken but they were not considered and his Revision has been arbitrarily rejected only on the ground that the procedure prescribed under the Act has been followed by the Assessing Authority and as per the rate of the area in question in respect of Rs.15/- per sq. feet., a duty of Rs.130/- per sq. feet was paid.

9. In pursuance of the orders impugned, the Tehsil Authorities had initiated recovery proceedings against the petitioner including taking steps to arrest him and also to auction the property in question. However, this Court as an interim measure had initially stayed the arrest of the petitioner and later on also stayed the recovery proceedings.

10. It has been submitted by learned counsel for the petitioner on the basis of the content of annexure-2 that there is specific statement made therein that the purchaser was informed, but he failed to appear and that on-spot inspection was done of the property in question and it was found that agricultural activities were going on on the plot and that it was situated only 800 mtrs. away from Hanuman Mandir Tiraha on Kaiserganj Huzoorpur road. The respondent no.2 has imposed the liability to pay Stamp Duty only on the basis of the circle rate and according to him any property which was situated within 1k.m. range of Hanuman Mandir Tiraha on Kaiserganj Huzoorpur road would be liable to stamp duty @ Rs.130/- per sq. foot. Accordingly, deficiency found in stamp duty was determined as Rs.12,310.50/- and a penalty equivalent to same amount as the deficiency was directed to be paid by the petitioner.

11. Learned counsel for the petitioner has pointed out three grounds to challenge to the orders impugned. According to him, specific averment has been made in paragraphs-5, 8 and 9 to the writ petition that the property in question is situated at a distance of 1.6 kms. and not at a distance of 800 mtrs. from Hanuman Mandir Tiraha on

Kaiserganj Huzoorpur road. Also, no penalty could have been imposed and only demand that the Assessment Authority could have made was with regard to payment of deficiency, if any, found in the stamp duty as the sale deed in question was entered into on 01.07.1995 and the power to impose penalty came into effect through the Government Order dated 28.07.2000, only on such conveyance deeds that were registered after 01.09.1998. The other ground raised in the writ petition is with regard to the question that no notice was served upon the petitioner before the spot inspection was made by the Assessing Authority and also that after the on spot inspection, a memo had to be prepared including the map of the area in question, which was not done.

12. Learned counsel for the petitioner has pointed out from the pleadings in the counter affidavit filed by the State Respondent that there is no specific reply of paragraphs-5, 8 and 9 to the writ petition.

13. Learned counsel for the petitioner has referred to the supplementary affidavit filed by him on 15.09.2003 bringing on record the Government Order dated 28.07.2000 wherein after referring to the provisions of Section 47-A sub-Clause 4, the discretion is cast upon the Collector to ask for proper stamp duty to be paid and also to impose penalty on a person failing to do so. It was in this Government Order that for the first time after referring to the provisions of Section 47-A, the Government had made a provision for imposition of penalty also. It was clarified that since the provision of penalty under Section 47-A, sub Clause 1, became effective from 01.01.1998, any instrument which was registered before that day and was found deficient in payment of Stamp Duty would not be liable for payment of penalty thereon.

14. Learned counsel for the petitioner to buttress his argument has placed reliance upon a Full Bench judgment of this Court in *Girjesh Kumar Srivastava and another Vs. State of U.P. and others*, reported in **1998 (Supp) RD 523**, wherein this Court was considering two questions:-

"(i) Whether in proceedings under sub-section (4) of Section 47-A of the Act, penalty can also be imposed if the Collector holds that the market value of the property has not been truly set forth in the instrument and consequently there is deficiency in stamps duty?

(ii) Whether the limitation of four years as provided in sub-section (4) of Section 47-A of the Act is for making a reference by a Court or any one of the authorities enumerated in the sub-section or it is for intimation of proceedings by the Collector?"

15. In response to the first question, the Full Bench had observed that the language of Section 47 sub Section 4 is clear that the Collector/ Additional District Magistrate (Finance & Revenue) does not have any power to impose penalty in such proceedings. Under this provision only power vested in the Collector was to determine the market value of the property and if he finds that the duty paid on the instrument in question is less than that payable on the correct market value of the property, he may order that the difference may be realized from the party to the

instrument. The Court observed that law regarding such matters is well settled. The power to impose penalty must be conferred by the Statute itself. The language of Section 47-A alone can be seen and such a power cannot be inferred by implication or by reference to some general words contained in the Rules. In the absence of a specific provision to that effect, the Collector is not empowered to impose penalty.

16. The learned counsel for the petitioner has also placed reliance upon the judgment rendered by Co-ordinate Bench of this Court in *Ram Khelawan @ Bachcha Vs. State of U.P. and others;* ***2005 (23) LCD 1681,*** wherein this Court has observed in paragraph-24 thus:-

"24. It has been found in several cases like the present one that the entire basis of determination of market value for the purpose of stamp duty is ex parte report of Tehsildar or other Officer. Ex parte inspection report may be relevant for initiating the proceedings under Section 47-A of Stamp Act. However, for deciding the case no reliance can be placed upon the said report. After initiation of the case inspection is to be made by the Collector or authority hearing the case after due notice to the parties to the instrument as provided under Rule 7(3) (c) of the Rules of 1997. Moreover in the inspection report distance of the property from other residential or commercial properties and road must be shown and wherever possible sketch map must; also be annexed alongwith the report so that correct valuation may be ascertained with reasonable certainty."

17. This Court finds from the pleadings on record that no specific reply has been given by the State Respondents in their counter affidavit to the grounds raised for challenge in paragraphs-5, 8 and 9 of the writ petition, nor has any dispute been raised regarding the applicability of the Government Order dated 28.07.2000 in so far as it clarifies the position regarding the power to impose penalty along with power to recover deficiency in stamp duty.

18. This Court has also perused the orders impugned and finds from the order dated 19.07.1999 that only a bald statement has been made therein that notice was issued and despite service, the vendee had failed to file any explanation and therefore proceedings were taken ex parte against him. If the findings of fact recorded by the Assessing Authority regarding the property in question to be situated within 800 mtrs. of Hanuman Mandir Tiraha on Kaiserganj Huzoorpur road taken on its face value, is to be taken as correct, at least spot inspection memo and a rough sketch map ought to have been appended to and referred in the order itself. Neither there is any reference of on spot inspection report or sketch map in the order impugned, nor the same has been filed in the counter affidavit by the respondents to refute the allegation made by the petitioner in the writ petition.

19. This Court also finds from the order passed in the Revision that only the statement made by the Assessing Authority's order has been rephrased although in a different language. There is no application of mind by the Revisional Authority as to whether the procedure prescribed for determination of deficiency and for imposition of penalty had been followed by the Assessing Authority. Consequently, both the orders dated 19.07.1999 and 26.11.2001 are liable to be set aside and are therefore set aside.

20. The writ petition stands ***allowed***. Consequences to follow.

(2021)07ILR A97
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.07.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 14768 of 2021

Mahanth Chaturbhuj Das @ Chanda ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rajeev Narayan Pandey

Counsel for the Respondents:
C.S.C.

Order rejecting mutation challenged-Remedy is under Rule 5A (4) of Nazul rules-civil or revenuecourt have jurisdiction-Writ not maintainable being a summary proceeding.

W.P. dismissed. (E-7)

List of Cases cited:

1. Naveen Chandra Seth & ors. Vs Commissioner, Allahabad & ors., 1999 (3) A.W.C. 2444

2.Writ Petition No.5147 (M/S) of 2015:Smt. Hadisul Nisha Vs Additional Commissioner (Judicial) Faizabad& ors.

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

1. Heard learned counsel for the petitioner and Sri V.P. Nag, learned standing counsel appearing for the State Respondent.

2. The petitioner is aggrieved by the order dated 03.03.2021 passed by the Commissioner, Ayodhya Division, Ayodhya, and also the order dated 22.05.2017 passed by the Additional District Magistrate (Finance & Revenue)/ Nazul Officer, Faizabad (now Ayodhya) and prays for a mandamus directing the respondent to allow mutation application dated 10.12.2013 filed under Rule 5A of the Nazul Manual in respect of Khasra No.51 ad-measuring 3 Bigha 10 Biswa 12 Biswansi 12 Kachwansi situated in Mohalla Guptarghat, Pargana Haveli Avadh, Tehsil Sadar, District Faizabad.

3. It is the case of the petitioner that he is the successor of Mahant Gopal Das, who was spiritual brother/ Gurubhai of Mahant Maha Tyagi Mohan Das Mauni Baba chela Mahanth Ram Bharosey Das. A nazul lease deed for 90 years with renewal due after every 30 years had been executed between the Secretary of State of Indian Dominion and Baba Janki Das Maharaj Phalahari Chela Sri Ram Sevak Das Ji with respect to the aforesaid Khasra No.51 on 26.07.1927. The same was registered before the Registrar, Faizabad. The lease agreement was renewed by the Competent Authority on an application made by the Mahanth Baba Ram Prasad Das chela Baba Janki Das Maharaj on 04.06.1958. Thereafter, the lease agreement was renewed on an application of Mahanth Mohan Das Mauni Baba on 30.07.1997 with effect from 1987, which was also a registered agreement. Mahanth Mohan Das executed a Will in favour of Mahanth Gopal Das and after death of Mahanth

Mohan Das, Mahanth Gopal Das filed a mutation application and his name was noted in the revenue record and he remained in possession over the said Khasra No.51 till his death.

4. Mahanth Gopal Das appointed the petitioner Mahanth Chaturbhuj Das as the Mahanth of the Temple after his death. On the death of Mahanth Gopal Das, a *Bhandara* was organized on 18.10.2008, wherein all other Mahanths executed Mohajjarnama in favour of the petitioner in respect of the Temple/ Yagyashala situated in Khasra No.51 at Guptarghat. The petitioner moved an application under Rule 5A of the Nazul Rule before the Additional District Magistrate Faizabad/ Ayodhya for mutation of his name. The application was registered as Mutation Case No.639 of 2013. A report of the Naib Tehsildar was sought which was submitted. The petitioner filed the evidence in the form of Mohajjarnama executed on 18.10.2008. The respondent no.3 rejected the mutation application on 11.07.2014.

5. The petitioner being aggrieved filed an Appeal before the Commissioner, Ayodhya Division, registered as Appeal/ Revision No.62 of 2014. Learned Commissioner set aside the order dated 11.07.2014 and remanded the matter to the respondent no.3 to consider afresh.

6. The mutation application was revived and registered as Case No.171 of 2016. The Naib Tehsildar Nazul again submitted a report in favour of the petitioner but the respondent no.3 rejected the mutation application on 22.05.2017 on the ground that the tenure of lease had expired on 22.03.2017 therefore there was no need of mutation of the name of the petitioner. The petitioner being aggrieved filed an Appeal on 22.05.2017 before the Commissioner, Ayodhya Division, Ayodhya, which has been rejected on 03.03.2021 on the ground that the Commissioner had no jurisdiction to hear the matter under Rule 5A of the Nazul Rules.

7. It has been submitted by learned counsel for the petitioner that the order passed by respondent no.3 is arbitrary in nature and therefore the petitioner had filed the Appeal. The Appeal has been rejected on a misconceived ground of being not maintainable under Rule 5A of Nazul land.

It has been submitted by learned counsel for the petitioner that after the matter was remanded by the Commissioner on 01.12.2016, a report was submitted by the Tehsildar, Nazul on 31.12.2016 and had the mutation application be taken up with expedition by the Additional District Magistrate (Finance & Revenue), and orders passed thereon, at that time alone the right of the petitioner for mutation of his name would not have been prejudiced as the lease expired only in March, 2017.

8. Learned counsel for the petitioner has placed reliance upon a Co-ordinate Bench judgement rendered in *Naveen Chandra Seth and others Vs. Commissioner, Allahabad and others, 1999 (3) A.W.C. 2444*, wherein this Court has held that the Commissioner being a superior officer had power under the Nazul Rules to correct the error of Collector on the administrative side.

9. This Court has carefully perused the judgement cited by learned counsel for the petitioner and finds that it was rendered in respect of a subsisting lease of Nazul land situated in George Town, Allahabad,

ad-measuring 1007 sq.yards. The original lease agreement was executed on 23.10.1914 to be effective from 01.01.1910 for the period of 90 years subject to renewal after every 30 years in favour of one Rai Keshri Narain Chaddha. The original lessee built a bungalow over the said plot of land and on his death, his son Triyugi Narain Chaddha inherited the lease hold rights to the property. On death of Sri Triyugi Narain Chaddha, his two sons, namely, Satyugi Narain Chaddha and Triloki Narain Chaddha, inherited the lease hold rights and lease hold rights renewed in their names. Sri Satyugi Narain Chaddha had only one daughter Smt. Raj Kumari Seth who was not bequeathed the said property by Satyugi Narain Chaddha. Satyugi Narain Chaddha executed a Will on 19.04.1967 which was witnessed by Two Judges of the Allahabad High Court as well as two Advocates as Satyugi Narain Chaddha was a renowned Advocate of the Allahabad High Court. Satyugi Narain Chaddha in his Will specifically mentioned that he wanted the property to remain in the maleline and therefore had Willed it to his nephew- the son of Triloki Narain Chaddha.

After the death of Satyugi Narain Chaddha, the land in question was mutated in the name of his nephew- Dev Narain Chaddha and Smt. Raj Kumari Seth had endorsed a "no objection' in her handwriting on the application of mutation moved by the sons of Triloki Narain Chaddha. The order of mutation was passed on 20.06.1963. The house built over the Nazul land had been Willed by Satyugi Narain Chaddha to Raj Kumari Seth and house was therefore mutated in the name of Smt. Raj Kumari Seth. Sri Triloki Narain Chaddha executed a Will in respect of lease hold rights of Nazul land in favour of his grand-son Deepak Narain Chaddha, who moved an application for mutation on the basis of the said Will dated 03.07.1983. During the course of mutation, an objection was filed by Smt. Raj Kumari Seth. It was alleged that the Additional District Magistrate (Nazul) rejected the objection of Raj Kumari Seth arbitrarily and mutation was done in favour of Deepak Narain Chaddha on 19.03.1997. The mutation proceedings having become final, no Appeal was filed by Raj Kumari Seth, instead she filed a representation to the District Magistrate/ Collector who by an order dated 17.08.1998 rejected the mutation of the name of Deepak Narain Chaddha. The order passed by the Collector was carried out. It was this order which was challenged by Deepak Narain Chaddha before the Divisional Commissioner. He also filed a writ petition before the Court saying that the Appeal was pending before the Divisional Commissioner and he was not deciding the same. This Court had disposed of the writ petition on 15.01.1999 with a direction to the Commissioner to decide the representation. The Divisional Commissioner allowed the representation by an order dated 09.03.1999.

10. It was this order which was challenged by Naveen Chandra Seth before this Court on the ground that the Additional District Magistrate/ Nazul Officer had no power of mutation under the Nazul Rules. It was only the Collector who could do so. This Court found that the Additional District Magistrate/ Nazul Officer was authorized to order mutation as in the Act itself there was a provision that the word "Collector" shall include the "Additional District Magistrate" as well. The Court also observed that after the competent authority

i.e. Additional District Magistrate/ Nazul officer had made the order in favour of respondent, it could not have been set aside by the Collector on a representation, as the power of the Collector had already been exercised by the Additional District Magistrate. It was further observed by the Court that the order of the Collector being without jurisdiction, it could certainly be corrected by the Commissioner of the Division who was a higher Administrative Officer. If the subordinate officer had wrongly assumed jurisdiction, the superior officer must certainly pass appropriate orders to correct the error on the administrative side. It was observed that orders passed by the Additional District Magistrate were passed in their capacity as Collector and therefore such orders could not be set aside by the District Magistrate and if the District Magistrate had taken to his head in an illegal manner to set aside the orders passed by the Additional District Magistrate, in that event, the officer superior to the District Magistrate should set aside the order passed by the District Magistrate. The Court held the order passed by the Commissioner to be equitable and just. It moreover observed in paragraph 14 thus:-

"14. The mutation proceedings are summary in nature. In clause (4) of Rule 5A of the Nazul Manual, it has been provided that no order passed under Rule 5A shall debar any person from establishing his right to the property in any civil or revenue court having jurisdiction. If the petitioners are really aggrieved of the orders passed by the Commissioner of the Division, or for that matter, the Additional District Magistrates, exercising the power of the Collector, in that event they can get their rights established by filing a suit before an appropriate Court to challenge the execution, validity and effect of the Wills, in question."

11. The observations made by the Coordinate Bench in the case of Naveen Chandra Seth (supra) were made in the peculiar facts and circumstances of the case where the Additional District Magistrate having passed the order under Rule 5A of the Nazul Rules, being the competent authority, and acting in the capacity of the District Magistrate, the District Magistrate had stepped out of his jurisdiction and set aside the order passed by the Additional District Magistrate. Therefore, Court observed that if a subordinate officer assumes the power which is not there and has not vested in him, the superior officer can undo the wrong committed by his subordinate. It was only in this context that the Court observed that Commissioner could interfere in the order passed by the Collector.

12. This Court having gone through the orders impugned finds that the Additional District Magistrate (Finance & Revenue)/ Nazul Officer, Faizabad (now Ayodhya) had rejected the mutation application of the petitioner only on the ground that the term of lease executed in 1917 had come to an end, therefore, there was no reason for mutation of the name of the petitioner on the basis of such lease which had already expired. This order was challenged by the petitioner by filing Appeal/ Revision before the Commissioner. The Commissioner observed that under Rule 5A of the Nazul Rules, the office of the Commissioner had no role to play and had no jurisdiction to consider the Appeal/ Revision. He thus rejected the said Appeal/ Revision as not maintainable by his order dated 03.03.2021.

13. The order dated 03.03.2021 suffered from some typographical error and therefore, it was corrected by the order dated 19.03.2021.

14. This Court has perused Rule 5 and 5A of the Nazul Rules, which are being quoted hereinbelow:-

"5. Change entries in Nazul register.-Entries in the Nazul register shall not be changed except under the orders of the Collector. Where a local authority is entrusted with the management of nazul, it shall be the duty of the local authority to maintain nazul register up-to-date and where it proposes to change any entry in the nazul register as a result of succession, transfer or assignment of any lease for building purposes, or on the discovery of any error or omission in such register, it shall submit its proposal to the Collector, who, if he is satisfied after such enquiry as he considers necessary, that a succession, transfer or assignment has taken place or that an error or omission exists, shall order the register to be corrected accordingly.

5-A. Mutation procedure.-(1) On each transfer by succession, sale, assignment or otherwise, the lessee and the person to whom the lease rights are so transferred, shall, within two months, of the same, deliver a notice in writing to the Collector or the Nazul Officer appointed by the Collector, setting forth the names and other particulars of the persons from whom and to whom the transfer take place and the nature and description of the transfer.

(2) The Collector, on receiving such report, or upon the facts coming otherwise to his knowledge, shall decide the matter on the basis of possession, and shall order mutation in the name of the transferee in the records accordingly.

(3) If in the course of enquiry into a dispute under this rule, the Collector is unable to satisfy himself as to which party is in possession, he shall ascertain by summary inquiry the person best entitled to the property, and shall order the name of such person to be entered in the records accordingly.

(4) No order passed under this rule shall debar any person from establishing his right to the property in any Civil or Revenue Court having jurisdiction."

15. Learned counsel for the petitioner has submitted that if this Court finds that the Commissioner had no role to play in the matter of mutation of Nazul property then the petitioner would be rendered remediless and the only course open for him was to file a writ petition before this Court.

16. This Court finds from sub-Rule 4 of Rule 5A that a remedy is provided in the Nazul Rules itself as it says that no order passed under the Rule shall debar any person from establishing his right to the property in any civil or revenue court having jurisdiction.

17. It is settled law that mutation proceedings are summary in nature and if an order is passed in such proceedings or any writ petition thereafter challenging such orders passed in mutation proceedings, in favour of a litigant, it would not establish his right to the property in question. The ultimate establishment of right would only be through a competent

court by way of a declaration, therefore, this Court ordinarily does not interfere in orders passed in mutation proceedings. There have been exceptions carved out which have been mentioned in detail by this Court in its order dated 25.06.2021 in Writ Petition No.5147 (M/S) of 2015*:Smt. Hadisul Nisha Vs.Additional Commissioner (Judicial) Faizabad And Ors., which exceptions from the said judgment are being quoted hereinbelow:-*

"i) If the order is without jurisdiction;

ii) If the rights and title of the parties have already been decided by the competent court, and that has been varied by the mutation courts;

iii) If the mutation has been directed not on the basis of possession or simply on the basis of some title deed, but after entering into a debate of entitlement to succeed the property, touching into the merits of the rival claims;

iv) If rights have been created which are against statutory provisions of any Statute, and the entry itself confers a title on the petitioner by virtue of the provisions of the U.P. Zamindari Abolition and Land Reforms Act;

v) Where the orders impugned in the writ petition have been passed on the basis of fraud or misrepresentation of facts, or by fabricating the documents by anyone of the litigants.

vi) Where the courts have not considered the matter on merits for example the courts have passed orders on restoration applications etc (Vijay Shankar v Addl Commissioner; 2015 (33) LCD 1073)."

18. The case of the petitioner does not fall in any of the exceptions that have been carved out by this Court for showing interference in an order passed in mutation proceedings.

19. The writ petition is ***dismissed*** leaving it open for the petitioner to establish his right before the competent Civil or Revenue Court with regard to the property in question.

(2021)07ILR A102
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.07.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

C.M. Application No. 127734 of 2019
In re:
Misc. Single No. 5846 of 2008

Ashok Kumar Singh ...Petitioner
Versus
Presiding Officer Debt Recovery Tribunal Lucknow ...Respondent

Counsel for the Petitioner:
Ravi Singh

Counsel for the Respondents:
Rakesh Kumar Singh, Ashish Sinha, Nirankar Nath Jaiswal, Prashant Jaiswal, Siya Ram Pandey

SERFAESI Act, 2002 - Section 13 92- Notice under of to Petitioner-Petitioner submitted representation u/s13 (3A)-not decided-auction held- Securitization Application filed-rejected being time barred-challenged-not maintainable-remedy u/s18 of Act -Appeal before DRT.

W.P. dismissed. (E-7)

List of Cases cited:

1. Civil Appeal No.1281 of 2018: Authorized Officer, State Bank of Travancore & anr. Vs Mathew K.C.

2. P.N.B. Vs O.C. Krishnan & ors. 2001 (6) SCC 569

3.United Bank of India Vs Satyawati Tandon & ors. 2010 (8) SCC 110

4.General Manager, Sri Siddeshwara Cooperative Bank Limited & anr. Vs Ikbal & ors. 2013(10) SCC 83

5.Kanaiyalal Lalchand Sachdev & ors. Vs St. of Mah. & ors. 2011 (2) SCC 782

6. P.N.B. & anr. Vs Imperial Gift House & ors. 2013 (14) SCC 622

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

1. C.M. Application No.127734 of 2019 has been filed praying for leave to amend the prayer clause of the writ petition and to delete the word "termination" from the prayer clause (i) and to correct the date of the impugned order to "22.10.2008".

2. The amendment sought being formal in nature is allowed.

3. Learned counsel for the petitioner shall incorporate necessary amendments during the course of the day.

4. This petition has been filed challenging the order dated 22.10.2008 passed by the Presiding Officer, Debt Recovery Tribunal.

5. It is the case of the petitioner that he had taken the loan of Rs.15 lakhs from Bank of Maharashtra in the year 2005 and started construction of building, but he suffered huge losses in business and could not repay the loan to the Bank. The Bank declared his account as Non Performing Asset and issued a notice under Section 13 (2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (hereinafter referred to as the 'SARFAESI Act') on 16.06.2007. The petitioner submitted a representation under Sub-Section 3A of Section 13 and requested for statement of account and time to arrange the money, but the Bank neither provided the statement of account nor decided the representation of the petitioner. No notice under Section 13 Sub-Section 4 was given and the Bank initiated proceedings of sale of the building in question without issuing notice under Rule 8 Sub-Rule 6 and Rule 9. No application under Section 14 (1) was moved by the Bank also. The entire procedure adopted by the Bank was against the provisions of the SARFAESI Act only because there was a conspiracy to hand over the building in question to the wife of the current Bank Manager Sri Sharad Kumar Sinha.

6. The petitioner filed a Writ Petition No.2624 (M/B) of 2008 before this Court praying for time to arrange money. This writ petition remained pending and auction was held on 28.06.2008 in favour of wife of the Bank Manager and Sanjay Singh, his relative. The petitioner filed a Securitization Application numbered as S.A. No.104 of 2008 before the Debt Recovery Tribunal on 17.07.2008. The Bank filed preliminary objection that the Securitization Application was beyond time. The Presiding Officer, Debt Recovery Tribunal, passed an order rejecting the application for interim relief in the Securitization Application as time barred on 09.09.2008. The petitioner submitted an application along with the affidavit saying that the possession of the property in question was still with the petitioner. On

22.10.2008, the matter was taken up on the question of maintainability of the Securitization Application and the Presiding Officer rejected the same as being not maintainable being time barred. Against such an order, this writ petition has been filed.

7. Sri Prashant Jaiswal, learned counsel for the respondent nos.4 and 5, has referred to his short counter affidavit filed on 26.05.2009 and referred to Section 18 of SARFAESI Act wherein it has been provided that any person aggrieved by the order passed by the Debt Recovery Tribunal, may prefer an Appeal to the Debt Recovery Appellate Tribunal within 30 days from the date of receipt of the order.

8. Learned counsel has also referred to the counter affidavit filed by the Bank wherein the Bank has stated that proper valuation of property was done. The petitioner had been served notice of recovery proceedings and also of possession and sale. The Securitization Application No.104 of 2008 being highly time barred was rejected rightly and that the petitioner had filed Writ Petition No.2624 (M/B) of 2008 against measures taken under Section 13 Sub-Section 4 read with Rule 8 and 9 of the Securitization Act, which writ petition was dismissed by this Court on 24.09.2008, on the ground that the petitioner has statutory remedy of filing the Appeal under Section 18 of the Securitization Act.

9. Learned counsel for the respondent has placed reliance upon the judgments rendered by Hon'ble Supreme Court in Civil Appeal No.1281 of 2018: *Authorized Officer, State Bank of Travancore and Another Vs. Mathew K.C.*, where the Supreme Court after referring to its earlier judgment relating to SARFAESI Act, namely, *Punjab National Bank Vs. O.C. Krishnan and others* 2001 (6) SCC 569; *United Bank of India Vs. Satyawati Tandon and others* 2010 (8) SCC 110 and *General Manager, Sri Siddeshwara Cooperative Bank Limited and another Vs. Ikbal and others* 2013 (10) SCC 83, as well as other judgements like *Kanaiyalal Lalchand Sachdev and others Vs. State of Maharashtra and others* 2011 (2) SCC 782 and *Punjab National Bank and another Vs. Imperial Gift House and others* 2013 (14) SCC 622, has observed in paragraphs-16 and 17 as follows:-

"16. It is the solemn duty of the Court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex-parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the tax payers expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in Satyawati Tandon (supra), has also not been kept in mind before passing the impugned interim order:

"46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously

impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Whirlpool Corpn. v. Registrar of Trade Marks and Harbanslal Sahnia v. Indian Oil Corpn. Ltd. and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."

17. The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter affidavit having subsequently been filed, stay/modification could be sought of the interim order cannot be considered sufficient justification to have declined interference."

10. This writ petition is ***dismissed*** on the grounds of maintainability leaving it open for the petitioner to approach the Debt Recovery Appellate Tribunal under Section 18 of the Act.

(2021)07ILR A105
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.06.2021

BEFORE

THE HON'BLE SANJAY YADAV, C.J.
THE HON'BLE VIVEK AGARWAL, J.

Public Interest Litigation (PIL) No. 826 of 2021

Akash Jan Kalyan Samiti & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Swati Agrawal Srivastava, Kamal Krishna Roy

Counsel for the Respondents:
C.S.C., Krishna Mohan Asthana, Nagendra Nath Mishra

A. PIL-Article 226-Uttar Pradesh Urban Planning and Development Act, 1973-Sections 14, 15, 15-A, 26-A, 26-C, 28-A(1), 28-A(4)-availability of alternative statutory remedy of appeal-contention of the petitioner that there was a sanctioned gate towards the Madhubani Colony, which has been unauthorizedly sealed, is not made out-petitioner has not substantiated presence and sealing of a sanctioned exit through any documentary evidence-petitioner can avail alternative remedy available u/s 28-A(4) against the order within 30 days-chairman may after hearing the parties to appeal either allow or dismiss the appeal.(Para 1 to 15)

The petition is dismissed. (E-5)

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

1. Matter is taken up through video conferencing.

2. Heard learned counsel for the petitioners and learned counsel for the respondents.

3. This writ petition in the name and style of Public Interest Litigation has been filed claiming following reliefs:-

"(i) Issue a writ, order or direction in the nature of Mandamus directing the Secretary, Moradabad Development Authority respondent no. 6 to pass a fresh order after hearing the petitioner society in compliance of the order of the Hon'ble High Court dated 26.08.2020.

(ii) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 01.10.2020 (Annexure No. 11 to this writ petition), passed by the respondent no. 6 by which the entry gate of the Akash Residency Colony towards the Madhubani Colony has been illegally sealed.

(iii) Issue a writ, order or direction in the nature of Mandamus commanding the respondent no. 2 to constitute an independent, impartial, high powered committee to look into the matter of the use of the gate and the road by the residents of the Akash Residency Colony towards the Madhubani Colony and submit its report before the Hon'ble Court.

(iv) Issue a writ, order or direction in the nature of Mandamus commanding the respondents to remove the sealing of the gate of the Akash Residency Colony and allow its residence to use it in accordance with law."

4. Learned counsel for the petitioner submits that under similar facts and circumstances, P.I.L. No. 768 of 2020 was disposed of by a Coordinate Bench of this Court directing the respondent no. 6-Moradabad Development Authority, Moradabad to look into the grievance of the petitioners therein and take appropriate action in accordance with law, expeditiously, preferably within four weeks from the date of presentation of copy of this order.

5. Learned counsel for the petitioner submits that petitioner is also claiming similar order, but later on modifies his submissions and submits that because of various orders passed by the High Court directing Moradabad Development Authority to look into the grievances of different Resident Welfare Societies, problem has been caused to the petitioner and authorities be directed to give an opportunity of hearing to the petitioner and decide petitioner's representation on its own merits.

6. In fact, in the guise of opportunity of hearing before the authority, the main relief claimed is for issuance of a writ, order or direction in the nature of Mandamus, commanding the respondent to remove the sealing of the gate of the

Akash Residency Colony and allow its residents to use it in accordance with law.

7. In support of this prayer, learned counsel for the petitioner has placed reliance on the provisions contained in Section 26-A of Uttar Pradesh Urban Planning and Development Act, 1973. It is submitted that, even if a person has made any encroachment on a land in a development area, he has to be provided a written notice of not less than 15 days time before taking any decision to remove obstruction/encroachment.

8. Placing reliance on provisions contained in Section 26-A, it is submitted that opportunity of hearing is ingrained in the said statutory provision and petitioner is entitled to opportunity of hearing.

9. Learned counsel for respondents, in their turn, submits that petitioner has in fact, tacitly conceded that there is an encroachment of the petitioner's society on a land in a development area and therefore, authorities have sealed the gate of Akash Residency Colony. It is further submitted that if petitioner has any grievances in regard to easementary rights of its members, then the remedy, which is open to the petitioner is under the provisions of the Indian Easements Act, 1882.

10. After hearing learned counsel for the parties and referring to the provisions contained in the Act of 1973, it is apparent that the Act of 1973 provide for Zonal Development Plans. Section 14 deals with development of land in the developed area. Section 15 provides for application for permission and Section 15-A for issuance of completion certificate. Petitioners have not enclosed copy of the permission, granted by the competent authority i.e., Moradabad Development Authority granting them permission for development and have also not filed copy of completion certificate. Annexure-2, does not contain approval of Moradabad Development Authority, but is only a layout of the colony, which might have been or might not have been submitted for approval.

11. Section 26-C, authorizes the authority to remove anything erected or deposited in contraventions of the Act without notice.

12. A perusal of the order dated 01.10.2020, passed by the Secretary of Moradabad Development Authority, Annexure-11 reveals that an opportunity of hearing was given to Sri Gurjeet Singh Chaddha S/o Harbhajan Singh Chaddha vide letter dated 18.09.2020 to present is case on 25.09.2020 with a further direction that in case, party fails to present its case, then it will be proceeded ex-parte and orders will be passed in terms of the provisions contained in Section 28-A(1) of the Act of 1973. It has also come in the impugned order that Sri Chaddha had filed a reply on 25.09.2020 and accepted that as House no. 26, situated in Madhubani Extension Colony was in a dilapidated condition and therefore, this building was dismantled gradually and keeping in view safety of this passage towards Madhubani Scheme, passage was developed and was used by the residents of Akash Residency. It is mentioned in the reply that residents of the Madhubani Scheme had also not raised any objection and therefore, Sri Chaddha prayed for providing a six feet wide passage, as his properties are situated on both sides of the Scheme.

13. The Secretary of Moradabad Development Authority did not find this proposal as acceptable and ordered for sealing of the gate towards Madhubani Colony.

14. Analyzing of order dated 01.10.2020, reveals that contentions of the petitioner that there was a sanctioned gate towards the Madhubani Colony, which has been unauthorizedly sealed, is not made out. As has been discussed above, petitioner has not substantiated presence

and sealing of a sanctioned exit, through any documentary evidence.

It is admitted position that petitioner's society has an alternative gate for ingress and exit.

15. Section 28-A(4) provides for an alternative statutory remedy to a person aggrieved of an order made under sub-section (1) or sub-section (2) to file an appeal to the Chairman against that order within 30 days from the date thereof and the Chairman may after hearing the parties to the appeal either allow or dismiss the appeal. Thus, it is evident that there exists an alternative statutory remedy of appeal against the order dated 01.10.2020, quashing of which has been prayed by the petitioner as part of prayer no. 2.

16. Thus, both in view of availability of alternative statutory remedy of appeal and as is evident from the impugned order dated 01.10.2020, that developer of the petitioner's colony namely, Sri Chaddha, was afforded an opportunity of hearing, inasmuch as, it is matter of record (Annexure-1) that Akash Jan Kalyan Samiti, was given registration on 05.11.2020 and was not in existence, when notices were issued to the builder/developer in pursuance of order dated 26.08.2020 passed by a Coordinate Bench and said builder/developer was afforded an opportunity of hearing, therefore, it cannot be said that petitioner, who were not in existence were required to be heard before passing of order dated 01.10.2020. Thus, petition being bereft of merits deserves to be dismissed and is *dismissed.*

(2021)07ILR A108

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 24.06.2021

BEFORE

THE HON'BLE SANJAY YADAV, C.J.

THE HON'BLE VIVEK AGARWAL, J.

Public Interest Litigation (PIL) No. 838 of 2021

Rahul Singh ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Daya Shankar

Counsel for the Respondents:
C.S.C.

A. PIL-Evidence Act, 1872 - Article 226 - presumption of genuineness u/s 81 of the act, does not give rise to any presumption of genuineness about news paper reports-hence, it is not be treated as proof of facts in them.(Para 2 to 8)

B. Petitioner failed to substantiate his claim through any substantial documentary evidence and has not taken pains to do proper research on the subject to collect material which can be said to be credible in nature. in fact, it is a publicity oriented litigation.(Para 9)

The petition is dismissed. (E-5)

List of Cases cited:

1. Laxmi Raj Shetty & anr. Vs St. of T.N. AIR (1988) SC 1274, para-5

2. B. Singh Vs U.O.I. & ors AIR (2004) SC 1923 (1924, 1929)

3. Ravinder Kumar Sharma Vs St. of Assam (1999) 7 SCC 435,

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

1. Heard learned counsel for the petitioner and learned Standing Counsel for the State.

2. This petition has been filed by an individual claiming himself to be a general

member of the village & Post-Sdhauna, Mehnajpur, Tehsil-Lalganj, District-Azamgarh presently residing at Avadhoot Bhagwan Ram Kushth Sewa Ashram, Jalilpur, Chandauli, District-Chandauli for issuance of "a writ order or direction in the nature of mandamus commanding the respondent authorities to enquire the matter against respondent no.6 under Public Money Recovery Act and etc. Act and also recovered the money from him, which was taken under the Members of Parliament Local Area Development (M.P.L.A.D.)/M.L.A. (Member of Legislative Assembly) Scheme in accordance with law."

3. We requested learned counsel for the petitioner to provide us some material in the form of an Audit Report of the Comptroller and Auditor General or any other competent authority, which may have been taken as bedrock for this petition. Learned counsel for the petitioner submits that this petition has been filed on the basis of a news paper cutting published on 8th July, 2020 in a vernacular news paper-'Amar Ujala'.

4. When this Court asked learned counsel for contesting petitioner to show, as to whether, such news paper cuttings are admissible under the provisions of Indian Evidence Act, learned counsel for the petitioner submits that since it has been published in a leading vernacular news paper, it can be treated as piece of evidence.

5. Learned counsel for the State, on the other hand, submits that news paper reports are not admissible in evidence and this petition is nothing but a misuse of the process of the forum of Public Interest Litigation (PIL).

6. After hearing learned counsel for contesting parties and going through the pleadings, it is evident that provisions of Section 81 of the Evidence Act, even when read in totality then also the presumption of genuineness attached under Section 81 to a news paper report, cannot be treated as proof of the facts reported therein.

7. In case of ***Laxmi Raj Shetty and another Vs. State of Tamil Nadu; AIR 1988 SC 1274, para-5,*** it is held that facts stated in a news paper are hearsay in nature. They are inadmissible in evidence unless maker of statement is examined. Judicial notice of facts stated in news paper cannot also be taken.

8. In case of ***B.Singh Vs. Union of India and others; AIR 2004 SC 1923 (1924, 1929)***, it is held that petitioner not claiming to have any personal knowledge of allegations made against respondent in said representation and paper cuttings of news item and is also not aware of authenticity or otherwise of news item; the news paper report per se, not admissible in evidence. Supreme Court held that petitioner is busy body bent upon self publicity. No element of public interest involved in the petition and dismissed the petition filed with oblique motive as misconceived with exemplary costs. Supreme Court further held that it is open for court to examine the locus standi of petitioner to veil on public interest and see private malice etc. lurking behind it. Similarly, in case of ***Ravinder Kumar Sharma Vs. State of Assam; (1999) 7 SCC 435***, it has been held that presumption of

genuineness created under Section 81 of the Evidence Act does not give rise to any presumption of genuineness about news paper reports and it is not to be treated as proof of facts stated in them. Such statements are merely hearsay.

9. Thus, in view of said legal position, when petitioner has failed to substantiate his claim through any substantial documentary evidence and has not taken pains to do proper research on the subject to collect material which can said to be credible in nature, we are not persuaded to accept this petition as Public Interest Litigation (PIL), but are constrained to term it as a publicity oriented litigation, which needs to be curtailed and grafted in its root. Therefore, petition fails and is **dismissed** with cost of Rs.20,000/-

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(2021)07ILR A110
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.07.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Rent Control No. 11921 of 2017

Mukesh @ Lallu Saxena & Ors.
...Petitioners
Versus
A.D.J.(Essential Commodities Act) Hardoi & Anr. ...Respondents

Counsel for the Petitioners:
Anuj Dayal

Counsel for the Respondents:
Anurag Narain

Suit for ejectment-as tenancy got terminated-Revisional Court allowed the revision -directed to vacate the shop-and give peaceful possession to the lanlord-challenged-questions framed were answered based upon evidence recorded by the trial court-no fresh evidence taken-no infirmity in impugned order.

Held, It is settled law that jurisdiction in SCC Revision is greater than the jurisdiction under Section 115 C.P.C. and less that of as appeal. (para 22)

W.P. dismissed. (E-7)

List of Cases cited:

1. Allah Bux Vs Ist A.D,J, & ors., AIR 1996 Allahabad 49

2. Radhey Shyam Gupta Vs Jawahar Lal Bhatia, (1996) 28 ALR, 518

3. Abul Alim Vs D.J., Jhansi & ors. 1995(2) Allahabad Rent Case, 52

4. Hindustan Petroleum Corporation Ltd. Vs Dilbahar Singh (2014) 9 SCC,78

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

1. Heard Sri Anuj Dayal, learned counsel for the petitioner and Sri Anurag Narain, learned counsel for the respondent-landlord.

2. It is the case of the petitioner that respondent no.2 filed a Suit for ejectment on 13.07.2005 registered as SCC Suit no. 10 of 2005 on the ground that respondent no.2 and the wife of his brother Vedrani purchased the property in question on 22.03.1984 and after the death of Vedrani, the respondent alone is the legal heir and owner and landlord of the shop in question. Respondent no.2 had let out one shop (herein referred to as shop in question) to the father of the petitioners in 1985 on rent at the rate of Rs. 275/- per month which included house tax and water tax.The father of the petitioner had paid rent as well as house tax and water tax till 30th June,2001.The father of the petitioners

expired on 27.03.2004 and after his death petitioner had occupied the shop in question as a joint tenancy. In the plaint filed by respondent no.2, it was alleged that notice was sent to the petitioners on 17.03.2005 for arrears of rent which they refused to accept. After lapse of statutory period, the of tenancy got automatically terminated on 07.07.2005. It was also stated in the plaint that petitioners had sub-let the premises to one Deepu son of Sri Rajendra Kumar Saxena on rent of Rs.1000/- per month and the shop in question is in possession of Deepu.

3. After filing of Suit the notices were issued to the petitioners, they filed written statement. Although they accepted relationship of landlord and tenant they stated that they were giving rent and house tax and water tax till January,2005 but landlord was not giving any receipts to them. After January,2005, landlord refused to accept the rent. The petitioners denied the notice of termination of tenancy saying that it was never served upon them. The petitioners are running a General Store in the shop in question and after death of their father, Deepu being his nephew was helping the petitioners in the shop and he was not a sub tenant as alleged in the plaint. It was also stated that the petitioners and their mother were compelled to prefer a suit for injunction which was registered as Regular Suit no.72 of 2005 in the court of Civil Judge (J.D.) (West) in which interim order was passed that they should not be evicted except in accordance with law. Petitioners were liable to get benefit of Section 20 (4) of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 as they had already preferred an application for depositing the rent unconditionally before the court below in Regular Suit no. 72 of 2005. Since February, 2005 they were depositing the rent in SCC Suit No. 10 of 2005 (the petitioners made an application on 13.12. 2005 before the Judge Small Causes for permission for depository of rent in Court under section 20(4) which was accepted).

4. Learned Additional Civil Judge/Judge Small Causes Court framed seven issues for adjudication. The evidence of respondent no.2 was taken. He admitted in his statement that he wanted the petitioners to vacate the premises because he wished to start a Coaching Center for his unemployed graduate son. Respondent no.2 also accepted that Deepu was the nephew of late Rajesh Kumar Saxena, the original tenant and he was taking care of the shop but died during the pendency of the Suit.

5. It has been argued by learned counsel for the petitioners that in the statement given by the landlord before the learned court below he accepted the rent of the shop as Rs.300/- which included water tax and house tax. In the statement of petitioner no.1,he had stated that petitioner had deposited rent upto June 2005 and it was not disputed during cross-examination by the plaintiff.

6. Learned court below found that there was a relationship of landlord and tenant between the petitioner and respondent no.2 and that the petitioner was also depositing the rent in SCC no.10/2005 under section 20 (4) of the Act,1972 which meant that the petitioner was always ready and willing to tender the rent to the landlord but he refused to accept the same. Learned court below observed that Deepu was the nephew of the original tentant and was a family member therefore there was no evidence of sub-letting.Learned Civil Judge/Judge Small Causes Court dismissed the suit by judgment

and order dated 02.11.2015 . The suit for injunction, namely Suit No.72 of 2005 was, in the meantime, also decreed by an order dated 22.12.2007 to the effect that defendant-landlord shall not evict the petitioners except in accordance with the procedure prescribed by law.

7. The landlord/respondent no.2 preferred a Revision against the judgment and order dated 02.11.2015 registered as SCC Revision no. 40 of 2015 again on the ground of default in payment of rent and on the ground of sub-letting. In the Revision, it was stated that although the petitioner preferred an application for depositing the rent in Court under Section 20(4), petitioner did not deposit water tax and house tax.The Revisional Court has given a finding that tenant did not deposit house tax and water tax, therefore, they were not entitled for the benefit of Section 20(4) of the Act,1972.The Revisional Court also held that Deepu was not a family member of late Rajesh Kumar Saxena, the original tenant and running of the shop in question by him amounted to sub- letting.

8. It has been argued by learned counsel for the petitioner that Revisional court far exceeded its jurisdiction under Section 25 of the provisions of Small Causes Courts Act.The revisional Court reopened the findings of fact recorded by the Judge, Small Causes Court and wrongly concluded that the petitioners were defaulters and that Deepu was a sub tenant.He failed to appreciate that the petitioners were depositing rent in Court and also that if tenanted premises were occupied by family members,it cannot be said to be case of sub-letting. Moreover the alleged sub tenant Deepu had already expired during the pendency of the SCC Suit and petitioner no.1 was taking care of the shop in question and he was legal heir of the original tenant being his son.

9. Sri Anurag Narain has appeared for opposite party no.2. He has pointed out the averments made in the counter affidavit filed by him on 22.03.2018 and also a supplementary counter affidavit filed on 23.04.2019. It is the case of the respondent no.2 that the statement recorded by learned court below of landlord referred to another shop in the same premises which had been let out for Rs.300/- per month to some other tenant which rent included house tax and water tax. So far as shop in qustion is concerned, its rent was only Rs.275/- and did not include house tax and water tax which had to be deposited separately.

10. It has been argued by Sri Anurag Narain that unless it is indicated in the rent agreement or otherwise by the conduct of the parties in the past, tenant's failure to pay water tax and house tax separately shall amount to default in payment of rent. It has also been argued that if payment of rent is stopped for some reason, it is deposited in the Court. To get the benefit of Section 20(4) of Act,1972 , the tenant has to deposit not only rent, house tax and water tax but also interest accrued thereon at the rate of 9% and also costs including the Advocate's fee.

11. It has been submitted that the Revisional court did not exceed its jurisdiction as there were only two questions of law that were to be considered by the Revisional court; one was with regard to whether Deepu, the nephew of late Rajesh Kumr Saxena could be said to be a family member under section 3(g) of 1972 Act and other question was whether non deposit of rent alongwith house tax and water tax and interest and costs on the first

date of hearing before the Court concerned and thereafter failure to continuously deposit month to month of rent, house tax and water tax during the pendency of the suit would amount to the tenant be declared as defaulter.

12. Learned counsel for the respondent no.2 has placed reliance upon definition of "family members" under Section 3(g) of the Act,1972 which specifically included only spouse, male-female parents, grand parents daughter of original tenant or his grand daughters the word "nephew" is not included in the definition of family member.

The Revisonal court looking into account to the fact that petitioners had not denied that shop in question was being run by Deepu, the newphew of late tenant and the Revisonal court on the basis of definition under Section 3(g) of the Acts 1972 rightly came to the conclusion that nephew is not a family member and, therefore,it amounted to sub-letting.

13. Learned counsel for the respondent no.2 has also pointed out that the findings recorded by learned revisonal court in the order impugned that the petitioners had not deposited rent alongwith house tax and water tax and with interest and costs either at the time of the institution of the SCC Suit nor did they deposit the said rent month to month regularly during the pendency of suit Some-times the tenants had given application for depositing two months rent at others they had deposited 15 months rent altogether, without depositing house and water tax. Learned counsel for the respondent no.2 had placed reliance upon the judgments rendered by this Court in the case of ***Allah Bux Vs. Ist Additional District Judge and others, AIR 1996 Allahabad 49*** and the judgment rendered by this Court in the case of ***Radhey Shyam Gupta Vs. Jawahar Lal Bhatia, (1996) 28 ALR, 518*** and the judgment rendered by this Curt in the case of ***Abul Alim Vs. District Judge, Jhansi and others 1995(2) Allahabad Rent Case, 52.*** To substantiate his arguments regarding petitioner being defaulter for not depositing rent month to month alongwith house tax and water tax.

14. In *Allah Bux Vs. Ist Additional District Judge* and others (supra) this Court has considered the case of the the tenant who fell in arrears of rent for six months and deposited the same under Section 30 of 1972 Act in the Court concerned. The tenant argued that he could not be said to have committed any default wherein the meaning of Section 20 of 1972 Act and was, therefore, not liable for ejectment. The Court observed that the landlord served notice to the tenant for deposit of arrears of rent for four months and on failure to deposit the same despite such demand the tenant was liable to be evicted. The service of notice by landlord meant that landlord was willing to accept the rent, therefore, the tenant should not have deposited the same in Court. A perusal of section 30 of the Act of 1972 showed that it permitted to deposit of rent in Court in the event of refusal by the landlord. The landlord by sending notice in writing to the tenant signified his willingness to accept rent. Despite service of notice the tenant chose to deposit the arrears of rent in the Court of Munsif which amounted to failure to comply 0f the Section 20(4) and therefore he could not be saved under Section 30 of Act.

15. In *Abul Alim Vs. District Judge, Jhansi* (supra) a Coordinate Bench of this Court considered section 7 of the Act 1972 wherein it has been provided that the liability to pay water tax is that of the tenant , subject to any contract in writing to the contrary. It was held that when there was no contract in writing to the contrary, the liability of payment of water tax and house tax was that of the tenant. The tenant having not paid the water tax in addition to and as part of rent,was liabile to eviction. Such a Tenant can be saved by section 20(4) of the Act of 1972, if he deposited the arrears of water tax on the first date of hearing. However, the tenant had not deposited the arrears even on the first date of hearing hence the Court allowed the writ petition filed by the landlord.

16. In *Radhey Shyam Gupta Vs. Jawahar Lal Bhatia (Supra),* this Court observed that the tenant should have deposited their taxes also at the time of first hearing under section 20(4) of the Act 1972 to avoid liability of eviction. The tenant could have also deposited the amount under section 30 of the Act in case of refusal of landlord to accept it. Since neither of the two options were exercised by the tenant he was liable for eviction. Section 7 of the Act of 1972 was quoted by Hon'ble Judge and it was observed that there was a duty of the tenant to pay water tax and he should not wait for payment by the landlord to Municipal authorities and then later on pay the same. The court relied upon the observations made in *Abul Alim* (supra) and observed that although the provision is very harsh as it effected the right to shelter of the tenant but tenant should have been advised correctly and he should have paid the arrears of water tax at the time of first hearing under section 20(4) of the Act. The tenant having committed default he was liable for eviction.

17. Sri Anuj Dayal in rejoinder has submitted that it is evident from the statement of respondent no.2 before learned trial court that Deepu was the tenant's nephew and he had died during pendency of the Suit. Sri Anurag Narain however pointed out from the statement of landlord recorded by learned trial court that rent of the adjoining shop was Rs.300 and it included house tax and water tax. The shop in question ws let out only for Rs. 275/- per month.

18. This Court has considered the judgement of the Revisonal Court under challenge and finds therefrom that the revisonal court after mentioning the fact of filing of the SCC Suit and framing of issues by learned trial court and decision therein has referred to the question whether the rent that was being paid by the petitioner at the rate of Rs.275/- per month included house tax and water tax or whether it was exclusive of house tax and water tax which has to be paid separately at the rate 10 % of the rent of the shop. With regard to question of default, the Revisional Court has considered various applications made by the petitioners herein in 2011-2012 and then again in 2014 for depositing two months of rent, fifteen months of rent and six months of rent at the rate of Rs.275/- per month only without tendering separate amounts for house tax and water tax which was their statutory duty to deposit @ 10% of the monthly rent. He came to the conclusion that rent was deposited irregularly and the petitioners were in default in depositing the rent also the petitioners did not deposit house tax and water tax at any point of time in Court.

19. The Revisonal Court also found that Deepu was the nephew and not a family member of the original tenant and the petitioners had admitted that he was the running shop in question at the time when the SCC Suit was filed although during the pendency of SCC Suit he had died. Learned Revisonal Court also observed that the original tenant had been let out the shop in 1985 at the rate of Rs. 275/- per month. At the time of decision of revision after 32 years, the tenans were paying only Rs.275/- per month and that too irregularly and for most of the time they were in default. They were running a General Merchant business in the shop in question .

20. Hence, the Revisional court allowed the Revision, setting aside the order passed by Judge Small Causes Court dated 02.11.2015 and dircted the petioners to vacate the shop and give its peaceful possession to the landlord within two months and also to pay all the arrears at the rate of Rs.275/- per month to him.

21. With regard to the arguments raised by learned counsel for the petitioners that the Revisonal court exceeded its jurisdiction unraveiling the findings of fact recorded by the learned trial court.This court finds that the Revisonal court was entitled to look into the findings recorded by the trial court in the light of statutory provisions. There were two legal questions to be considered by the Revisonal court; one relating to whether a nephew can be said to be a 'family member' under 1972 Act, and the other was whether house tax and water tax can be said to be included in the rent offered by the tenant in the absence of any agreement between the parties and whether failure to deposit arrears of rent and monthly rent thereafter in the learned trial court and during pendency of revision before revisonal court amounted to default,dis-entitling the tenant from the protection of Section 20(4) of Act 1972. Both these question have been answered by the Revisonal Court based upon the evidence that was recorded by the learned trial court. No fresh evidence was taken to come to the findings as recorded in the judgment impugned.

22. It is settled law that jurisdiction in SCC Revision is greater than the jurisdiction under Section 115 C.P.C. and less that of as appeal. It has been so held by the Constitution Bench of Hon'ble Supreme Court in the case of ***Hindustan Petroleum Corporation Limited Vs. Dilbahar Singh (2014) 9 SCC,78.***

23. In *Hindustan Petroleum Corporation Limited Vs. Dilbahar Singh,*(supra),the Constitution Bench of Hon'ble Supreme Court was considering the question of scope of Revison under various Rent Control Acts as interpreted by the respective High Court, and observed in para 28 and 29 as follows:-

"28. Before we consider the matter further to find out the scope and extent of revisional jurisdiction under the above three Rent Control Acts, a quick observation about the "appellate jurisdiction" and "revisional jurisdiction" is necessary. Conceptually, revisional jurisdiction is a part of appellate jurisdiction but it is not vice versa. Both, appellate jurisdiction and revisional jurisdiction are creatures of statutes. No party to the proceeding has an inherent right of appeal or revision. An appeal is continuation of suit or original proceeding,

as the case may be. The power of the appellate court is coextensive with that of the trial court. Ordinarily, appellate jurisdiction involves rehearing on facts and law but such jurisdiction may be limited by the statute itself that provides for the appellate jurisdiction. On the other hand, revisional jurisdiction, though, is a part of appellate jurisdiction but ordinarily it cannot be equated with that of a full-fledged appeal. In other words, revision is not continuation of suit or of original proceeding. When the aid of Revisional Court is invoked on the revisional side, it can interfere within the permissible parameters provided in the statute. It goes without saying that if a revision is provided against an order passed by the Tribunal/appellate authority, the decision of the Revisional Court is the operative decision in law. In our view, as regards the extent of appellate or revisional jurisdiction, much would, however, depend on the language employed by the statute conferring appellate jurisdiction and revisional jurisdiction.

29. With the above general observations, we shall now endeavour to determine the extent, scope, ambit and meaning of the terms "legality or propriety"; "regularity, correctness, legality or propriety"; and "legality, regularity or propriety" which are used in the three Rent Control Acts under consideration:

29.1. The ordinary meaning of the word "legality" is lawfulness. It refers to strict adherence to law, prescription, or doctrine; the quality of being legal.

29.2. The term "propriety" means fitness; appropriateness, aptitude; suitability; appropriateness to the circumstances or condition conformity with requirement; rules or principle, rightness, correctness, justness, accuracy.

29.3. The terms "correctness" and "propriety" ordinarily convey the same meaning, that is, something which is legal and proper. In its ordinary meaning and substance, "correctness" is compounded of "legality" and "propriety" and that which is legal and proper is "correct".

29.4. The expression "regularity" with reference to an order ordinarily relates to the procedure being followed in accord with the principles of natural justice and fair play."

After considering the relevant case laws , the Supreme Court give it conclusion in para 43 as follows:-

"43. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the first appellate court/first appellate authority because on reappreciation of the evidence, its view is different from the court/authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the court/authority below is according to law and does not suffer from any error of law. A finding of fact recorded by court/authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself as to the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity,

correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity.(emphasis supplied)"

24. This Court does not find any factual legal infirmity in the order impugned.The writ petition is **dismissed**. Petitioners are directed to pay all the arrears of rent since 01.07.2013 alongwith house tax and water tax at the rate of 10% to the respondent no.2 within two months from today and simple interest at the rate of 9% per annum thereon, and to give vacant peaceful possession of the shop in question to the landlord/ respondent no.2 within the same period.

(2021)07ILR A117
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.07.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Rent Control No. 12338 of 2019

Mohammad Aamir ...Petitioner
Versus
Dist. Judge Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Khaleeq Ahmad Khan, Mohammad Akram, Mohd. Mubali Gussalam

Counsel for the Respondents:
Mohammad Ehtesham Khan, Neeraj Chaurasiya

Even if the issue of jurisdiction not raised-and no objection was taken before him to considered the question-always court's duty to decide question of jurisdiction and limitation suo moto-impugned orders set aside.

W.P. partly allowed.(E-7)

List of Cases cited:

1. Harshad Chiman Lal Modi Vs DLF Universal Ltd. & anr. (2005) 7 SCC 791

2.Bahrein Petroleum Co. Ltd. Vs P.J. Pappu, AIR 1966 SC 634

3. Kiran Singh Vs Chaman Paswan , AIR 1954 SC 340

4. United Bank of India Vs Achintyakumar Lihiri, 2007(25) LCD 176

5. Manoj Kumar Gupta Vs Sunil Kumar Gupta, 2019 (1) JCLR 832(All)

6. M/s Bharat Petroleum Corporation Limited & anr. Vs Rent Control and Eviction Officer/ City Magistrate, Allahabad & ors., 2015 (110) ALR 177

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

1. Heard Sri Mohd. Mubalig-Us-Salam, learned counsel for the petitioner and Sri Mohammad Ehtesham Khan, learned counsel appearing for respondent/landlord.

2. It is the case of the petitioner as argued by his Counsel that Sri Riyaz

Ahmad, Sri Ayaz Ahmad, Sri Ahraz Ahmad and Sri Imran Ahmad, all four sons of Late Aziz Ahmad were the landlords of the property in question i.e. House no. 429/40 ad-measuring 3256 Sq. feet situated in Mohalla Muazzam Nagar, Pargana, Tehsil and District - Lucknow by virtue of registered sale-deed dated 23.04.2001 executed by one Mangli Prasad. On 02.02.2006 Sri Ahraz Ahmad, son of Late Aziz Ahmad had let out the two shuttered shop situated in aforesaid building no. 429/40 to the petitioner on rent at the rate of Rs.2000/- per month with the condition that the rate rent will keep on increasing at the rate of 5% on the expiration of every three years. Opposite party nos. 3 and 4 are the daughters of late Aziz Ahmad and after the death of Late Aziz Ahmad, Sri Ahraj Ahmad orally informed the petitioner that opposite parties no. 3 and 4 had been given the ownership of the two shops in question on the basis of family settlement that had taken place after the death of their father Aziz Ahmad on the basis of his Will to carry out his last wishes. The petitioner bonafidely believed the oral statement of Ahraj Ahmad and starting giving rent to respondent no.3 an 4 at the rate of Rs.2400/- per month.

3. The opposite parties no. 3 and 4 filed an application under Section 21(1) (a) of the U.P. Act no.13 of 1972 before the Prescribed Authority, saying that they were living in a rent ed accommodation at Kanpur and they wished to start their business in the shop in question at Lucknow. The petitioner filed his objection to the said application wherein he stated clearly that Aziz Ahmad was not the owner of the property in question . He could not have Willed the same to opposite parties no. 3 and 4. Ahraj Ahmad with his three brothers had purchased the property through registered sale-deed and the shop in question had been let out by Sri Ahraz Ahmad,who was the owner and landlord of the shop in question. It was also stated that the petitioner was running a General Merchant business in the two shops in question for the past 12 years which was the only source of income and it would be difficult for him to seek alternative accommodation in neighborhood.

4. The Prescribed Authority in the order dated 19.11.2018 considered three points i.e. (a) whether there was relationship of landlord and tenant between the parties (b) whether the applicants have a bonafide need of the shops in question (c) the balance of convenience and relative hardship of the parties to the dispute; and passed an order in favour of the applicants saying that petitioner had himself admitted that he was paying rent to opposite parties no.3 and 4 on the request of the original owner Ahraj Ahmad. With regard to bonafide need, it was found by the Prescribed Authority that indeeds the applicants were living in rented accommodation at Kanpur and with regard to the balance of convenience and relative hardship, it was observed that there was no statement of the tenant that he tried to look for alternative accommodation and could not find the same in the neighborhood. It was observed that failure to look for alternative accommodation in itself disentitled the tenant for any sympathetic consideration.

5. After the application was allowed, the petitioner filed an Appeal before District Judge which was also decided against him on 29.03.2019 , hence this writ petition.

6. It has been argued by learned counsel for the petitioner that in the Appeal , petitioner had taken a specific ground that rent of the shop in question was Rs. 2400/- per month i.e. beyond monitory limit of

Rs.2000/- per month as given in Section 2(1) (g) of the Act 13 of 1972 hence the Prescribed Authority had no jurisdiction to hear the matter of release.

7. Learned counsel for the petitioner has read out section 2(1) which enumerates exemptions from the operation of the Act and sub-section (g) thereof says that any building whose monthly rent exceeds Rs.2000/- would be outside the operation of the Act. Despite this specific plea being taken in Appeal, the appellate court has not considered the same and passed the impugned order .Learned counsel for the petitioner has placed reliance on the judgments of this Court as well as the Hon'ble the Supreme Court to buttress his arguments.

8. Learned counsel for the petitioner has cited a judgment of Hon'ble Supreme Court in the case of ***Harshad Chiman Lal Modi Vs. DLF Universal Ltd. and another (2005) 7 SCC 791*** wherein learned counsel has placed reliance in paragraph 30, 32, 33 and 37. The Supreme Court had observed that the jurisdiction of a court may be classified into several categories. The important categories are (I) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject matter. So far as first two are concerned, it is incumbent upon the parties to raise objection at the very first opportunity, if they do not do so, they cannot take objection at a subsequent stage. The jurisdiction as to subject matter however, is totally distinct and stands on different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by the Statute, Charter or Commission, it cannot take up the cause or matter. The order passed by by a court having no jurisdiction is a nullity.

9. Learned counsel for the petitioner has pointed out the observations made by Hon'ble Supreme Court referring to its earlier judgments in the cases of ***Bahrein Petroleum Co. Limited Vs. P.J. Pappu, AIR 1966 SC 634*** and ***Kiran Singh Vs. Chaman Paswan , AIR 1954 SC 340 .*** The Supreme Court in sum and substance has observed that the decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon even at the stage of execution, and even in collateral proceedings.

10. Learned counsel has placed reliance upon the judgment of a Coordinate Bench of this Court in the case of ***United Bank of India Vs. Achintyakumar Lihiri, 2007(25) LCD 176.*** (paragraphs 18,19,20); wherein this Court had considered the order passed under U.P. Act 13 of 1972 and it observed that under the Act an action can be initiated before the authority only when the subject matter of the proceeding is within the jurisdiction of the Authority. It was a case where the rent of the shop in question was Rs. 8000/- per month initially which was increased from time to time and was Rs.15000/- per month, at the time of application filed before the Prescribed Authority under the Act. The Court observed in paragraphs no.18,19,20 that there was an inherent lack of jurisdiction in the Courts below then any waiver or acquiescence or not raising of objection at the first instance by the petitioner, even if accepted, would not bring the building under the purview of the Act nor the Courts

could adjudicate the said dispute as there was no jurisdiction at all with them to do so.

11. Learned counsel for the petitioner has also placed reliance upon the judgment rendered by a Coordinate Bench of this Court in ***Manoj Kumar Gupta Vs. Sunil Kumar Gupta, 2019 (1) JCLR 832(All)*** (paras 6 and 7); where the Court was dealing with a Rent Control matter and held that that once it is admitted by the landlord that the rent of the premises was Rs.2000/- per month plus water tax, the rent of the building would definitely be more than the monitory limit as given under clause (g) of sub-section(1) of Section 2 of the Act, consequently the Prescribed Authority has no jurisdiction to deal with the application.

12. Learned counsel for the petitioner has placed reliance upon another judgment rendered by a Coordinate Bench in case of ***M/s Bharat Petroleum Corporation Limited and another Vs. Rent Control and Eviction Officer/ City Magistrate, Allahabad and others, 2015 (110) ALR 177;*** where considering Section 2(1) (g) of the Act which provides that the provisions of the Act would not be applicable to a building whose monthly rent exceeds Rs.2000/-. This Court observed that the Rent Control and Eviction Officer had exceeded his jurisdiction in entertaining the application.

13. Sri M.E. Khan counsel appearing on behalf of opposite parties no.3 and 4 has very fairly stated before this Court that the question of jurisdiction was raised in the appeal by the petitioner but learned appellate court has failed to consider the ground of challenge in the impugned order.

14. This Court has carefully perused the order passed by Prescribed Authority and also the judgment rendered in appeal dated 29.03.2019 and finds from the perusal of both the orders that none of the courts below had considered the question of jurisdiction. It was the duty of the Prescribed Authority even if the issue of jurisdiction was not raised and no objection was taken before him, to have considered the question of jurisdiction as it is always the duty of the court below/ authority concerned to decide the question of jurisdiction and that of limitation suo moto even if it is not raised by any of the parties to the dispute. The Prescribed Authority had passed the order assuming the jurisdiction as no dispute was raised regarding the same before him. Learned appellate court, however, failed to exercise its jurisdiction to correct the errors of law and fact even where such ground was taken in appeal and was argued before it, it was not considered in right perspective, when the appellate court is court of both law and fact. In this case question of law was regarding jurisdiction and question of fact that was arising for determination was whether indeed premises in question was let out on rent beyond Rs.2000/- per month.

15. The Judgment and order dated 29.03.2019 passed by learned District Judge in Rent Appeal No. 35 of 2018 is set aside and the matter is remanded to the appellate court to pass a fresh order in the light of observations made herein above.

16. Since the pleadings have been exchanged between the parties before the Prescribed Authority and all the pleadings before appellate court have already been completed, the only question that the Appellate Court would now be considereing would be with regard to the rate of rent and it should decide the matter expeditiously as possible, say, within a

period of six months from the date a copy of ordered produced before it.

17. The writ petition is **partly allowed.**

18. Since both the parties are represented before this Court, this Court feels it appropriate to fix a date before learned Appellate Court for appeal to be taken up. Let the Appeal be taken up for hearing before the District Judge, Lucknow on 28.07.2021.

(2021)07ILR A121
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.07.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 117 of 2005

Jawahar & Ors. ...Petitioners
Versus
D.D.C. Faizabad & Ors. ...Respondents

Counsel for the Petitioners:
Radhey Shyam Tiwari, Vinod Kumar Singh

Counsel for the Respondents:
C.S.C., M.A. Siddiqui

Consolidation Proceedings - U.P. Zamindari Abolition and Land Reforms Act, 1950: Section 171- In case the name of any person has been left to be recorded by mistake or for some other reasons it cannot be said that the right of a male lineal descendant accrued to him by operation of law has been extinguished. (Para 16).

During verification of records at the time of consolidation proceedings, it was found that the petitioners are also entitled for half of the shares in the land in dispute therefore an objection was filed. (Para 17)

Writ Petition Allowed. (E-8)

List of Cases cited:

1. Beni Prasad & ors. Vs Deputy Director of Consolidation, Allahabad & ors. 1986 All. 999 I(followed)

2. Shri Ram & ors. Vs Deputy Director of Consolidation, Allahabad & ors. 2011 (29) LCD 764 (followed)

3. Shahid Khan & ors. Vs Deputy Director of Consolidation, Gautam Buddha Nagar & ors. 2011 (113) RD 723 (followed)

4. Bhagwat Sharan (Dead through LRs.) Vs Purshottam & ors. 2020 (6) SCC 387 (distinguished)

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

1. Heard, Sri R.R. Upadhyaya, learned counsel for the petitioner and Sri Aftab Ahmad, Advocate holding brief of Sri M.A.Siddiqui, learned counsel for the respondents no. 2 and 3. Notice on behalf of respondent no.1 has been accepted by learned Chief Standing Counsel.

2. The instant writ petition has been filed challenging the order dated 27.11.2004 passed by the Deputy Director of Consolidation, Faizabad (respondent no.1) in Revision No.986 / 165.

3. The brief facts, for adjudication of the present case, are that the land in dispute relating to Khata No.169 situated in Village- Chandipur Nagahra was recorded in the name of Tulsi Ram son of Ram Sanehi, Khata No.87 situated in Bansawa was recorded in the name of Ram Sanehi

son of Sahti and Khata No.857 situated in the Village- Mehdauna was recorded in the name of Tulsi Ram son of Ram Sanehi in the basic year. The dispute was also recorded, showing the mistake and on the basis of enquiry, that the petitioners are the co-tenure holders of the land in dispute so their names should also be recorded. On publication of records, an objection was filed under Section 9(2) of the Consolidation of Holdings Act, 1953 (here-in-after referred as the Act of 1953) by the father of the petitioners about half share in above Khatas i.e. in the land in dispute before Assistant Consolidation Officer (here-in-after referred as the A.C.O.). The matter could not be settled therefore A.C.O. referred the matter to the Consolidation Officer for adjudication. The Consolidation Officer, after consolidating all the cases, framed six issues on the basis of pleadings of the parties. After considering the evidence adduced by the parties and the pleadings, the Consolidation Officer allowed the objection and directed to record the name of the petitioners also as per their shares by means of the order dated 08.02.2002 as their father had died during pendency of the case. The respondents no.2 and 3 filed an appeal because their father had also died during pendency of the case before the Consolidation Officer.

4. The Appeal No.6297 / 5474 under Section 11(1) of the Act of 1953 was dismissed by the Settlement Officer Consolidation (here-in-after referred as S.O.C.) by means of the order dated 18.04.2003. Being aggrieved a revision under Section 48 of the Act of 1953 was filed before the Deputy Director of Consolidation (here-in-after referred as D.D.C.), Faizabad now Ayodhya which was allowed by means of the order dated 19.11.2004 and the orders passed by the Consolidation Officer and the S.O.C. have been quashed. Hence the present writ petition has been filed.

5. Submission of learned counsel for the petitioners was that the land in dispute was acquired by a common ancestor of the petitioners and the respondents no.2 and 3, Sahti son of Bandhan. Sahti had two sons; Ram Sanehi and Budhai. Budhai was a dancer and living out in Burma for the purposes of earning therefore the name of only Ram Sanehi was recorded and the name of Budhai; predecessor-in-interest of the petitioners was left to be recorded in the records after death of Sahti, while the land in dispute which was coming from the common ancestor was devolved on both the sons as per section 171 of the U.P. Zamidari Abolition and Land Reforms Act, 1950 (here-in-after referred as the Act of 1950). Therefore in case the name of the predecessor in interest of the petitioners was left to be recorded it can not be said that their right was extinguished. Therefore at the time of verification of records during the consolidation proceedings a dispute was recorded in CH Form-5 to the effect that the petitioners are also entitled for half of the share in the land in dispute. Accordingly objection was duly considered and allowed after considering the evidence adduced by the parties.

6. The father of the respondents no.2 and 3 had admitted in his evidence that Budhai i.e. the grandfather of the petitioners was his uncle. He further submitted that the objection regarding Section 11(A) was neither raised nor any issue was framed by the Consolidation Officer therefore it could not have been considered. The appeal filed by the respondents no.2 and 3 was also dismissed but the revision has been allowed without

considering the aforesaid and setting aside the findings recorded by the Consolidation Officer and the S.O.C. only on the ground that no objection was filed at the time of first consolidation.

7. He had also submitted that the learned D.D.C. has wrongly and illegally held that it could not be proved that the land in dispute was acquired by the common ancestor and was coming in the same form. He had also submitted that the respondents had tried to create a doubt by making a new plea of another pedigree before the appellate court which was rejected. He had also submitted that there was no issue of jointness of family or joint nucleus because the land was coming from a common ancestor but the learned D.D.C. has wrongly and illegally considered it and held that it could not be proved.

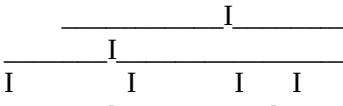
8. On the basis of above, learned counsel for the petitioners had submitted that the impugned order is not sustainable in eyes of law and liable to be quashed and the writ petition is liable to be allowed. He relied on ***Beni Prasad and Others Vs. Deputy Director of Consolidation, Allahabad and Others; 1986 All. 999, and Shri Ram and Others Vs. Deputy Director of Consolidation, Allahabad and Others; 2011 (29) LCD 764.***

9. Per contra, learned counsel for the respondents no.2 and 3 had submitted that the petitioners' grandfather had not filed any objection at the time of first consolidation which was held around the year 1962 therefore in the second consolidation he could not have filed any objection and it was barred by Section 11(A) of the Act of 1953. The respondents no.2 and 3 had raised a ground in the appeal but the same was not considered and the revisional authority after considering it has rightly allowed the revision on the ground that the objection raised by the petitioners is barred by Section 11(A) of the Act of 1953. There is no illegality or infirmity in it. The writ petition has been filed on misconceived and baseless ground which is liable to be dismissed. He relied on ***Shahid Khan and Others Vs. Deputy Director of Consolidation, Gautam Budhha Nagar and Others; 2011 (113) RD 723 and Bhagwat Sharan (Dead through LRs.) Vs. Purshottam and Others; 2020 (6) SCC 387.***

10. I have considered the submissions of learned counsel for the parties and perused the record.

11. The dispute relates to Khata No.169 situated in Village- Chandipur Nagahra, Khata No.87 situated in Village- Bansawa and Khata No.857 situated in Village- Mehdauna. On publication of records after enquiry in the consolidation proceedings, an objection under Section 9(2) was filed by Budhai, grandfather of the petitioners no.1 and 2 which was objected by the father of the respondents no.2 and 3. The claim was set up on the basis of following pedigree:-

Bandhan
I
_____Sahti_____
I I
Ram Sanehi Budhai
I I
Tulsi Ram Ram Bahore
(died during case) (died during case)



12. The learned Consolidation Officer, after examining the records and the evidence adduced before it, recorded a categorical finding that the land in dispute was recorded in the name of Sahti son of Bandhan in the earlier records which were of 1356-65 Fasli, 1362-65 Fasli, 1360-66 Fasli and 1368 Fasli etc. He has also recorded that the name of common ancestor of the parties Sahti is recorded in the documents which have been filed by the respondents also in support of their claim. Tulsi Ram, the father of the respondents no.2 and 3, who got himself examined in evidence had also admitted that मेरे बाबा का नाम सहती था। उनको सहतु भी कहते थे। मेरे बाबा के बाप का नाम बंधन था। सहतु के दो लड़के राम सनेही, बुधई थे। बुधई के लड़के राम बहोर है तथा राम सनेही का मै लड़का हूँ। बुधई मेरे सगे चाचा थे। बुधई कब मरे मै समझता नहीं हूँ। उनकी शक्ल मैंने देखा नहीं था। यह सही है कि राम सनेही बुधई सगे भाई थे । बुधई राम सनेही कब अलग हुए थे मैं नहीं जानता हूँ। A copy of the statement has been filed as annexure no.19 to the writ petition. As such it was admitted by the respondents that Sahti was the common ancestor of the parties and Budhai was the real brother of Ram Sanehi and when they separated, it was not known, therefore partition has not been proved. It was also proved from the record that the land in dispute was acquired by Sahti son of Bandhan. Therefore after death of Sahti, the land devolved on Ram Sanehi and Budhai both and the names of both should have been recorded but since the name of only Ram Sanehi was recorded and Budhai was left to be recorded by mistake therefore the objection was allowed.

13. In the objection filed by the respondents before the Consolidation Officer the plea of Section 11 (A) was not taken but in the appeal a plea was taken that the objection is barred by Section 11(A) and a fresh case was also sought to be set up by presenting a fresh pedigree and depicting that Budhai had two sons; Sahti and Bahti and Ram Sanehi was the son of Sahti and it was acquired by Sahti. It was also pleaded that the partition had already taken place therefore the petitioners are not entitled for any co-tenancy and share. The learned appellate court, after examining the records and evidence, found that the pedigree set up by the respondents is off the record and this plea was not taken before the lower court. The land in dispute was recorded in the name of Sahti son of Bandhan who was the common ancestor of the parties. Accordingly the S.O.C. dismissed the appeal holding that the respondents have failed to prove that Bandhan had two sons; Sahti and Bahti whereas it was admitted by Tulsi Ram in his evidence that the name of his grandfather was Sahti who was used to be called Sahtoo also and the name of his father was Bandhan. Sahti had two sons; Ram Sanehi and Budhai and Budhai was his real uncle. Therefore, it is apparent that the respondents had tried to deny the claim to the petitioners fraudulently on the basis of false pleading.

14. The respondents no.2 and 3 had filed the revision. The revisional authority recorded a finding that the petitioners have failed to prove the jointness of two families from any

document while it is apparent from the oral evidence that the partition had taken place at the time of ancestor of the petitioners namely Budhai therefore the findings recorded by the revisional authority are not sustainable because on the one hand he is saying that on the basis of oral evidence, it has been found that the partition had taken place at the time of Budhai against the admission of Tulsiram that he does not know when Budhai and Ram Sanehi had separated and it has also not been proved that if separated what was given to the petitioners. On the other hand he has recorded a finding that jointness of two families could not be shown by any documentary evidence while it was not the case of anybody therefore it is not sustainable in the eyes of law. This Court also failed to find from any record placed before this Court that there was any issue of jointness of two families or joint nucleous whereas the case in hand is that the land in dispute was acquired by common ancestor of the parties, Sahti son of Bandhan, therefore it was devolved on both the sons of Sahti equally as per Section 171 of the Act of 1950 or not. If it was devolved on both the sons, the name of the petitioners should also be recorded.

15. The revisional authority has allowed the revision on the ground of bar under Section 11(A). While this plea was not taken in the memo of revision which is annexed as annexure no.5 to the writ petition. The revisional authority, also without setting aside the factual and concurrent findings recorded by the Consolidation Officer and S.O.C., held that it is not proved that the land in dispute was recorded in the name of the common ancestor of the parties and it was coming in the same form while a categorical finding has been recorded by the Consolidation Officer and the S.O.C. after considering the evidence and previous records also and giving the old and new numbers of plots. Learned Revisional Authority has also failed to consider that the grandfather of the petitioners lived his most of the life out and he had come only four years ago whereas Ram Sanehi was living here, which has not been disputed by the opposite parties. In these undisputed facts and circumstances, if the name of the petitioners could not be recorded, it can not be a ground to deny the rightful claim, if the petitioners are entitled for the same in accordance with law.

16. Section 171 of the Act of 1950 provides that Subject to the provisions of Section 169, when a bhumidhar or asami, being a male dies, his interest in his holding shall devolve upon his heirs being the relatives specified in sub-section (2). Sub-section 2 (A) provides widow, unmarried daughter and the male lineal descendant per stirps. Therefore on the death of a bhumidhar or asami his land shall devolve on his male lineal descendant i.e. sons and others, if any, by operation of law. The names are to be recorded in the revenue records in accordance with the procedure prescribed by law. Therefore, in case the name of any person has been left to be recorded by mistake or for some other reasons it can not be said that the right of a male

lineal descendant accrued to him by operation of law has been extinguished.

17. In the present case, during verification of records at the time of consolidation proceedings, it was found that the petitioners are also entitled for half of the shares in the land in dispute therefore this dispute was also recorded. As such on objection being filed it can be examined in case it is found that there are valid reasons the right can not be taken away because in view of Section-9, 9(A) and 11(A) it is the duty of A.C.O. to make an enquiry and in case it is found that there are some other legal heirs also he has to record it and refer the matter to the Consolidation Officer for adjudication, who has to adjudicate after considering the pleadings and evidence adduced by the parties.

18. So far as the ground of Section 11(A) is concerned, this plea was neither raised nor any issue was framed and considered by the Consolidation Officer so it can also not be said as to whether the land in dispute was in consolidation or not in earlier consolidation operation, and if it was, any notice was issued and served on the predecessor-in-interest of petitioners or not. Section 9(2) of the Act provides that any person to whom a notice under sub-section (1) has been sent, or any other person interested may, within 21 days of the receipt of notice, or of the publication under sub-section (1), as the case may be, file before the Assistant Consolidation Officer, objections in respect thereof disputing the correctness or nature of the entries in the records or in the extracts furnished therefrom, or in the Statement of Principles, or the need for partition. A substantive right accrued to a person can not be taken away merely on the basis of some procedural lapse, however it would be material and may be fatal in case any other person was claiming the land in dispute on the basis of adverse possession or otherwise.

19. This Court, considered similar issue in the case of ***Shri Ram and Others Vs. Deputy Director of Consolidation, Allahabad and Others (Supra)***, which was decided by a Division Bench on being referred by a Single Judge. In the said case the objection of the respondent no.3 therein and the appeal was dismissed on the ground that the claim of the respondent no.3 is barred under Section 49 of the Act, 1953, since the claim of co-tenancy was not raised during the earlier consolidation proceeding but the revision filed by the respondent no.3 was allowed and he was declared co-tenant to extent of half of the share. The Division Bench has held that the Act, 1953, was enacted with the object of ensuring compactness of holdings and also to provide a forum for settlement of disputes of all nature including rules in relation of land, mistakes in the revenue records and shares of tenure holders etc. It has further held that in filing objection no kind of limitation can be read in filing objection under Sections 9 and 9A, nor there can be any classification on the ground of disputes of recent past or dispute of remote past. When an objection can be filed by any interested person, objection can be raised on any conceivable or valid ground and to read any prohibition in the provision that objection should relate to only recent disputes is doing violence to the express provision of the Act. It has further been observed that law pertaining to land tenure is principally for determining rights of peasants of this country who earn their livelihood from agriculture. Most of them are not literate enough to know their rights

and vigilantly assert their rights. The other relevant paragraph nos.57 to 61, 63 and 64 are extracted below:-

"57. The Assistant Consolidation Officer, under Section 9Aof the Act, 1953, is entitled to settle the disputes even in cases where any objection is not filed on the basis of conciliation for eg. with regard to a plot, name of one branch of a family is recorded and the name of two other branches are not recorded. A dispute is raised at the time of partal (survey) which is noticed by the consolidation officials and if no objection is filed by the person claiming co-tenancy right, the Assistant Consolidation Officer is fully empowered under Section 9A, of the Act, 1953 to decide the dispute on the basis of conciliation between the parties in accordance with the rules.

58. Taking a case, where the parties agree for conciliation and by conciliation, shares are allotted and the dispute is decided according to rules, the same shall be perfectly in accordance with the scheme of the Act.

59. Taking a converse case, i.e. if objections are filed claiming co-tenancy rights by a branch of a family whose name is not recorded for the last say 50 years, if the interpretation put by the learned Single Judge is accepted, such objections are to be treated as barred.

60. Thus for the same dispute although by conciliation it can be decided, but on objection it cannot be decided would lead to anomalous results, which cannot be the intention of the legislature. Thus no such implied bar for filing objections can be read into the provisions of Section 49.

61. The entries in the revenue records raise only a presumption which is a rebuttable presumption. There is one more principle i.e. presumption of correctness of entries can apply to only genuine not forged or fraudulent entries. If the bar is read in filing objections against such entries it would lead to injustice.

63. It is relevant to note that even the records prepared in consolidation proceedings raise only a rebutabble presumption. Section 27(1)) and 27 (2) of the Act, 1953 are quoted below:

"27.(1) As soon as may be, after the final Consolidation Scheme has come into force, the district Deputy Director of Consolidation shall cause to be prepared for each village, a new map, field-book and record of rights in respect of the consolidation area, on the basis of the entries in the map, as corrected under Section 7 7, the Khasra chakbandi, the annual register prepared under Section 10 and the allotment orders as finally made and issued in accordance with the provisions of this Act. The provisions of the Uttar Pradesh Land Revenue Act, 1901, shall, subject to such modifications and alterations as may be prescribed, be followed in the preparation of the said map and records.

(2). All entries in the record of rights prepared in accordance with the provisions of sub-section (1) shall be presumed to be true until the contrary is proved."

64. Thus, when the revenue entries raise only a rebuttable presumption a party objecting to the said entry can always by sufficient evidence rebut the presumption. Shutting out such objections at the very threshold cannot be said to be in accordance with the provisions of the Act, 1953."

20. This Court, in the case of ***Beni Prasad and Others Vs. Deputy Director of Consolidation, Allahabad and Others***

(Supra), has held that if sections 9, 9A and 11A are read together the only possible conclusion is that even in these cases where no objections has been filed, the Assistant Consolidation Officer would make an enquiry and he would refer the matter to the Consolidation Officer and he shall decide the same in accordance with the procedure prescribed particularly in view of Rule 25 A(2), Rule 26 and Rule 27 of the rules framed under the U.P. Consolidation Of Holdings Act. Therefore, once a dispute was recorded by the Assistant Consolidation Officer and on objection being filed the same was referred to the Consolidation Officer, it is incumbent to the Consolidation Officer to decide the same in accordance with law.

21. This Court, in the case of ***Shahid Khan and Others Vs. Deputy Director of Consolidation, Gautam Buddha Nagar and Others (Supra)***, has held that there is a bar also created during the consolidation operations itself under Section 11-A therefore the petitioners will have to establish that there was a cause of action existing so as to allow them to file objections under Section 9-A in the second round of consolidation proceedings. In the present case undisputedly the predecessor in interest of petitioner at the relevant point of time i.e. at the alleged time of earlier round of consolidation proceeding was out and it has also not been proved that any notice was served to him. This plea was also not taken before the Consolidation Officer, therefore it could not be examined so it can not be said that the objection filed by the petitioner could not have been filed or examined. During enquiry (Padtal) it was recorded that the petitioners are entitled for half share, therefore it has rightly been examined and decided.

22. The judgment of Hon'ble Supreme Court in the case of ***Bhagwat Sharan (Dead through LRs.) Vs. Purshottam and Others (Supra)*** relied by learned counsel for the opposite parties no.2 and 3 is in regard to the Hindu undivided family which is not applicable on the facts and circumstances of the present case.

23. In view of above, this Court is of the considered view that the impugned Judgment and order is not sustainable in the eyes of law and liable to be quashed.

24. The writ petition is, accordingly, **allowed**. The impugned order dated 27.11.2004 passed by A.D.M. Executive / Deputy Director of Consolidation, Faizabad in Revision No.986 of 165 contained in annexure no.1 to the writ petition is hereby quashed. No order as to costs.

25. The consequences shall follow accordingly as per law.

(2021)07ILR A128
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.07.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 4845 of 1985

Ram Lakhan ...Petitioner
Versus
J.D.C. & Ors. ...Respondents

Counsel for the Petitioners:
A.S. Chaudhary, Arun Kumar Yadav, Prabhakar Vardhan Chaudha

Counsel for the Respondents:
C.S.C., S.P. Tiwari

(a) Land Law - U.P. Consolidation of Holdings Act, 1953 - U.P. Zamindari Abolition and Land Reforms Act, 1950: Section 171, 172 - In present case, the land in dispute had come to Smt.Mahadei as widow of Ram Harak. After her remarriage the property would revert back tot he family of her husband Ram Harak and would devolve upon the nearest surviving heirs according to Section 171. (Para 21)

'Ghar Bhaitha' marriage is no marriage in the eyes of law. (Para 16)

The claim of the petitioner that him being the illegitimate son of Mahadei is entitle for the land in dispute of his mother is misconceived and not tenable. The land in dispute was coming from the husband of Mahadei, namely Ram Harak and not from the father of the petitioner i.e., Sarvadeen. Therefore, even if the petitioner is treated to be illegitimate son of Mahdei and Sarvadeen, the petitioner cannot be treated to be successor of the land which had come to his mother from her legally wedded husband. (Para 19 & 20)

Under Section 194 of the Act of 1950 the Land Management Committee is entitled to take possession of the land in dispute which was wrongly and illegally recorded in the name of the father of the petitioners after the death of Mahadei under Section 171 of the Act of 1950. (Para 23) (E-8)

List of Cases cited:

1. Hari Bans Vs Deputy Director of Consolidation & or. 2014 (32) LCD 2629

2. Jagdamba Singh & ors. Vs Deputy Director of Consolidation & ors. 1984 (2) LCD 398

3. Singhai Ajit Kumar Vs Ujayar Singh AIR 1961 2 SC 1334

4. Santi Deb Berma Vs Kanchan Prava Devi 1991 Supp (2) SCC 616 (followed)

5. Dina Nath Verma & ors.Vs Gokaran & ors. 2003 (94) RD 323 (followed)

6. Ramji Dixit & ors. Vs Bhrigunath & ors. AIR 1965 Allahabad 1 (V 52 C 1)

7. Dheeraj& anr. Vs Deputy Director of Consolidation, Gautam Budh Nagar & ors. 2009 (107) RD 695

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

1. Heard, Sri P.V. Chaudhary, learned counsel for the petitioner and Sri S.P. Tiwari, learned counsel for the private respondents. Chief Standing Counsel has accepted notice on behalf of opposite party no.1.

2. The instant writ petition has been filed challenging the judgement and order dated 29.08.1985 passed by the opposite party no.1 i.e. Joint Director of Consolidation, Sultanpur(here-in-after referred as JDC).

3. The dispute relates to Plots of Gata No.47, situated in Village-Tihra, Pargana-Barosa,Tehsil and District-Sultanpur, which was recorded in the names of the petitioner-Ram Lakhan(now the deceased) and Ram Deen, son of Budhai, and uncle of the petitioner in the basic year. A joint objection dated 23.12.1978 was filed by Smt.Jhabra, the opposite party no.2(now deceased) and Ram Kishun, son of Budhai (now deceased), claiming co-tenancy in the disputed gata. The Consolidation Officer, by means of the order dated 24.11.1980, rejected the claim of Ram Kishun and Har Deen and determined the share of the petitioner as 2/3rd and the opposite party no.2 as 1/3rd in Gata No.47. Two appeals, bearing no. 790(Ram Lakhan versus Smt. Jhabra and others) and 371(Ram Kisun

versus Ram Lakhan and others), were filed against the order dated 24.11.1980 under Section 11(1) of the U.P. Consolidation of Holdings Act, 1953 (here-in-after referred as the Act of 1953). The appeals were dismissed by means of the order dated 21.05.1981. Hence two revisions, bearing no.1058(Ram kishun versus Ram Lakhan) and 1059(Ram Lakhan versus Smt. Jhabra), under Section 48 of the Act of 1953 were filed. The revision of the opposite party no.2 was allowed and the revision of the petitioner was dismissed by means of the order dated 29.08.1985 and the order passed by the Settlement Officer Consolidation and Consolidation Officer have been amended accordingly and share of the opposite party no.2 has been determined as 2/3rd and share of the petitioner as 1/3rd in the land in dispute. Hence, the present writ petition was filed.

4. Submission of learned counsel for the petitioner was that the opposite party no.2 had set up the pedigree in the objection, in which the land in dispute was said to have been acquired by Bankey, and thereafter, the name of his three sons Jokhu, Budhai and Ghoghar were jointly recorded. Subsequently, by amendment in the objection, added 'alias Paltan' with Bankey and 'alias Golan' with Ghoghar, as land in dispute was recorded in the name of Paltan and thereafter in the name of Jokhu son of Paltan. Therefore, merely by adding alias Paltan, the opposite party no.2 does not get right without any proof that Bankey and Paltan were one and the same person, and similarly, Ghoghar and Golan. Ram Harakh son of Jokhu, Budhai son of Bankey and Ghoghar son of Bankey died prior to Jokhu. On the death of Jokhu, Ram Din, Sarva Din and Ram Kishun succeeded in equal share. The objection was filed by the petitioner claiming that the name of Ram Din was wrongly recorded as he never remained in possession. The father of the petitioner;Sarvadeen had separated from his family/brothers and lived with Mahdei, wife of Ram Harakh, son of Jokhu as Ghar Baitha. Some of the plots were acquired by Paltan, who was grand father of Ram Harak. Pedigree given by the petitioner was different, in which Paltan was the original tenant. Thereafter, the land devolved on Jokhu his son, and thereafter, on Mahdei. Thereafter it was settled with Sarvadeen by the Zamindar. As such, he was the sole tenant. The opposite party no.2 was claiming on the basis of Will, which was not proved. The period and rent of the land in dispute was changed and it was not in the same form. Since the land in dispute was acquired by Paltan which had come to the widow of Ram Harakh i.e. Smt. Mahdei, with whom the father of the petitioner had started living. He got the land of Mahdei. Therefore, the petitioner is only entitled to succeed even if the petitioner is treated to be illegitimate child of his father and Smt. Mahdei. Lastly, he had submitted that the learned JDC, without setting aside the findings, recorded by the Consolidation Officer and the SOC, has allowed the revision of the opposite party no.2 and rejected the revision of the petitioner ,which could not have been done, as there was concurrent findings.

5. Learned counsel for the petitioner has relied on ***2014(32) LCD 2629; Hari Bans Versus Deputy Director of Consolidation and others, 1984(2) LCD 398; Jagdamba Singh and others Versus Deputy Director of Consolidation and others and AIR 1961 2 SC 1334; Singhai Ajit Kumar versus Ujayar Singh.***

6. Per contra, learned counsel for the opposite party no.2 submitted that after

death of Bankey @ Paltan, the land in dispute came jointly to his sons, Jokhu, Budhai and Ghoghar @ Golan. After death of Jokhu, his share was devolved on Ram Harak, and after death of Budhai, his share devolved to his five sons, namely, Ram Deen, Sarvadeen, Ram Kishun, Panchu and Hardeen. Panchu died issueless and Hardeen was residing in some other village. As such, Ram Deen, Sarva Deen and Ram Kishun became the co-tenant in equal shares, as the share of Panchu was divided in his three brothers and since Hardeen was residing in some other village, he had no share. Ramdeen, father of the opposite party no.2, had executed a Will in favour of the opposite party no.2 on 16.08.1989 and Ram Kishun had also executed a Will in favour of the opposite party no.2 on 05.05.1978. Therefore, the opposite party no.2 is entitled for 2/3rd share and the petitioner, for the share of Sarvadeen. As such, there is no illegality or infirmity in the impugned order. Therefore, the writ petition is misconceived and liable to be dismissed.

7. I have considered the submissions of learned counsel for the parties and perused the records.

8. The dispute relates to Plots of Gata No. 47. During consolidation proceedings, two objections were filed. The opposite party no.2 had claimed on the basis of Will executed by Ram Deen and Ram Kishun and set up the following pedigree:-

Bankey(alias Paltan)_____

I	I	I
Jokhu	Budhai	Ghoghar
I	I	
Ram	Harakh(died issueless)	

I	I	I
Ram Deen	Sarva Deen	Ram Kishun
I	I	
Smt. Jhabra	Ram Lakhan(son)	

9. The petitioner had filed the objections, claiming the land in dispute, on the ground that his father had started living with Mahdei, wife of Ram Harak and he was their son. Therefore, the land which had come to Mahadei as widow of Ram Harak, should have been devolved on the petitioner, the only legal heir. He set up the following pedigree:-

Paltan
I
Jokhu
I
Ram Harakh=Mahdei

10. The pedigree was amended subsequently by the opposite party no.2 on the application allowed by the Consolidatoin officer and 'alias Paltan' with Bankey and 'alias Golan' with Ghoghar was added. The parties adduced their evidence before the Consolidation officer. On behalf of the objector Hardeen, his son Parasnath was examined. He stated in his evidence that Hardeen had 5 brothers, namely, Sarvadeen, Hardeen, Ram Deen, Ram Kishun and Panchu. Name of the father of the Hardeen was Budhai, who had three brothers, namely, Jokhu, Budhai and Golan. Name of their father was Paltan. Ram Harak was the son of Jokhu. The petitioner Ram Lakhan is the son of Sarvadeen. Among the five brothers Sarvadeen died at first. Thereafter, Panchu died. He also

stated that the land in dispute was made by Paltan. In his sons, Jokhu was the eldest, so after death of Paltan, the land in dispute was rcorded in the name of Jokhu as Karta of the family.

11. On behalf of the opposite party no.2, her husband Ram Nihore appeared in evidence. He gave the following pedigree:-

Paltan@
Bankey_____
I I I
Jokhu Golan@Ghoghar Budhai
I I I
Ram I I
Harakh I I
_____ I
I I I I
Panchu Sarva Deen Har Deen I
_____
I I
Ram Deen Ram Kishun

He also stated that the land in dispute was made by Paltan, in which Ram Deen, Sarva Deen and Ram Kishun had 1/3rd share each. Hardeen had no share. Panchu had died issueless.

12. On behalf of the petitioner, the petitioner himself and Ram Sahay appeared in evidence. The petitioner stated that he had got the land in dispute from his father Sarvadeen. Jokhu was not from his family, and the name of the son of Jokhu was Ram Harak. Widow of Ram Harak was Mahdei. His father had started living with Mahdei as Ghar baitha. His father had got all the land and property of Ram Harak. The name of the father of the Jokhu was Paltan. It was also stated that the petitioner was born from his father and Mahdei. The name of the father of Jokhu is not Bankey. The other witness Ram Sahay also stated that Sarva Deen had gone to Mahdei as Ghar Baitha and supported the evidence of the petitioner and stated that the petitioner is in exclusive possession of the land in dispute and denied the possession of Hardeen, Ram Kishun etc. He also supported the pedigree of Paltan given by the petitioner and further stated that Paltan was not called as Bankey.

13. The Consolidation Officer after considering the evidence, rejected the objections of Ram Kishun and Hardeen, and allowed the objections of opposite party no.2, Smt. Jhabra and determined his share as 1/3rd on the basis of Will executed by Ram Deen in her favour and 2/3rd in the name of Ram Lakhan. The SOC dismissed the appeals.

14. Initially, the opposite party no.2 and the other objectors, who subsequently left the contest claimed the land in dispute on the basis of pedigree which started from Bankey, but after filing of the objection, the alias was added by way of amendment with Bankey but it has not been proved by any cogent evidence that Bankey and Paltan were one and the same person and it was being recorded as 'alias Paltan' or 'Paltan alias Bankey' in revenue records. The Consolidation Officer has recorded a categorical finding that alias is not recorded alongwith Paltan in the revenue records and the objectors i.e. opposite party no.2 and others had also not stated initially Bankey alias Paltan, but subsequently, Paltan was got added by way of amendment. Accordingly, he recorded a finding that Jokhu was not from the family of the pedigree given by the objectors. The revisional authority also recorded that in the revenue records, there was no entry in the name of Bankey alias Paltan. The entry was in the name of Jokhan son of Paltan in second settlement, and in the first settlement the name of the Paltan was

recorded. The land in dispute was also never recorded in the name of Ghoghar @ Golan.

15. In view of above, it is not in dispute that the land in dispute was made by Paltan. Thereafter, it came to Jokhu then to Ram Harak and thereafter to his widow Mahdei. Since father of the petitioner Sarva Deen had started living with Mahdei, widow of Ram Harak,it was recorded in the name of the petitioner. The objection was filed. On coming to know that it was initially recorded in the name of paltan, alias was added with Bankey by way of amendment in the objection, but it could not be proved that Bankey and Paltan were one and the same person. Therefore, this Court is of the view that the pedigrees given by the opposite party no.2 and the petitioner were different and had no concern with the family of each other except that the father of the petitioner had started living with the widow of Ram Harak namely Mahdei.

16. Now, the question arises as to whether the property which had come to Mahdei, who was widow of Ram Harak, could have come to the petitioner, who was son of Mehdei and Sarva Deen, who had started living with Mahdei as *Ghar Baitha*. This Court is of the view that the land which has devolved to Mahdei being widow of Ram Harak, could not have devolved on the petitioner. Firstly, because as per Section 172 of the U.P.Z.A. & L.R. Act 1950 when a bhumidhar or asami, who has after the date of vesting, inherited an interest in any holding as a widow or widow of a male lineal descendant dies, marries, abandons or surrenders such holding, or part thereof, the holding or the part shall devolve upon the nearest surviving heir (such heir being ascertained in accordance with the provisions of Section 171) of the last male bhumidhar or asami. Therefore, on her re-marriage or death, land would go back to the family of her husband and would devolve according to Section 171.Therefore the land would revert back after death of Mahdei. Secondly, the Ghar Baitha marriage claimed by the petitioner, is no marriage in the eyes of law and any right will not accrue to the father of the petitioner and/or the petitioner on the basis of the alleged claim.

17. The Hon'ble Apex Court, in the case of ***Santi Deb Berma Versus Kanchan Prava Devi; 1991 Supp (2) SCC 616,*** held that living together as husband and wife cannot in any way serve as proof of a valid marriage as per the Act, especially when there is no plea that the marriage was solemnized in accordance with the customary rites and usage, which do not include 'Saptpadi'.

18. This Court in the case of ***Dina Nath Verma and others Versus Gokaran and others;2003(94) RD 323*** did not find *"Ghar Baitha"* as legal marriage. The relevant paragraphs 11 to 13 are extracted below:-

"11. Now coming to the other questions firstly, I consider whether Smt. Lakhraji re-married to Phagoo. Oral evidence has been produced regarding re-marriage. However, the same does not appear to convincting. There is absolutely no evidence to show that the marriage took place. On the other hand, only to is alleged that it was "Ghar Baitha"; that sagai took

place and thereafter Smt. Lakhraji and Phagoo started living as husband and wife. It does not show that it was a legal marriage. It is not alleged in the plaint that "sapta-pati" took place and therefore, this marriage cannot be recognised and Smt. Lakhraji cannot be divested from the property.

12. In the present case, it is admitted position that the name of Smt. Lakhraji was recorded over the land on which dispute houses exist in CH Form No. 23. Smt. Lakhraji was declared as exclusive owner of the land and chack was carved out in her name. Smt. Yashoda Devi and respondent Nos. 2 and 3 did not raised any objection in the consolidation proceedings. They have not stated that Smt. Lakhraji has been divested from the land because she had re-married with Phagoo. Therefore, the allegations made in the suit is only a after thought and the allegation that Smt. Lakhraji has re-married cannot be accepted.

13. The Apex Court in the case of Surjit Kaur v. Garja Singh [A.I.R. 1994 SCC 135.] , has held that where customary marriage is pleaded but the custom is not pleaded and there is no evidence of the nature of the ceremonies performed in marriage in such a case from the evidence that the parties were living together as husband and wife does not itself show that it would confer status of husband and wife."

19. The claim of the petitioner that, at the most, he can be said to be an illegitimate son of Mahdei, therefore even if the father of the petitioner had not married to Mahdei, he is entitled for the land in dispute of his mother, is also misconceived and not tenable. The succession could have been made in accordance with Section 171 of the Act 1950, which has come to the widow from her husband under Section 172 after she re-married or on her death after reversion of property to the family of her husband.

20. In the present case, the land in dispute was coming from the husband of Mahdei, namely Ram Harak and not from the father of the petitioner i.e. Sarvadeen. Therefore, even if the petitioner is treated to be illegitimate son of Mahdei and Sarvadeen, the petitioner cannot be treated to be successor of the land which had come to his mother from her legally wedded husband. Therefore, the petitioner is not entitled for any benefit of the judgment of the Hon'ble Apex Court in the case of ***Singhai Ajit Kumar versus Ujayar Singh(supra),*** in which, the question which was considered is, whether the illegitimate son of Sudra vis-a-vis self acquired property, after having succeeded to a half share of his putative father's estate, will be entitled to succeed to the other half share, got by the widow, after the succession opened out to his putative father on the death of the said widow. Therefore, even if the petitioner is treated to be illegitimate son of Mahdei and Sarvadeen, he is not entitled for the land, which had come from her husband. However, if the land in dispute would have been coming from the family of his father i.e. Sarvadeen, then only the petitioner could have got right according to his share.

21. In the present case, admittedly the land in dispute had come to Smt. Mahdei as widow of Ram Harak; her husband. Therefore, after her death the property would revert back to the family of her husband Ram Harak and devolve upon the nearest surviving heirs according to Section 171. The Full Bench, in the case of ***Ramji Dixit and another Versus Bhrigunath and***

others;AIR 1965 Allahabad 1(V 52 C 1), has held that it is worthy to note that on the death of a female bhumidhar succession to the holding goes not to her heirs but to the "nearest surviving heir of the last male bhumidhar". In other words it is the heirs of the last male-holder and not that of the deceased female bhumidhar who succeed to the holding. This would again indicate that her interest in the holding ends with her death.

22. The revisional authority without any pleadings and evidence and setting aside the findings recorded by the Consolidation Officer and Settlement Officer Consolidation, recorded a finding that the name of Sarva Deen was recorded in place of Jokhu and on the basis of presumption held that it does not seem that the same was recorded in the name of Sarva Deen after Mahdei and on the basis of substitution. Therefore the finding recorded by the learned revisional authority is not sustainable in the eyes of law. The revisional court could not have recorded its own finding without setting aside the finding recorded by the courts below. The law on the issue is settled, as it has been held by this Court in the case of ***Hari Bans versus Deputy Director of Consolidation and others; 2014(32) LCD 2629.***

23. Now the question arises as to who is entitled for the portion of land in dispute which was recorded in the name of father of the petitioners after death of Mahdei, widow of Ram Harak. Since there was no claimant and the remaining portion of the land in dispute has been recorded in the name of the opposite party no.2 on the basis of Will executed by Ram Deen and Ram Kishun, therefore the interest in the land in dispute stands extinguished on the death of Mahdei under Section 189 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 and under Section 194, the Land Management Committee is entitled to take possession of the land in dispute which was wrongly and illegally recorded in the name of the father of the petitioners after the death of Mahdei under Section 171 of the U.P. Zamindari Abolition and Land Reforms Act, 1950.

24. In view of above, the court's below have dealt with the case of petitioner in an illegal manner without application of mind because under Section 11-C of the Act of 1953 it was the duty of the Consolidation Court's to see that if any land vests in State Govt. or Gaon Sabha or any local body or authority he may record in his name even if any objection has not been filed, but they have failed to do so. This Court in the case of ***Dheeraj and Another versus Deputy Director of Consolidation, Gautam Budh Nagar and Others; 2009(107) RD 695,*** has held that under Section 11-C of the U.P. Consolidation of Holdings Act it is provided that if C.O., S.O.C., D.D.C. while hearing a case comes to the conclusion that any land vests in the State Government or Gaon Sabha then it shall be recorded in the name of State or Gaon Sabha even though no objection, appeal or revision has been filed by State or Gaon Sabha.

25. In view of above, this Court is of the considered opinion that the impugned judgment and order is not sustainable to the extent of 1/3rd share of the petitioners determined in the land in dispute and the same is liable to be quashed.

26. The impugned judgment and order dated 29.08.1985 is accordingly quashed to the extent it determines the share of

petitioner as 1/3 rd in the land in dispute and the order passed in favour of respondent no.2 is upheld. Accordingly the orders passed by Settlement Officer Consolidation and Consolidation Officer also stand quashed to the extent of 1/3rd share of petitioner. The said land shall be recorded in the name of concerned Land Management Committee. The Land Management Committee shall take possession of the said land. The petitioner is directed to vacate the land in question.

27. With the aforesaid, the writ petition is **disposed of.** The Joint Director of Consolidation , Sultanpur shall pass the consequential order and communicate to the concerned Land Management Committee for further action and submit a compliance report to this Court within four months. No order as to costs.

28. A copy of this order shall be communicated to the Joint Director of Consolidation, Sultanpur forthwith.

(2021)07ILR A136
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.06.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Consolidation No. 12180 of 2021

Gulam Anwar & Anr. ...Petitioners
Versus
D.D.C./Upper Ziladhikari Judicial, Amethi & Ors. ...Respondents

Counsel for the Petitioners:
Deomani Tripathi

Counsel for the Respondents:
C.S.C.

(a) Consolidation Proceedings - U.P. Consolidation of Holdings Act, 1953 - Section 9-A, 11, 12 – The decision in proceedings under Section 9-A is appealable and the decision in proceedings under Section 12 also being a decision on title does not leave the aggrieved party without the statutory remedy of appeal. (Para 15).

On reading Section 9-A(1) it is inferred that the Assistant Consolidation Officer shall, where the objections in respect of claims to land or partition of joint holdings are files, after hearing the concerned parties and where objections are not filed after making necessary inquiry, settle the disputes, correct the mistakes and make partition by conciliation and pass necessary orders. If conciliation does not takes place the Assistant Consolidation Officer shall forward those cases. It is evident from Section 11 that any party to the proceedings under Section 9-A aggrieved by an order of the Assistant Consolidation Officer or the Consolidation Officer, may file an appeal before the Settlement Officer, Consolidation. (Para 13)

(b) Words & Phrases - Mutatis Mutandis - It mean that the matter or things are generally the same, but to be altered when necessary, as to names, offices and the like. The rules which are adopted make principles embodied in the rule applicable and not the details pertaining to particular authority or things of that nature. (Para 11)

List of Cases cited:-

1. Smt. Lal Dei (D) through L.Rs. & ors. Vs Deputy Director of Consolidation, Varanasi & ors. 2005 (2) AWC 1097

2. Devesh Singh & ors. Vs Deputy Director of Consolidation, Banda & ors. 2005 (3) AWC 2663

3. Ashok Service Centre Vs St. of Orissa (1983) 2 SCC 82

4. Prahlad Sharma Vs St.of U.P. & ors. (2004) 4 SCC 113

5. Malkhan Singh Vs Sohan Singh (1985) 4 SCC 469

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Shri Deomani Tripathi, learned counsel for the petitioners, Shri Vinod Kumar Shukla, learned Standing Counsel for the State-opposite parties No. 1 & 2 through video conferencing.

2. Learned counsel for the petitioners submits that on the death of Ghulam Mustafa, the recorded tenure holder of the land in dispute, the names of the petitioners were directed to be mutated in the proceedings under Section 12 of the U.P. Consolidation of Holdings Act, 1953 (in short, "U.P.C.H. Act') vide order dated 29.07.2013 passed by the Assistant Consolidation Officer on the basis of conciliation, against which, Mohsina Bano/ opposite party No. 3, daughter of Ghulam Mustafa, filed an appeal which was allowed by the Settlement Officer Consolidation vide order dated 09.07.2015 with a direction to record the names of petitioners and of Mohsina Bano in place of the deceased, Ghulam Mustafa. The petitioners Revision No. 220 under Section 48(1) of U.P.C.H. Act was dismissed by the order dated 29.01.2021, under challenge in the writ petition.

3. Learned counsel for the petitioners has submitted that no appeal lies under Section 11(1) of the U.P.C.H. Act against the order of Assistant Consolidation Officer passed under Section 12 of the Act, and further that as the opposite party No. 3 was not party before the Assistant Consolidation Officer, the appeal at her instance was not maintainable. The opposite party No.3 ought to have filed objection before the Consolidation Officer or applied for recall of the order before the Assistant Consolidation Officer.

4. Learned counsel for the petitioner has further submitted that even if the appeal was maintainable and was allowed, the matter should have been remanded to the Consolidation Officer for its decision on merits after affording opportunity of leading evidence and hearing to the parties concerned to prove their respective case. He submits that Mohsina Bano was married and not unmarried daughter of Ghulam Mustafa on the date of his death, and as such she was not preferential legal heir to inherit along with the petitioners under Section 171 of the U.P. Zamindari Abolition & Land Reforms Act (in short, "U.P.Z.A. & L.R. Act').

5. Shri Vinod Kumar Shukla, the learned Standing Counsel submits that the appeal against the order of Assistant Consolidation Officer was maintainable under Section 11(1) of the U.P.C.H. Act and in this regard, he has placed reliance in the cases of **Smt. Lal Dei(D) through L.Rs. and others Vs. Deputy Director of Consolidation, Varanasi and others,** reported in **2005 (2) AWC 1097 and in Devesh Singh and others Vs. Deputy Director of Consolidation, Banda and others,** reported in **2005 (3) AWC 2663.**

6. I have considered the submissions advanced and perused the material placed on record.

7. So far as the first submission of the learned counsel for the petitioners is concerned that the appeal against the order of Assistant Consolidation Officer passed

under Section 12 of the U.P.C.H.Act is not maintainable and also on the ground that the appeal was not maintainable at the instance of the opposite party No. 3, not party before the Assistant Consolidation Officer, it has got no substance for the reasons hereinafter.

8. In order to appreciate the controversy, it is relevant to reproduce Section 12 of the U.P.C.H.Act, which provides as under:

"12. Decision of matters relating to changes and transactions affecting rights or interests recorded in revised records.- (1) All matters relating to changes and transfers affecting any of the rights or interests recorded in the revised records published under sub-section (1) of Section 10 for which a cause of action had not arisen when proceedings under Sections 7 to 9 were started or were in progress, may be raised before the Assistant Consolidation Officer as and when they arise, but not later than the date of notification under Section 52, or under sub-section (1) of Section 6."

(2) The provisions of Sections 7 to 11 shall *mutatis mutandis*, apply to the hearing and decision of any matter raised under sub-section (1) as if it were a matter raised under the aforesaid sections.

9. It is evident from sub-section (1) of Section 12 of the Act that an objection as regards the matters relating to changes and transfers affecting any of the rights or interest recorded in the revised records published under Section 10(1), for which cause of action had not arisen when the proceedings under Sections 7 to 9 were started or were in progress, will be raised before the Assistant Consolidation Officer under Section 12(1) of the Act. Sub section (2) of Section 12 of the Act makes it evident that Sections 7 to 11 have been made applicable *mutatis mutandis* to the hearing and decision of those matters as if such were the matters raised under Sections 7 to 11 of the U.P.C.H. Act.

10. Sub section (2) of Section 12 of the Act uses the expression, "*mutatis mutandis*', which implies applicability of any provision with necessary changes in the points of details. In the case of **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 paragraph-17 of the said report the Honble Supreme Court has held as under:

"17. ..... Before considering what provisions of the Principal Act should be read as part of the Act, we have to understand the meaning of the expression '*mutatis mutandis*'. Earl Jowitt's '*The Dictionary of English Law (1959)* defines '*mutatis mutandis*' as 'with the necessary changes in points of detail'. *Black's Law Dictionary* (Revised 4th Edn. 1968) defines '*mutatis mutandis*' as "with the necessary changes in point of detail, meaning that matters or things are generally the same, but to be altered when necessary as to names, offices, and the like. *Housman v. Waterhouse, 191 App. Div. 850, 182 N.Y.S 249, 251.* "In *Bouvier's Law Dictionary* (3rd Revision, Vol. II), the expression '*mutatis mutandis*' is defined as '(T)he necessary changes. This is a phrase of frequent practical occurrence, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like". Extension of

an earlier Act *mutatis mutandis* to a later Act brings in the idea of adaptation, but so far only as it is necessary for the purpose, making a change without altering the essential nature of the thing changed, subject of course to express provisions made in the later Act....."

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.

11. From the aforesaid it is clear that "*mutatis mutandis*' means that the matters or things are generally the same, but to be altered when necessary, as to names, offices and the like. 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.

12. Sections 9-A and 11 of the U.P.C.H. Act also deserves to be reproduced as under:

"9-A. Disposal of Cases relating to claims to land and partition of joint holdings.-(1) The Assistant Consolidation Officer shall -

(i) where objections in respect of claims to land or partition of joint holdings are filed, after hearing the parties concerned; and

(ii) where no objections are filed after making such enquiry as he may deem necessary;

settle the disputes, correct the mistakes and effect partition as far as may be by conciliation between the parties appearing before him and pass orders on the basis of such conciliation:

[Provided that where the Assistant Consolidation Officer, after making such enquiry as he may deem necessary, is satisfied that a case of succession is undisputed, he shall dispose of the case on the basis of such enquiry].

(2) All cases which are not disposed of by the Assistant Consolidation Officer under sub-section (1), all cases relating to valuation of plots and all cases relating to valuation of trees, wells or other improvements, for calculating compensation therefor, and its apportionment amongst co-owners, if there be more owners than one, shall be forwarded by the Assistant Consolidation Officer to the Consolidation Officer, who shall dispose of the same in the manner prescribed.

(3) The Assistant Consolidation Officer, while acting under sub-section (1) and the Consolidation Officer, while acting under sub-section (2), shall be deemed to be a Court of competent jurisdiction, anything to the contrary contained in any other law for the time being in force notwithstanding."

"11. Appeals.- (1) Any party to the proceedings under Section 9-A, aggrieved by an order of the Assistant Consolidation Officer or the Consolidation Officer under that section, may, within 21 days of the date of the order, file an appeal before the Settlement Officer, Consolidation, who shall, after affording opportunity of being heard to the parties concerned, give his decision thereon which, except as otherwise provided by or under this Act, shall be final and not be questioned in any Court of law.

(2) The Settlement Officer, Consolidation, hearing an appeal under sub-section (1) shall be deemed to be a Court of competent jurisdiction, anything to the contrary contained in any law for the time being in force notwithstanding."

13. It is evident from Section 9-A(1) of the Act that the Assistant Consolidation Officer shall, where the objections in respect of claims to land or partition of joint holdings are filed, after hearing the concerned parties and where objections are not filed after making necessary inquiry, settle the disputes, correct the mistakes and make partition by conciliation between the parties and pass orders on the basis of conciliation. If conciliation does not take place the Assistant Consolidation Officer shall forward those cases to the Consolidation officer, who shall decide those cases in the prescribed manner and it is evident from Section 11, that any party to the proceedings under Section 9-A aggrieved by an order of the Assistant Consolidation Officer or the Consolidation Officer, may file an appeal before the Settlement Officer, Consolidation. Thus, it is clear that an order passed by the Assistant Consolidation Officer under Section 9-A on the basis of conciliation is appealable before the Settlement Officer Consolidation under Section 11(1) of the Act. As Section 9-A has been made applicable to the hearing and decision of any matter raised under Section 12(1), disputes raised under Section 12(1) are to settled by the Assistant Consolidation Officer on the basis of conciliation and if conciliation does not take place, those cases are to be forwarded to the Consolidation Officer for decision in the prescribed manner and as Section 11 has also been made applicable the order passed by the Assistant Consolidation Officer on the basis of conciliation under Section 12(1) read with Section 9-A(1) would be appealable before the Settlement Officer Consolidation.

14. There is another aspect of the matter. The scheme of the U.P.C.H. Act clearly suggests that on the commencement of the consolidation proceedings an aggrieved person whose name is not recorded or who has any grievance with regard to the title may raise objection under Section 9-A of the U.P.C.H. Act. This is the first stage of filing objection. Such objection under Section 9-A shall be heard and disposed of after full fledge trial by the Consolidation Officer, which could not be settled on the basis of conciliation and thereafter, there is remedy of appeal under Section 11(1) before the Settlement Officer Consolidation. The objection under Section 12 relates to changes and transactions recorded in the revised record published under Section 10(1), for which a cause of action had not arisen when the proceedings under Sections 7 to 9 had been started or were in progress. This is the second stage, at which objection can be maintained subject to the conditions mentioned in Section 12(1) of the Act. The difference, as regards the two objections, is of the stages only, otherwise, the decision with respect to the matter under Section 12 is also a decision of title. In **Malkhan Singh Vs. Sohan Singh, (1985) 4 SCC 469,** the Hon'ble Supreme Court has very specifically laid down that after the amendment of 1963, Sections 7 to 11 of the Act deal with rights and title of the tenure holder and by the application of those provisions to the proceedings under Section 12 in matters for which cause had arisen subsequently, the decision is a decision of title. Prior to amendment of 1963, the position was different as there was no

provision for the adjudication of rights and title of tenure holder once the title and interest of the original tenure holder had been finally determined and Chak had been allotted.

15. Therefore, the decision in proceedings under Section 9-A, being appellable and the decision in proceedings under Section 12 also being a decision on title, it cannot be conceived that such a decision, may be a settlement of dispute by Assistant Consolidation Officer on conciliation or by Consolidation Officer by following the prescribed procedure, would not be appellable under Section 11(1) of the Act. The decision under Section 12also being a decision on title, the aggrieved party cannot be left without the statutory remedy of appeal, only because of the objection having been raised at a subsequent stage when cause accrued for which statute grants permission.

16. So far as the second limb of the first submission of the learned counsel for the petitioners is concerned that the appeal is not maintainable as the opposite party No. 3 was not the party before the Assistant Consolidation Officer, this has already been settled by this Court in the cases of **Devesh Singh (supra) and Laldei (supra).**

17. In **Devesh Singh (supra)**, this Court held that, a perusal of Section 11 permits any party to the proceeding under Section 9A of the Act aggrieved by an order of the Assistant Consolidation Officer/ Consolidation Officer under that section, to file an appeal. Thus, right has been given to every party to the proceeding under Section 9A(2) of the Act to file appeal. The right conferred on a party to file appeal, has not been restricted to the party if he takes the ground that the order is *ex parte*. Thus, where the party who is filing appeal even if takes ground that the order is *ex parte* or the order is otherwise bad on merit, in both situation, he can file appeal. It was held that against the order of Assistant Consolidation Officer/ Consolidation Officer passed in proceedings under Section 9A(2) of the Act, in both class of cases, appeal would be maintainable. In **Smt. Lal Dei (supra)** this Court held that as and when there is an order by an Assistant Consolidation Officer/ Consolidation Officer, any person claiming himself aggrieved on proof of prejudice and adverse effect from the order sought to be challenged has a right to move that very court, or the appellate court.

18. In view of the aforesaid, the first submission of the petitioners' counsel has no substance that the appeal filed by the opposite party No. 3, Mohsina Bano, against the order of the Assistant Consolidation Officer passed on the basis of conciliation between the petitioners was not maintainable.

19. The second submission of the learned counsel for the petitioners that the matter should have been remanded to the Consolidation Officer, so that the question if Mohsina Bano, was married daughter or unmarried daughter on the date of death of Ghulam Mustafa, and was entitled to succeed along with the petitioners, could be decided by the Consolidation Officer as per the prescribed procedure under Section 9-A(2) read with Section 12 after affording opportunity of leading evidence and hearing, and the Settlement Officer Consolidation and the Deputy Director of

Consolidation could not have assumed her to be the unmarried daughter entitled to succeed along with the petitioners, prima facie, appears to have force and requires consideration.

20. Issue notice to the opposite party No. 3.

21. The opposite parties may file counter affidavit within a period of six weeks.

22. Rejoinder affidavit may be filed within one week thereafter.

23. List in the month of August, 2021.

24. The petitioners have made out a case of grant of interim order. The orders under challenge shall remain stayed and the parties shall not change the nature of property in suit nor shall create any third party interest till the next date of listing.

(2021)07ILR A142
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.01.2021

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 304 of 2020

Mohd. Javed ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Petitioner:
Sri Mukesh Kumar

Counsel for the Respondents:
A.G.A.

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Narcotics Drugs and Psychotropic Substance Act, 1985-Sections 18,20, 21-conviction-prayer for lenient view on the quantum of sentence-accused only member of the family to look after his parents-no criminal history-accused did not press legality of sentence, but he pressed only on the quantum of sentence as he had already served out for two years and four months.(Para 5)

B. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. Apex court laid emphasis on proportional sentencing by affirming the doctrine of proportionality. the fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. the impact on the society as a whole has to be seen.(Para 8 to 17)

The appeal is partly allowed. (E-5)

List of Cases cited:

1. Mohd. Giasuddin Vs St. of A.P. (1977) AIR SC 1926

2. Sham Sunder Vs Puran (1990) 4 SCC 731

3. St. of M.P. Vs Najab Khan (2013) 9 SCC 509

4. Jameel Vs St. of U.P. (2010) 12 SCC 532

5. Guru Basavraj Vs St. of Karn., (2012) 8 SCC 734,

6. Deo Narain Mandal Vs St. of U.P. (2004) 7 SCC 257

7. Shyam Narain Vs St. (NCT of Delhi)(2013) 7 SCC 77

8. Sumer Singh Vs Surajbhan Singh (2014) 7 SCC 323

9. St. of Punj.Vs Bawa Singh (2015) 3 SCC 421

10. Raj Bala Vs St. of Har. (2016) 1 SCC 463

11. Kokaiyabai Yadav Vs St. of Chhattisgarh (2017) 13 SCC 449

12. Ravada Sasikala Vs St. of A.P. (2017) AIR SC 1166

13. Jameel Vs St. of U.P. (2010) 12 SCC 532

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

1. Heard Sri Mukesh Kumar, learned counsel for the appellant and learned A.G.A. for the State and perused the record.

2. This criminal appeal has been filed against the judgement and dated 14.02.2019 passed by Additional Sessions Judge 9th, Kanpur Nagar, in S.T. No. 1035 of 1998 (State Vs. Mohd. Javed), arising out of Case Crime no. 326 of 1996, under Section 18/20/21 of N.D.P.S. Act, P.S. Naubasta, District Kanpur Nagar, whereby learned Judge convicted and sentenced the appellant to five years rigorous imprisonment under Section 18-C of N.D.P.S., Act with a fine of Rs. 25,000/- and in default of payment of fine, further additional imprisonment for three months.

3. The prosecution story in brief is that on 18.04.1996 Sri Uday Pratap Singh SHO along with some other police personnel were on patrolling dutyin search of wanted criminals near Gopal Nagar bypass, suddenly two persons were seen coming together on scooter no. UMY-371 from Gopal Nagar and when they saw the police jeep they started running towards back side. On suspicion, the police party chased them and caught hold the suspected persons before gopal nagar tri crossing adjacent to ara machine of Ram Dhani Sharma. After catching the suspected persons the police enquired about running away after seeing the police personnel then the suspected persons admitted that they were having smack and poppy straw. When the police asked them whether they are interested to search by a Gazetted Officer then the accused persons told that now we are in your custody so you may search out. When the police personnel asked the people and shop keepers for witnessing they denied to be witness of the incident. After being enquired the suspected person told their names as Ramesh Chandra Gupta @ Babloo son of Laxmi Shanker Gupta, resident of 133, Gopal Nagar, Naubasta, Kanpur Nagar and Mohd. Javed son of Mohd Sareef, R/o. 126/11, NLC Colony Thana Babupurwa, Kanpur Nagar. From the possession of Ramesh Chandra Gupta @ Babloo a white coloured polythene in which 1 1/2 Kg. poppy straw was kept and from another polythene bag 150 grams of smack was also recovered. From the possession of Mohd. Javed 1 1/2 Kg. poppy straw was recovered in two polythene bags and from his pocket about 125 grams smack was also recovered. When the police personnel enquired about the licence they fail to show the licence.

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

5. In furtherance to his submission, the learned counsel for the accused-appellant submits that the accused appellant had been in jail during trial and after conviction he is in jail. As such, the accused has already served out for about two years and four months of the sentence. The accused-appellant is a young man and he is the only male member in the family to look after his parents. Further submission is that it was the first offence of the accused and after conviction the accused had not indulged in any other criminal activity. He next submits that although the trial court has convicted the present accused on the basis of mere conjunctures and surmises while the appellant is absolutely innocent and has been falsely implicated in this case with the ulterior intention of harassing him. He also submits that on the question of legality of sentence he is not pressing this appeal and only pressing on the quantum of sentence and he has prayed for taking lenient view considering the age of the accused and his age related ailments.

6. Learned A.G.A. has vehemently opposed the submission made by learned counsel for the appellant. He has however, submits that if slight reduction in sentence is made, he has no objection.

7. I have perused the entire material available on record and the evidence as well as judgment of the trial court. The learned counsel for the accused-appellant does not want to press the appeal on its merit and requests to take a lenient view of the matter.

8. In ***Mohd. Giasuddin Vs. State of AP, AIR 1977 SC 1926***, explaining rehabilitary & reformative aspects in sentencing it has been observed by the Supreme Court:

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that leads to ante-social behaviour has to be countered not by undue cruelty but by reculturization.Therefore, the focus of interest in penology in the individual and the goal is salvaging him for the society. The infliction of harsh and savage punishment is thus a relic of past and regressive times. The human today vies sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of a social defence. Hence a therapeutic, rather than an 'in terrorem' outlook should prevail in our criminal courts, since brutal incarceration of the person merely produces laceration of his mind. If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries."

9. In ***Sham Sunder vs Puran, (1990) 4 SCC 731***, where the high court reduced the sentence for the offence under section 304 part I into undergone, the supreme court opined that the sentence needs to be enhanced being inadequate. It was held:

"The court in fixing the punishment for any particular crime should take into consideration the nature of offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of offence."

10. In ***State of MP vs Najab Khan, (2013) 9 SCC 509,*** the high court, while upholding conviction, reduced the sentence

of 3 years by already undergone which was only 15 days. The supreme court restored the sentence awarded by the trial court. Referring the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734***, the court observed as follows:-

"In operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment.

11. Earlier, "Proper Sentence" was explained in ***Deo Narain Mandal Vs. State of UP (2004) 7 SCC 257*** by observing that Sentence should not be either excessively harsh or ridiculously low. While determining the quantum of sentence, the court should bear in mind the principle of proportionately. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically.

12. In subsequent decisions, the supreme court has laid emphasis on proportional sentencing by affirming the doctrine of proportionality. In ***Shyam Narain vs State (NCT of delhi), (2013) 7 SCC 77***, it was pointed out that sentencing for any offence has a social goal. Sentence is to be imposed with regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is that the society may not suffer again by such crime. The principle of proportionality between the crime committed and the penalty imposed are to be kept in mind. The impact on the society as a whole has to be seen. Similar view has been expressed in ***Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463.***

13. In ***Kokaiyabai Yadav vs State of Chhattisgarh(2017) 13 SCC 449***, it has been observed that reforming criminals who understand their wrongdoing, are able to comprehend their acts,have grown and nartured into citizens with a desire to live a fruitful life in the outside world, have the capacity of humanising the world.

14. In ***Ravada Sasikala vs. State of A.P. AIR 2017 SC 1166***, the Supreme

Court referred the judgments in ***Jameel vs State of UP (2010) 12 SCC 532, Guru Basavraj vs State of Karnatak, (2012) 8 SCC 734, Sumer Singh vs Surajbhan Singh, (2014) 7 SCC 323 , State of Punjab vs Bawa Singh, (2015) 3 SCC 441, and Raj Bala vs State of Haryana, (2016) 1 SCC 463*** and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformative and corrective. At the same time, undue harshness should also be avoided keeping in view the reformative approach underlying in our criminal justice system.

15. Keeping in view the facts and circumstances of the case and also keeping in view criminal jurisprudence in our country which is reformative and corrective and not retributive. This Court considers that no accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream.

16. Since the learned counsel for appellant has not pressed the appeal on merits, however, this Court after perusal of the entire evidence on record and judgment of the learned Trial Court considers that the appeal is devoid of merit and is liable to be dismissed. Hence, the conviction of the appellant is **upheld**.

17. Accordingly, the conviction is upheld. The appeal is **partly allowed** with the modification of the sentence by the period already undergone and served out by the appellant and with fine of Rs. 10,000/-. Appellant shall deposit a fine of Rs. 10,000/- before the learned court below within four months from the date of passing of the judgment and in default of payment of fine the accused-appellant shall further under go one month imprisonment.

18. Office is directed to transmit the lower court record along with a copy of this judgment to the learned court below for information and necessary compliance as warranted.

19. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by the learned counsel for the applicant alongwith 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.

20. 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)07ILR A147
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.07.2021

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Appeal No. 2752 of 1983

Badri & Ors. ...Appellants (In Jail)
Versus
State ...Opposite Party

Counsel for the Appellants:
Sri Mohan Chandra, Sri Arunkumar Mishra, Sri C.S. Saran, Sri Kundan Singh, Sri N.P. Midha, Sri Ram Pal Singh, Sri Ratan Singh, Sri S.K. Kulsrestha, Sri Sanjiv Ratan, Sri Shailendra Prakash

Counsel for the Respondent:
D.G.A., Sri N.P. Middha, Sri Sanjiv Ratan

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code,1860-Sections 147, 302/149, 307/149-challenge to-conviction-accused came with hand grenade with common object to murder informant and other family members over the land dispute-informant's uncle was issuless, he wanted to give his 6 beegha land to informant- the accused/appellants being cousins of informant was angry over the matter-they succeeded in executing their plan successfully-ocular version stands corroborated by the medical evidence-presence of PW-5 and PW-6 was natural, their testimony is consistent in respect of time and place of occurrence-merely because witnesses are close relatives of victim, their testimonies can not be discarded-relationship with one of the parties is not a factor that affects credibility of witness-more so, a relative would not conceal the actual culprit and make allegation against an innocent person-they were subjected to lengthy cross examination, but the defence could not succeed in impeaching their creditworthiness by extracting anything suspicious.(Para 2 to 41)

B. It is a settled legal proposition that the evidence of closely related witness or interested witness is required to be carefully scrutinized and appreciated. there is no hard and fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court. it will always depend upon the facts and circumstances of 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.(Para 35 to 38)

The appeal is dismissed. (E-4)

List of Cases cited:

1. Sampath Kumar Vs. Inspr. of Police, Krishnagiri (2012) 4 SCC 124

2. Sachin Kumar Singhraha Vs St. of M. P. (2019) CRLA 473-474

3. Smt. Shamim Vs St. (NCT of Delhi)(2018) CRLA 56

4. Yogesh Singh Vs Mahabeer Singh & ors. (2017) 11 SCC 195

5. Lokesh Shivakumar Vs St. of Karn. (2012) 3 SCC

6. Dalip Singh Vs St. of Punj. (1953) AIR SC 364

7. Dharnidhar Vs St. of U.P. (2010) 7 SCC 759

8. Jayabalan Vs U.T .of Pondicherry (2010) 1 SCC 199

9. Ganga Bhawani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

10. Bhagalool Lodh & anr. Vs St. of U.P.(2011) AIR SC 2292

11. Dhari & ors. Vs St. of U.P.(2013) AIR SC 308

12. Anil Rai Vs St. of Bih. (2001) SCC 456

13. Raju@ Balachandran & ors. Vs St. of T.N. (2012) 12 SCC 701

14. Jodhan Vs St. of M.P.(2015) 11 SCC 52

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. The present Criminal Appeal has been filed by accused-appellants, namely, Badri, Babu Ram, Jawahar Singh, Natthu and Subedar against the common judgement and order dated 21.10.1983 passed by IV Additional Sessions Judge, Etah, in Sessions Trial No.515 of 1983 and Sessions Trial No. 507 of 1983, under Sections 147, 302/149 and 307/149 IPC, Police Station, Mirehchi, District Etah, convicting accused-appellants and sentencing them to undergo life imprisonment.

2. Factual matrix of case as emerging from First Information Report (hereinafter referred to as "FIR") as well as material placed on record is as follows.

3. A written report, Ex.Ka-7, dated 15.05.1983 was presented in Police Station Mirehchi, District Etah by Informant PW-5, Tolwar Singh, alleging that on 14.05.1983 at about 7:00 p.m., he (informant), his brother-in-law Tota Ram and his uncle (Tau) Chhviram were sitting on respective cot on Chabutara (platform) in front of his house. His mother Smt. Ramdevi (deceased) was also sitting on the earth of Chabutara. A lantern was lighting on the peg. Accused persons, namely, Badri, Babu Ram, Jawahar Singh, Natthu and Subedar came from the side of one Khumano with intention to kill them (informant side), threw hand grenade due to which there was a huge explosion and he, (complainant himself), his uncle and his mother sustained serious injuries. His mother sustained much injuries in her head and died on spot. All the accused persons were recognized by informant, his brother-in-law Tota Ram and his Tau in the light of lantern. The F.I.R. further recites that his uncle Chhaviram was issue-less and lived with him. He wanted to give six Beegha land of his share to the informant Tolwar Singh, because of this accused Badri who happens to be his cousin was angry with Chhaviram.

4. On receipt of written report Ex.Ka-7, Chik F.I.R. Ex.Ka-3 was prepared by constable concerned, who registered the case under Sections 302 and 307 IPC as Case Crime No. 59 of 1983. An entry of case was made in General Diary on the same day at 6:00 a.m., a copy whereof is Ex.Ka-4 on record.

5. Immediately after registration of case, PW-7, Sri Bal G. Sonkar, started investigation, took copies of relevant

papers, proceeded to spot, directed S.I. Jagdish Prasad for conducting inquest Ex.Ka.-8 and other relevant papers. Investigating Officer prepared site plan Ex.Ka-12, took lantern in his possession, collected bloodstained and simple earth from spot and prepared Fards thereof Ex.Ka-13 and 14. Dead body of deceased Ramdevi was sent for post-mortem.

6. P.W. 4 Dr. K.K. Singh conducted post-mortem over the dead body of deceased Smt. Ramdevi and prepared post-mortem report Ex.Ka-6. Doctor noted the anti-mortem injuries found on the dead body of deceased as under :-

(i) 3 lacerated wounds of skull cavity deep of the dimension of 8 cm. x 6 cm., 4 cm. x 2 cm. and 5 cm. x 2 cm. On occipital parietal region of left half. 7 cm. Medial and back of ear.

(ii) Multiple wound of entry of various sizes measuring from 1 cm. x ½ cm. x skin deep muscle deep and ½ cm. x ½ cm. x skin deep on the left shoulder in an area of 8 cm. x 8 cm.

(iii) Multiple wounds of entry in an area of 10 cm. x 10 cm. On the shoulder of supra scapular region of right back varying ¾ cm. x ½ cm. x tissues deep to ½ cm. x ½ cm. x skin deep.

Doctor opined that death of Smt. Ramdevi was possible at 7:00 p.m. on 14.05.1983 due to coma as result of ante-mortem injuries.

7. PW-1, Dr. S.P. Varshney, the then Medical Officer, District Hospital, Etah, medically examined the injured Tolwar Singh P.W.-5 and Chhaviram PW-6 on 15.05.1983 and prepared injurty reports.

(a) Injuries of Tolwar Singh P.W.-5 are as under :

(i) Superficial burn over contused base in an area 16 cm x 7 cm on back of right elbow and upper forearm with peeling of cuticle.

(ii) Superficial burn on front of Rt. Arm in upper part size 4 cm. x 2 cm. Superficial layer of skin is absent with contused base. No black area are around the wound present.

(iii) Superficial burn in an area of 15 cm. x 6 cm. On Rt. Side of abdomen in lower part. Skin has not peeled off.

(iv) Superficial (multiple) burn in an area of 18 cm. x 8 cm. On front and outer side of Rt. Thigh upper half skin has not peeled off.

(b) Injuries of Chhaviram P.W.-6 are as under :

(i) Superficial burn are (multiple) on left side of whole of chest 30 cm. x 18 cm. With some lacerated wound of .5 cm. x .5 cm. x skin deep. Skin has not peeled off.

(ii) Multiple small area of burn of the 1 cm. x .75 cm on back side of Lt. arm in an area of 20 cm. x 5 cm.

(iii) Superficial burn with the L/w 1 cm. x 1 cm. to 0.5 cm. x .75 cm. No blackening of skin present on the back of the hip and upper thigh in an area of 25 cm. x 10 cm.

8. Investigating Officer of case, after completing entire formalities of investigation submitted charge sheets Ex.Ka-15 and 16 against the accused persons before C.J.M. concerned. C.J.M. took cognizance on the charge sheets and after necessary compliance under Section 207 Cr.P.C. and case, being triable by Court of Session, was committed to the Court of Session for trial.

9. It appears that trial was transferred from the Court of Sessions Judge, Etah to IV Additional Sessions Judge, Etah, who, after examining the entire evidence collected by Investigating Officer, hearing both the parties, framed charges against the accused-appellants under Sections 147, 302/149 and 307/149 I.P.C.

10. Charges were read over and explained to accused-appellants, who denied the charges, pleaded not guilty and claimed to be tried.

11. In order to substantiate its case, prosecution has examined total seven witnesses, out of whom, Informant PW-5 Tolwar Singh, PW-6 Chhaviram, are witnesses of fact, whereas PW-1 Dr. S.P. Varshney, PW-2 Constable Vijay Bahadur, PW-3 Constable Satyaman Singh, PW-4 Dr. K.K. Singh and PW-7 S.O. Bal G. Sonkar are formal witnesses.

12. On closure of prosecution evidence, statement of accused-appellants under Section 313 Cr.P.C. was recorded by Trial Court explaining entire evidence and other incriminating circumstances. Accused denied prosecution case in toto and said that they have been falsely implicated in this case and witnesses are giving false evidence.

13. Trial Court, after hearing counsel for parties and appreciating entire evidence on record has found accused-appellants guilty and convicted and sentenced them as stated above.

14. During the pendency of appeal, appellant nos. 3 and 4 died and their appeals have already been abated by this Court vide order dated 03.08.2016. Appeal is pending on behalf of surviving appellants.

15. We have heard Sri Arun Kumar Mishra, learned counsel for the appellants, Sri Arunendra Kumar Singh, learned A.G.A. for State and have gone through the entire record with the valuable assistance of learned counsel for the parties.

16. Learned counsel appearing for appellants has challenged conviction of accused-appellants, advancing his submissions in the following manner :

i. The accused-appellants are innocent and they have been falsely implicated in the present case on account of land dispute.

ii. There is no sufficient motive to accused-appellants to commit murder of deceased Smt. Ramdevi and to cause injuries to other injured persons.

iii. There is no source of light so as to enable the witnesses to recognize the assailants.

iv. There is no public witness in support of prosecution while public witnesses are alleged to have been present on spot. Both the witnesses are interested and they have the motive for false implication of accused appellants because of land dispute.

v. There are major and material contradiction in the statement of witnesses so as to disbelieve the prosecution case.

vi. The medical evidence does not go with the prosecution case, hence, prosecution case is not worthy to credence.

17. Per contra learned AGA opposed submissions by submitting that this is the case of direct evidence, therefore, motive has no importance. Although there was a motive to the accused-appellants to commit the murder because of accused Badri is the cousin of informant and nephew of Chhaviram and

Chhaviram lived with informant. It was the perception in the mind of accused Badri that Chhaviram might have transferred his property in favour of Tolwar Singh so he wanted to finish Chhaviram so that he may get the property of Chhaviram. It was further submitted by learned AGA that Chhaviram and Tolwar Singh supported the prosecution case. Indisputably, Smt. Ramdevi succumbed to injury caused to her in incident and there was no reason to witnesses to falsely implicate the accused persons and medical evidence is in support of prosecution story. Witnesses are injured, therefore, their presence on spot cannot be doubted.

18. Although, time, date, place and nature of injuries found on the person of deceased have not been disputed or challenged by accused-appellants but what is argued is that accused-appellants are not responsible for present crime. From evidence of PW-5 and PW-6 and injury report Ex. Ka-1 and 2, inquest report Ex.Ka-8, post mortem report Ex.Ka.-6, time, date and place of incident stand established.

19. Thus the only question remains for consideration is "whether accused-appellants caused death of Ramdevi by throwing hand grenade on the victims and Trial Court has rightly convicted them or not?"

20. We now proceed to consider rival submissions on merits.

21. Before adverting to rival contention, we would like to consider briefly the evidence of prosecution, PW-5 Tolwar Singh, who happens to be informant, eye witness and injured, deposed that Chhaviram was his real uncle. He was issue-less and lived with him. He wanted to give six beegha land of his share to him, due to which accused Badri felt bad. On the fateful day, at about 7:00 p.m., he (informant), his brother-in-law (Bahnoi) Tota Ram and his uncle Chhaviram were sitting on their respective cots on the platform (Chabutara) in front of his house, his mother Ramdevi was also sitting there on the earth. Lantern was lighting on the peg. Then accused-appellants Badri, Babu Ram, Jawahar Singh, Natthu and Subedar came there with hand grenade and threw on them for killing, due to explosion of which he and Chhaviram sustained injuries and his mother Ramdevi succumbed to injuries received in incident. Accused Badri was also injured due to explosion. All the accused persons ran way from the spot. Statement further states that at about 3:00 a.m. in the same night, he got Tehrir Ex.Ka.-7 scribed by Tota Ram and presented it before police station at 6:00 A.M. He and Chhaviram were medically examined in district hospital, Etah.

22. P.W. 6 Chhaviram, injured witness, deposed that informant Tolwar Singh and accused Badri are his real nephews. He was issue-less. He was living with Towar Singh from beginning. He asked Towar Singh to give six beegha land of his share three or four days prior to the incident. Badri felt bad. On the fateful day, at about 7:00 p.m., he (witness), Towar Singh and Tota Ram were sitting on their respective cots on chabutara in front of his house. Smt. Ramdevi (deceased) was also sitting on earth. Lantern (Lalteen) was also

lightning on peg. Then accused Badri, Babu Ram, Jawahar Singh, Natthu and Subedar came there with hand grenade and threw on them. The hand grenade got burst due to which, he, Tolwar Singh (P.W.-5) and Ramdevi sustained injuries and Smt. Ramdevi succumbed to injuries on spot. He was medically examined. Accused Badri was also injured. Accused persons ran away.

23. Both the witnesses P.Ws.- 5 and 6 withstood lengthy cross-examination by accused persons but no major or material contradiction could be brought through the same, which may dent prosecution case or veracity of their statements. From the statement of PW-5 and 6, complicity of accused-appellants in the commission of present offence stands proved.

24. Certainly, there is minor contradictions or development in their evidence but they are not of such nature so as to disbelieve the entire story of prosecution and they are not so serious and sufficient that accused could be acquitted. Each and every contradiction and development appeared in cross examination do not affect the root of case.

25. In so far as discrepancies, variations and contradictions in the prosecution case are concerned, we have analysed entire evidence in consonance with the submissions raised by learned counsel's and find that the same do not go to the root of case.

26. In ***Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124,*** Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

27. In ***Sachin Kumar Singhraha v. State of Madhya Pradesh*** in Criminal Appeal Nos. 473-474 of 2019 decided on 12.3.2019 Hon'ble Supreme Court has observed that the Court will have to evaluate the evidence before it keeping in mind the rustic nature of the depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

28. We lest not forget that no prosecution case is foolproof and the same is bound to suffer from some lacuna or the other. It is only when such lacunae are on material aspects going to the root of the matter, it may have bearing on the outcome of the case, else such shortcomings are to be ignored. Reference may be made to a recent decision of the Apex Court (3 Judges) in Criminal Appeal No. 56 of 2018, **Smt. Shamim v. State of (NCT of Delhi),** decided on 19.09.2018.

29. In **Yogesh Singh vs. Mahabeer Singh & Other, 2017 (11) SCC 195,** Supreme Court has held that minor inconsistencies or insignificant embellishments in the statement of witnesses should yield to the fallibility of human faculties and be ignored if the evidence is otherwise trustworthy and corroborates in material particulars: -

"29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions. (See Rammi @ Rameshwar Vs. State of M.P. (1999) 8 SCC 649; Leela Ram (dead) through Dulli Chand Vs. State of Haryana and Another, (1999) 9 SCC 525; Bihari Nath Goswami Vs. Shiv Kumar Singh & Ors., (2004) 9 SCC 186; Vijay @ Chinee Vs. State of Madhya Pradesh, (2010) 8 SCC 191; Sampath Kumar Vs. Inspector of Police, Krishnagiri, (2012) 4 SCC 124; Shyamal Ghosh Vs. State of West Bengal, (2012) 7 SCC 646 and Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr., (2013) 12 SCC 796)."

30. Evidently, P.Ws.-5 and 6 are injured in incident. Dr. S.P. Varshney P.W.-1 examined their injuries and deposed that on 15.5.1983, he was posted as Medical Officer at District Etah. On the very same day, he medically examined Tolwar Singh and Chhaviram at about 1:45 p.m. and 2:00 p.m. respectively and found injuries on their person, prepared medical report mentioning their injuries. Dr. found following injuries on the body of Tolwar Singh :-

(i) Superficial burn over contused base in an area 16 cm x 7 cm on back of right elbow and upper forearm with peeling of cuticle.

(ii) Superficial burn on front of Rt. Arm in upper part size 4 cm. x 2 cm. Superficial layer of skin is absent with contused base. No black area are around the wound present.

(iii) Superficial burn in an area of 15 cm. x 6 cm. On Rt. Side of abdomen in lower part. Skin has not peeled off.

(iv) Superficial (multiple) burn in an area of 18 cm. x 8 cm. On front and outer side of Rt. Thigh upper half skin has not peeled off.

He also examined Chhaviram and found following injuries on his person.

(i) Superficial burn are (multiple) on left side of whole of chest 30 cm. x 18 cm. With some lacerated wound of .5 cm. x .5 cm. x skin deep. Skin has not peeled off.

(ii) Multiple small area of burn of the 1 cm. x .75 cm on back side of Lt. arm in an area of 20 cm. x 5 cm.

(iii) Superficial burn with the L/w 1 cm. x 1 cm. to 0.5 cm. x .75 cm. No blackening of skin present on the back of the hip and upper thigh in an area of 25 cm. x 10 cm.

31. From the statement of Dr. S.P. Varshney P.W.-1, it transpires that both P.Ws.-5 and 6 received injuries in incident.

It is well settled that presence of injured witnesses cannot be easily ignored on spot unless it is proved otherwise.

32. There is no suggestion from the side of accused persons that witnesses were not present on spot. In statement under Section 313 Cr.P.C., it is simply stated that they do not know why F.I.R. has been lodged against them. They have nothing to say. No evidence was adduced from the side of accused person in his defence. In his statement under Section 313 Cr.P.C., accused Badri Singh pleaded not guilty and denied the prosecution case and evidence of prosecution is said due to rivalry on account of land dispute. No specific plea has been taken by the accused persons why they have been trapped in so serious matter.

33. So far as motive is concerned, it is well settled, where direct evidence is worthy to credence, can be believed, then motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved.

34. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196**, Court held as under :-

"As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it."

35. Another limb of the argument is that PW-5 and PW-6 are closely related to each other and because of enmity they have falsely implicated the accused. The law of the point is well settled. The evidence of such witness is to be closely scrutinized, with extra care and caution. It cannot be rejected merely for the reason that they are closely related to the complainant. If on a careful scrutiny, their testimony is found to be intrinsically reliable and trustworthy, then nothing prevents the court from placing reliance upon the same, it is now well settled law laid down in **Dalip Singh v. State of Punjab, AIR,1953, SC 364,** where Court has held as under :-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause' for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

36. In **Dharnidhar v. State of UP (2010) 7 SCC 759,** Court has observed as follows :-

"There is no hard and fast rule that family members can never be true

witnesses to the occurrence and that they will always depose falsely before the Court. It will always depend upon the facts and circumstances of a given case. In the case of ***Jayabalan v. U.T. of Pondicherry (2010) 1 SCC 199,*** *this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim"*

37. In **Ganga Bhawani v. Rayapati Venkat Reddy and Others, 2013(15) SCC 298,** Court has held as under :-

"11. It is a 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. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (Vide: ***Bhagalool Lodh & Anr. v. State of UP, AIR 2011 SC 2292; and Dhari & Ors. v. State of U. P., AIR 2013 SC 308)****."*

38. In **Yogesh Singh (Supra)**, the Supreme Court summarized the legal position on the above issue as follows:

"28. A survey of the judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witnesses is required to be carefully scrutinised and appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly should, be relied upon. (See Anil Rai Vs. State of Bihar, (2001) 7 SCC 318; State of U.P. Vs. Jagdeo Singh, (2003) 1 SCC 456; Bhagalool Lodh & Anr. Vs. State of U.P., (2011) 13 SCC 206; Dahari & Ors. Vs. State of U. P., (2012) 10 SCC 256; Raju @ Balachandran & Ors. Vs. State of Tamil Nadu, (2012) 12 SCC 701; Gangabhavani Vs. Rayapati Venkat Reddy & Ors., (2013) 15 SCC 298; Jodhan Vs. State of M.P., (2015) 11 SCC 52)."

39. We have held that the presence of PW-5 and PW-6 was natural. Their testimony is consistent in respect of time and place of occurrence, the manner it took place and the persons instrumental in the same. They were subjected to lengthy cross examination, but the defence could not succeed in impeaching their creditworthiness by extracting anything suspicious.

40. It is settled that merely because witnesses are close relatives of victim, their testimonies cannot be discarded. Relationship with one of the parties is not a factor that affects credibility of witness, more so, a relative would not conceal the actual culprit and make allegation against an innocent person. However, in such a case Court has to adopt a careful approach and analyse the evidence to find out that whether it is cogent and credible evidence.

41. The result of above discussion is that there is clinching evidence to prove the prosecution case. The ocular version stands

corroborated by the medical evidence. The accused had come with hand grenade and in prosecution of the common object murdered Smt. Ramdevi and caused injuries to the injured. They succeeded in executing their plan successfully. They were rightly found guilty of offences by the Trial Court. There is no mitigating circumstance or evidence for taking a different view on the quantum of punishment. The appeal is devoid of merit and is **dismissed**. If the surviving appellants are on bail, they shall be taken in custody forthwith to serve out their sentence.

42. Let a copy of this judgment be sent to the trial court concerned.

(2021)07ILR A156
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.02.2021

BEFORE

THE HON'BLE AJIT SINGH, J.

Criminal Appeal No. 2929 of 1981

Smt. Nirmala Devi
...Appellant (On Interim Bail)
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri B.P. Gupta, Sri A.N. Mulla, Sri Atul Pandey, Sri I.N. Mulla, Sri Jitendra Pal Singh, Sri R.P. Tiwari, Sri Rahul Mishra, Sri S.P. Tiwari

Counsel for the Respondent:
A.G.A.

A. Criminal Law- Code of Criminal Procedure, 1973-Section 374(2) & Indian Penal Code, 1860-Section 161 & Prevention of Corruption Act, 1988-Section 5(2)-challenge to-conviction-reduction of substantive sentence-accused a lady doctor who is now 70 year old took bribe while serving in the government hospital-accused suffering from old age ailments and mental incarceration for about 41 years-hence, it would certainly be special reasons for reducing the substantive sentence but enhancing the fine, while maintaining the conviction.(Para 1 to 26)

The appeal is partly allowed. (E-5)

List of Cases cited:

1. Ashok Kumar Vs St. (Delhi Administration) (1980) 2 SCC 282

2. Sharvan Kumar Vs St. of U.P.(1985) 3 SCC 658

3. Ajab & ors .Vs St. of Mah. (1989) Supp. 1 SCC 601

4. V.K. Verma Vs CBI, (2014) CRLA No. 404

(Delivered by Hon'ble Ajit Singh, J.

1. Heard the learned counsel for appellant and Sri Rajesh Mishra, learned AGA appearing for the State and perused the record of this case.

2. This criminal appeal has been preferred against the judgment and order dated 19.11.1981 passed by IInd Additional Sessions Judge (Special Judge), Moradabad in Sessions Trial No. 460 of 1979 convicting the appellant under Section 161 of I.P.C. and sentencing her to one month's Rigorous Imprisonment and further convicting and sentencing her under Section 5(2) of the Prevention of Corruption Act to one month's Rigorous Imprisonment (under the impugned judgment and order). Both the above sentences were directed to run concurrently.

3. The prosecution story of this case in brief is that in the month of June 1979, the accused appellant was posted as Medical Officer in District Board's Janana Hospital in *Raja-Ka-Sahaspur*. It is next alleged that one Lokesh Pal Singh took his mother Smt. Shanti Devi to the said hospital and presented her before the accused appellant for treatment. It has been further alleged that the said ailing woman was medically examined by the accused appellant and after examining her, the appellant made a demand of Rs. 50/- as an illegal gratification for her treatment, at which Lokesh Pal Singh (son of the ailing woman) urged that there is no question of gratification in the Government hospitals as all the treatments there are available free of cost. Then, he was told that without charging money, the appellant never treated the patients. It was also told that even in big hospitals no treatment is done without charging the extra money. The complainant Lokesh Pal Singh was not having any money at that time. He showed his inability to fulfill the demand of the accused appellant and desired some time to arrange money to fulfill the illegal demand of the accused appellant and returned back.

4. It was also stated by the prosecution that the accused appellant did show her willingness to accept even Rs. 40/- for doing the treatment. Thereafter, a complaint was moved by Lokesh Pal Singh against the accused appellant in writing (Ext. Ka-1) before the Deputy Superintendent of Police, Anti-Corruption Department, Moradabad and in the said complaint, it was mentioned that the accused appellant was habitual of accepting bribes from the attendants of the patients who came to her for treatment.

5. Further prosecution case is that since the complainant wanted to get the accused appellant arrested red-handed, he was required by the Dy. S.P. To meet Ram Autar Tyagi, Inspector (Anti-Corruption), who recorded the statement of the complainant on 6.6.1979. The complainant was not having the amount to be offered to the lady doctor (appellant), he promised to come back with money on 07.06.1979 and the said Inspector along with other officials as well as the complainant with his mother Smt. Shanti reached at 9:00 A.M. at Octroi Post, Kundarki and at that place complainant Lokesh Pal Singh produced two currency notes of Rs. 20/- each which were treated with phenolphthalein powder by the driver Khem Singh and Lokesh Pal Singh was directed to pay those very notes to the lady doctor on demand. The number of the currency notes meant for being offered to the lady doctor (appellant) were noted in the *Fard* and the entire police party proceeded to the Janana Hospital, Raja Ka Sahaspur under PS Bilari, District - Moradabad. The jeep was parked a furlong before the Hospital. The party consisted of Inspector Ram Autar Tyagi, H.C. Km. Praveen Siddiqi and the two public witnesses and the other employees. It is further alleged that the accused was present in the room and as a matter of precaution Constable Km. Praveen Siddiqi was shown to the accused (lady doctor) for certain ailment though she was not suffering from any disease. Her name was entered by the accused in the outdoor register of the Hospital and was given some tablets and a prescription by the accused. Thereafter, it is alleged that after seeing Lokesh Pal Singh, the accused enquired from him if he had brought the money and his reply was in affirmative.

6. It is further alleged by the prosecution that immediately on demand, the two currency notes of Rs. 20/- each were handed over by complainant to the accused and she kept them in her left palm. Thereafter, the Inspector Shri R.A. Tyagi gave his introduction and in presence of the witnesses, got the two currency notes recovered from the left 'Fist/Mutthi' of the accused through H.C. Km. Praveen Siddiqi. The numbers of the said notes were compared with the numbers of the notes noted down in the memo earlier and were sealed in an envelope and wash of the accused's hand was taken in presence of the witnesses with the solution of sodium corbonate. Its colour turned pink *(gulabi)* and the same was filled in a bottle and then sealed. The First Information Report was lodged against the accused appellant at 11:30 A.M. by the said Ram Autar Tyagi, Inspector giving all the details.

7. A case was registered against the accused and after the investigation, charge sheet was submitted against her on 27.08.1979 with due permission for her prosecution. The accused pleaded not guilty and claimed to be tried.

8. After the completion of the trial proceedings, the accused appellant was found guilty of the charges levelled upon her and accordingly, she was convicted and sentenced by the impugned judgment and order as noted above.

9. Hence, the present appeal.

10. The learned counsel for the appellant submits that the incident is of the year 1979. The appellant is a lady and now she is aged about more than 70 years and is suffering from age related ailments. For the last 41 years, the sword of punishment had been hanging over her head. It is also submitted by the learned counsel that the appellant had suffered mental incarceration since the very inception of this incident. Learned counsel has further submitted that he does not want to press this appeal on merits but wants to argue only on the quantum of sentence.

11. However, the learned counsel for appellant has submitted that in **1982 Raj Cri C 120 (12), 1980 Raj Cri C 9(10),** a sentence of imprisonment under Section 161 was set aside by the High Court as the accused was above 60 years of age, had retired and the bribe amount was only Rs. 5/- and a sentence of fine was imposed.

12. The learned counsel for appellant has also argued that the question of sentence must in each case depend upon a variety of considerations and is a matter primarily in the discretion of the Court which passes a sentence and in support of his this argument, the learned counsel cites the decision of the Apex Court reported in **1979 CriLR (SC) 182 (183).**

13. The learned A.G.A. has strongly opposed the submission made by the learned counsel for appellant and he submits that the impugned judgment and order of the learned Trial Court is liable to be confirmed and the appeal deserves to be dismissed.

14. After having gone through the judgment and order assailed by this appeal and having perused the facts and circumstances of this case, it would not be out of context to have a glance on Section 5 of the Prevention of Corruption Act, 1947 which deals with criminal misconduct.

15. Section 5(2) deals with punishment, which reads as under:-

"5. Criminal misconduct.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine :

Provided that the court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year."

16. **Section 161 of IPC** was omitted by the introduction of the Prevention of Corruption Act, 1988. The pre-amended proviso dealt with the offence of public servant taking gratification other than legal remuneration in respect of an official act. The punishment was:

"... .....imprisonment of either description for a term which may extend to three years, or with fine or with both."

17. Thus, as far as punishment under the old Section 161 of IPC is concerned, there is no mandatory minimum punishment. The question is whether the sentence could be reduced for any special reason. Under the old Prevention of Corruption Act, 1947, there is a mandatory minimum punishment of one year. It may extend to seven years. However, under the proviso, the court may, for special reasons, impose a sentence of imprisonment of less than one year.

18. In imposition of punishment, the concern of the court is with respect to the nature of the act viewed as a crime or breach of the law. The maximum sentence or fine provided in law is an indicator of the gravity of the act. Having regard to the nature and mode of commission of an offence by a person and the mitigating factors, if any, the court has to take a decision as to whether the charge established falls short of the maximum gravity indicated in the statute, and if so, to what extent.

19. The long delay before the courts in taking a final decision with regard to the guilt or otherwise of the accused is one of the mitigating factors for the superior courts to take into consideration while arriving at a decision on the quantum of sentence to be imposed. As we have noted above, the F.I.R. was registered by the police in the year 1979 and the appellant has suffered physical and mental agony of criminal trial and conviction for more than 41 years in the *trap-case* involving a petty amount of Rs. 40/-.

20. In **Ashok Kumar Vs. State (Delhi Administration), 1980 (2) SCC 282,** the commission of offence of theft was in 1971 and the judgment of the Court was delivered in 1980. The conviction was under Section 411 of I.P.C. The Hon'ble Apex Court having regard to the purpose of punishment and "the long protracted litigation", reduced the sentence to the period already undergone by the convict.

21. In **Sharvan Kumar Vs. State of Uttar Pradesh, (1985) 3 SCC 658**, the commission of offence had taken place in 1968 and the judgment was delivered in 1985. The conviction was under Section 467 and 471 of IPC. In that case also, the long delay in the litigation process was one of the factors taken into consideration by the Court in reducing the sentence to the period already undergone.

22. In **Ajab and others Vs. State of Maharashtra, (1989) Supp. (1) SCC 601** also, the Hon'ble Apex Court had an occasion to examine a similar situation. The offence was committed in 1972 and the Court delivered the Judgment in 1989. The conviction was under Section 224 read with Section 395 of IPC. In that case also, passage of time was reckoned as a factor for reducing the sentence to the period already undergone. The Hon'ble Apex Court in that case, while reducing the substantive sentence, increased the fine holding that the same would meet the ends of justice.

23. In **Criminal Appeal No.404 OF 2014: V.K. Verma Vs. CBI,** decided on 14th February, 2014, the Hon'ble Apex Court has held in paragraphs - 15 and 16 thus:

"The appellant is now aged 76. We are informed that he is otherwise not keeping in good health, having had also cardio vascular problems. The offence is of the year 1984. It is almost three decades now. The accused has already undergone physical incarceration for three months and mental incarceration for about thirty years. Whether at this age and stage, it would not be economically wasteful, and a liability to the State to keep the appellant in prison, is the question we have to address. Having given thoughtful consideration to all the aspects of the matter, we are of the view that the facts mentioned above would certainly be special reasons for reducing the substantive sentence but enhancing the fine, while maintaining the conviction.

*Accordingly, the appeal is partly allowed. The substantive sentence of imprisonment is reduced to the period already undergone. However, an amount of Rs.50,000/- is imposed as fine. The appellant shall deposit the fine within three months and, if not, he shall undergo imprisonment for a period of six months. On payment of fine, his bail bond will stand cancelled".**(emphasis supplied)***

24. In the present case, this Court finds that the appellant is a lady, who is now a senior citizen aged about more than 70 years. This Court has also been informed that she is not keeping good health and is suffering from age related ailments. The offence pertain to the year 1979 and since she has been suffering mental incarceration for about more than 40 years. After conviction, she was on interim bail and thereafter, she was directed to be released on bail pending this appeal, vide order dated 14.12.1981 of this Court.

25. Looking to the facts and circumstances of this case and also taking into consideration the ratio of the law laid down by the Hon'ble Apex Court as discussed above, this Court is of the firm view that certainly a case is made out for reducing the substantive sentence by enhancing the fine. However, no case is made out to interfere with the conviction of the accused appellant.

26. In the result, the appeal is **partly allowed.** The substantive sentence of imprisonment is reduced to the period already undergone. However, an amount of Rs. 5,000/- is imposed as fine. The appellant shall deposit the fine within six months from the date of this judgment and in case of default in depositing the fine, she shall undergo imprisonment for a period of one month. On payment of the fine of Rs.5,000/-, her bail bonds will stand cancelled.

27. Let a copy of this judgment and order be sent to the learned District Judge, Moradabad for compliance.

28. The record of the lower court be transmitted immediately to the lower court.

(2021)07ILR A161
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.07.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Appeal No. 3271 of 2011
with
Criminal Appeal No. 3210 of 2011

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

Counsel for the Appellant:
Sri Rajul Bhargava, Sri A.C. Tiwari, Sri Indra Jit Singh, Sri Manoj Kumar Rajpal, Sri Rajeev Kumar Singh, Sri Yogesh Srivastava, Sri Noor Muhammad, Sri O.P. Singh

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

A. Criminal Law- Code of Criminal Procedure, 1973 - Section 374(2) - Indian Penal Code, 1860-Section 302/34 - Arms Act, 1959- Section 25-challenge to-conviction-when the deceased was returning home after defecation, appellants having unlicensed gun surrounded the deceased and shot fire-PW-1 and PW-2 seen the incident and reached the spot immediately and FIR lodged by PW-1 within 1 hour 5 minutes- ocular testimony of PW-1 and PW-2 fully corroborated by medical evidence-Presence of PW-3 on the spot also proved -finding of the trial court is based on proper appreciation of the evidence.(Para 1 to 132)

B. The maxim 'falsus in uno falsus in omnibus' is not a sound rule to apply in the conditions in this country, and therefore, it is the duty of the court in cases where a witness has been found to have given unreliable evidence in regard to certain particulars, to scrutinise the rest of his evidence with care and caution. omission on the part of the investigation cannot go against the prosecution case if it is otherwise supported by reliable and credible evidence.(Para 122 to 128)

C. Evidentiary value of medical evidence is only corroborative and not conclusive and hence, in case of a conflict between oral evidence and medical evidence, the former is to be preferred unless the medical evidence completely rules out the oral evidence.(Para 120,121)

D. It is well settled position of law that non-examination of independent witnesses by itself may not give rise to an adverse inference against the prosecution, but when the evidence of the alleged eyewitnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witnesses would assume significance. it is also well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement,(Para 116)

The appeal is dismissed. (E-5)

List of Cases cited:

1. Nagappan Vs St. by Inspr. of Police, T.N.(2013) 15 SCC 252

2. Yogesh Singh Vs Mahaveer Singh & ors. (2017) 11 C 195

3. Ganga Bhawani Vs Rayapati Venkat Reddy & ors. (2013) 15 SCC 298

4. Bhagalool Lodh & anr. Vs St. of U.P.(2011) AIR SC 2292

5. Dhari & ors. Vs St. of U.P.(2013) AIR SC 308

6. Anil Rai Vs St. of Bih. (2001) SCC 456

7. Raju@ Balachandran & ors. Vs St. of T.N. (2012) 12 SCC 701

8. Jodhan Vs St. of M.P.(2015) 11 SCC 52

9. St. of U.P. Vs Jagdeo (2003) 1 SCC 256

10. Stalin Vs St. reptd. by the Inspr of Police(2020) SCC 524

11. Badam Singh Vs St. of M.P.(2003) 12 SCC 792

12. Sheikh Hasib alias Tabarak Vs St. of Bih. (1972) 4 SCC 773

13. Balram Singh & anr. Vs St. of Punj.(2003) 11 SCC 286,

14. Puran Vs St. of Punj.(1953) AIR SC 459

15. Sarvesh Narain Shukla Vs Daroga Singh & ors. (2007) 13 SCC 360

16. Hem Raj & ors. Vs St. of Har. (2005) 10 SCC 614

17. Jarnail Singh Vs St. of Punj. (2009) 9 SCC 719

18. Rana Pratap & ors. Vs St. of Har. (1983) 3 SCC 327,

19. Ashok Vishnu Davare Vs St. of Mah. (2004) 9 SCC 431

20. Radha Kumar Vs St. of Bih.(2005) 10 SCC 216

21. Sunil Kumar Sambhudayal Gupta(Dr.) & ors. Vs St. of Mah.(2010) 13 SCC 657

22. Baldev Singh Vs St. of Punj.(2014) 12 SCC 473

23. Raghubir Singh Vs St. of U.P.(1972) 3 SCC 79

24. St. of H. P. Vs Gian Chand, (2001) 6 SCC 71,

25. C.Muniappan & ors. Vs St. of T.N.(2010) AIR SC 3718

26. Deep Chand Vs St. of Har.(1969) 3 SCC 890

27. Sucha Singh & anr. Vs St. of Punj. (2003) 7 SCC 643

(Delivered by Hon'ble Sanjay Kumar Pachori, J.

1. The present appeals have been preferred by the appellants against the common judgment and order passed by Additional District & Sessions Judge, Court No. 2 Mathura, on 16.5.2011 and 18.5.2011 in Sessions Trial Nos. 40 of 2008, 207 of 2008, 208 of 2008, and 73 of 2008 arising out of Case Crime No. 681 of 2007 Police Station1 Highway, District Mathura, whereby the appellants Jagdish and Manoj Kumar have been convicted for the offences punishable under Section 302 read with 34 of Indian Penal Code (in short "I.P.C."). The punishment awarded to the appellants for their conviction noticed above is as follows; imprisonment for life with a fine of Rs. 20,000/- each and default sentence of one year under Section 302 read with 34 of I.P.C. Learned trial court acquitted other co-accused Raghunath and Sahukar under Section 302 read with Section 34 of I.P.C. and the appellants Jagdish and Manoj Kumar under Section 25 of Arms Act and no Government appeal/s was/were reported to be pending against the aforesaid acquittal. Since the abovementioned appeals arise from a common judgment of the trial court, it will be proper for us to deal with these appeals in a common judgment.

PROSECUTION CASE

2. The brief facts of the case, as unfolded by the prosecution are as follows: On 10.11.2007, at 10:35 A.M., Mangal Singh (PW-1), the father of the deceased Kamal Singh, gave a written complaint (Ex.Ka.-1) at P.S. Highway, District Mathura, stating that his son Kamal Singh (deceased) returned back after attending the call of nature on 10.11.2007 at about 9:30 A.M. then Manoj and Jagdish, who had skimmers (Paunia/unlicensed gun) in their hands and Raghunath Singh and Sahukar, who had lathies in their hands, surrounded his son in the field of Prem Singh; then Raghunath and Sahukar shouted that his father poses himself to be great litigant, kill him and don't let him escape, at the same time Manoj and Jagdish shot fire at his son Kamal Singh with their skimmers (Paunia/ unlicensed gun). On hearing the gunshots, he along with his elder son Lakhan (PW-2), who were standing on the tubewell of Prem Singh, reached the spot. After hearing the noise, Raghuvir Singh, Moolchand, (not examined) and his 15 years old daughter Rekha (PW-3), who was coming from the field after dumping the cow dung, rushed to the spot. On seeing many people coming from the village, accused persons fled away towards their house threatening them to kill. Injured Kamal Singh, who tried to run towards his house after being shot, fell on the ground after 15-20 steps and died on the spot.

3. On the basis of a written complaint (Ex.Ka.-1) of Mangal Singh (PW-1) which was scribed by Mahavir Singh, an FIR dated 10.11.2007 (Ex.Ka-16) was registered as Case Crime No. 681 of 2007 under section 302 I.P.C. against the appellants and co-accused Raghunath Singh, and Sahukar at PS. Highway, District Mathura, at 10:35 A.M. by Head Constable2 124 Ramesh Chand (PW-5) and he entered the FIR in G.D. Report No.19 at 10:35 A.M. on 10.11.2007 (Ex.Ka.-17). The distance between the place of the incident and the Police Station is 16 Km. The special report (SR Report) of the present case had been sent to the Magistrate on the same day at 16:20 hours. After lodging the F.I.R. of the case, Sub-Inspector3 Rakesh Kumar Awasthi (Station House Officer4/PW- 4) himself took over the investigation of the case and he along with S.I. Netrapal Sharma (not examined) reached the place of occurrence. S.I. Rakesh Kumar Awasthi after inspecting the place of the incident, as pointed out by the informant (PW-1), prepared a site map (Ex.Ka-2) of the place of the incident. He also recovered blood-stained and plain earth from the place of the incident in presence of witnesses and prepared a seizure memo (Ex.Ka-3). The proceedings of the inquest were commenced at 11:05 A.M. and completed at about 12:15 P.M. by S.I. Netrapal Sharma under the direction of S.I. Rakesh Kumar Awasthi and in presence of *Panchan* (witnesses) at the spot and the inquest report (Ex.Ka-4) and other police papers i.e. letter to Chief Medical Officer, Photo Nash, Challan Lash and letter to R.I. (Ex.Ka-5 to Ex.Ka-7 and Ex.Ka.-24) were prepared for getting a post-mortem of the body of the deceased. The body of the deceased was sent for autopsy along with copy of the Chick FIR (Ex.Ka.-8) and other police papers through Constable No. 448 Ratan Kumar and Constable No. 147 Ashok Kumar. The statements of eyewitnesses Mangal Singh, Lakhan Singh, Raghuvir Singh and Moolchand have been recorded by the

investigating officer5, under Section 161 Cr. PC. On 10.11.2007.

4. PW-7 Dr. Surendra Singh conducted the post-mortem examination of the body of the deceased on 10.11.2007 at 3:40 P.M. and opined that the cause of death was shock and haemorrhage due to ante-martem injuries. The post-mortem report (Ex.Ka.-23) disclosed multiple firearm ante-mortem injuries on the corpse of Kamal Singh (aged about 18 years). These are as under:

1. Multiple wounds of entry of firearms size 0.5 cm x 0.5 cm skin deep present on right arm and forearm, margin inverted.

2. Multiple wounds of entry of firearms size 0.5 cm x 0.5 cm x cavity deep present on both chest and neck, margins inverted.

3. Multiple wounds of entry of firearms size 0.5 cm x 0.5 cm skin deep present on front of abdomen, margins inverted.

5. The doctor further opined that during the post-mortem, 10 pellets (3 from heart, 2 from the right lung, 3 from the left lung, and 2 from the liver) were recovered from the corpse which was handed over to the concerned constable in a sealed cover envelope. The membranes of the brain of the deceased were yellow, and accumulated blood was present, both lungs were torn, the stomach was empty, liver was torn, both kidneys were also yellow. The doctor further opined that death might have been caused 8 hours earlier to the post-mortem.

6. During the investigation, on 13.11.2007, co-accused, Sahukar and Raghunath Singh were arrested, and thereafter they were sent to jail after recording their respective statements. On 23.11.2007 PW-4 S.I. Rakesh Kumar Awasthi also arrested the appellant Jagdish, his statement was recorded and as pointed out by the appellant Jagdish recovered a skimmer (Paunia/unlicensed gun) .12 bore, four live and one empty cartridge, from the bushes near Pokhara Kachchi Road in presence of witnesses and seizure memo (Ex.Ka.-9) was prepared. Thereby, he has committed offence, on the basis of recovery made, an F.I.R. of Case Crime No. 708 of 2007 (Ex.Ka.-21) was registered against the appellant Jagdish under Section 25 of Arms Act at PS. Highway, Mathura. All the articles recovered during the investigation were sent for forensic examination. After completion of the investigation on 3.1.2008, a charge sheet (Ex.Ka.-11) was submitted against the appellants Jagdish and co-accused Raghunath Singh and Sahukar in Case Crime No. 681 of 2007 under Section 302 I.P.C. The prosecution has not examined the witnesses of the inquest report (Ex.Ka.-4) and S.I. Netrapal Sharma, who completed the proceedings of the inquest and prepared the inquest report (Ex.Ka.-4) and other related police papers (Ex.Ka.-5, Ex.Ka.-6, Ex.Ka.-7, and Ex.Ka.-24) which have been proved by PW-4 S.I. Rakesh Kumar Awasthi as secondary evidence.

7. S.I. Kunwar Singh (PW-6) after receiving the investigation of Case Crime No. 708 of 2007, under Section 25 of Arms Act, on 25.11.2007 prepared a site map (Ex.Ka.-18) of the place where the skimmer (Paunia/unlicensed gun) .12 bore was recovered and after completion of the investigation submitted a charge sheet under Section 25 of Arms Act, (Ex.Ka.-19) against the appellant Jagdish.

8. Proceedings under Section 82 and 83 of Code of Criminal Procedure, 1973 (in

short "Cr. PC.") were initiated against the appellant Manoj Kumar by the competent court. Pursuant to which the appellant Manoj Kumar surrendered before the court concerned on 28.01.2008 and was sent to jail. The statement of the appellant Manoj Kumar had been recorded in jail by the I.O. After taking police custody remand of appellant Manoj Kumar on 3.2.2008, The I.O. recovered a skimmer (Paunia/ unlicensed gun) .12 bore, two live and one empty cartridge, on pointing out of the appellant Manoj Kumar from the bushes of Babool near Bohara Pokhara Road in presence of witnesses and seizure memo (Ex.Ka-12) was prepared. Thereby, he has committed offence, on the basis of recovery made, an F.I.R. of case crime no. 59 of 2008 under Section 25 of Arms Act (Ex.Ka.-27) at P.S. Highway, Mathura was registered against the appellant Manoj Kumar. All the articles recovered during the investigation were sent for forensic examination. After completion of the investigation on 3.2.2008, a charge sheet (Ex.Ka.-13) in Case Crime No. 681 of 2007 under Section 302 I.P.C. was submitted against the appellant Manoj Kumar.

9. S.I. Veeresh Kumar (PW-8) also after receiving the investigation of Case Crime No. 59 of 2008, under Section 25 of Arms Act on 3.2.2008 prepared a site map (Ex.Ka.-24) of the place where skimmer (Paunia/unlicensed gun) .12 bore was recovered and after completion of the investigation submitted a charge sheet (Ex.Ka.-25) under Section 25 of Arms Act against the appellant Manoj Kumar.

10. Upon completion of the investigation of Case Crime Nos. 681 of 2007, 708 of 2007, and 59 of 2008, the investigating officers submitted the charge sheets, upon which cognizance was taken by the concerned Magistrate and thereafter, the cases were committed to the Court of Sessions giving rise to Sessions Trial Nos. 40 of 2008, 207 of 2008, 208 of 2008, and 73 of 2008. All the cases were amalgamated and the trial commenced. On 21.7.2008, learned trial court framed charges against the appellants Jagdish and co-accused Raghunath Singh, and Sahukar under Sections 302 read with Section 34 I.P.C. and a separate charge was framed against the appellant Jagdish under Section 25 of Arms Act. On 22.7.2008, the trial court framed charges against the appellant Manoj Kumar under Sections 302 read with Section 34 I.P.C. and a separate charge was framed against the appellant Manoj Kumar under Section 25 of Arms Act. The appellants and co-accused Raghunath Singh and Sahukar denied the charges and plead 'not guilty' and hence they were tried by the Court of Sessions.

11. During the trial, eight prosecution witnesses were examined to prove the prosecution case. PW-1 Mangal Singh, informant/father of deceased, PW-2 Lakhan Singh, elder brother of the deceased, PW-3 Rekha, age about 15 years/ younger sister of the deceased were the eye-witnesses of the incident. PW-4 S.I. Rakesh Kumar Awasthi, the then SHO, who investigated the case Crime No. 681 of 2007, proved various stages of the investigation including the documents connected therewith and also proved the material objects as Ex.-1 to Ex.-22, PW-5 HC Ramesh Chand, scribe of F.I.R. who proved the registration of the FIR, the

Chick FIR and GD entry as G.D. Report No. 19, thereof, PW-6 S.I. Kunwar Singh, I.O. of Case Crime No. 708 of 2007, PW-7-Dr. Surendra Singh, who conducted the post-mortem, proved the post-mortem report and PW-8 S.I. Veeresh Kumar, I.O. of Case Crime No. 59 of 2008. The permissions for prosecution under Arms Act against the appellants were given by District Magistrate Mathura (Ex.Ka.-20, Ex.Ka.-26), and were filed before the committal court, and proved by PW-6 and PW-8.

12. The appellants and co-accused were examined by the trial court under Section 313 of Cr.PC. wherein, they denied the incriminating evidence put to them and stated that they have been falsely implicated on account of enmity. The appellants Jagdish, Manoj Kumar stated that Mangal Singh, informant wanted to encroach their plot in the garb of the murder of Kamal Singh, the murder took place at different place and time by other persons, a false report has been lodged against them for taking possession of their plot. The appellants, however, did not lead any oral or documentary evidence in support of their defence.

FINDINGS OF THE TRIAL COURT

13. The trial court on the basis of the evidence held that the testimony of PW-1 Mangal Singh, PW-2 Lakhan Singh, and PW-3 Rekha is cogent, credible, trustworthy, and wholly reliable with regard to the guilt of the appellants Jagdish and Manoj Kumar. The evidence of relative of the deceased cannot be disbelieved merely on the ground that the witnesses are related to each other or to the deceased, it is a settled position of law that mere fact that the witnesses are related to each other itself is no ground to discard their evidence. Indeed, the evidence of a closely related/interested/inimical witness is required to be carefully scrutinised and appreciated with caution. It is an admitted fact that there exists an enmity between the appellants and the informant with regard to a plot, it cannot be said that the motive exists only against the informant.

14. The trial court also found that the FIR against the appellants and co-accused was lodged promptly i.e. within one hour and 5 minutes of the incident wherein the distance between the place of the incident and the police station is 16 Km, and the argument that the FIR had come into existence after the inquest proceedings had been completed, was unacceptable. The informant Mangal Singh lodged the FIR against the appellants and co-accused promptly; the complaint contained the signature of the informant at the bottom of the complaint i.e. back of the complaint. The credibility of the FIR is not affected merely on the ground that the informant had not signed on the first page of the complaint; scriber of the complaint (Ex.Ka.-1) Mahavir Singh had not been examined because there is no dispute with regard to the fact that the complaint was received by PW-5 HC Ramesh Chand and the copy of the FIR was issued to the informant immediately after registering the FIR. It is of no consequence, that the complaint has not contained his signature on the first page because the informant signed at the bottom of the complaint i.e. at the back of the first page.

15. The trial court further held that the special report (SR Report) of the present case was sent at 16:20 P.M. on 10.11.2007 by Constable Dhanesh, the delay (about 6 hours)

in sending the SR Report had been duly explained by PW-5 HC Ramesh Chand. The inquest proceedings were commenced at 11:05 A.M. and the post-mortem of the dead body was completed at 3:40 P.M. on the same day, and it was suggested to PW-7 Dr. Surendra Singh that no other police papers except the inquest report, were received at the time of post-mortem, and seizure of incriminating articles was effected, only on the basis of such delay in sending the SR Report, the credibility of the FIR is not affected; overwriting in the Chick FIR (Ex.Ka.-16) at distance between the place of the incident and the Police Station, digit '6' of '16 Km'; at the time of lodging of the FIR digit '0' of '10:35 A.M.' and the time of the incident, letter 'A' of '9:30 A.M' are only a clerical mistake because there is no overwriting in G.D. entry of Chick FIR. G.D. Report No. 19 with regard to the other facts. There is no dispute with regard to receiving the copy of FIR by the informant after its registration, on the basis of such clerical mistake, it can not be said that the FIR of the present case was lodged ante timed.

16. The trial court further held that the presence of eye-witnesses PW-1 Mangal Singh and PW-2 Lakhan Singh at the tubewell of Prem Singh, at the time of the incident, is natural because they went to the tubewell of Prem Singh for taking the water for irrigation of their field, wherein Prem Singh was present at that time and after hearing of the gunshots, PW-1 and PW-2 rushed to the spot. The presence of PW-3 Rekha in her plot, where she was dumping cow dung at the time of the occurrence, which is situated near the place of the incident, is natural after seeing the incident she also rushed to the spot. The eye-witnesses PW-1, PW-2, and PW-3 has seen the incident and after committing the offence, the appellants and co-accused fled away from the place of the occurrence.

17. The trial court further held that the motive is not of much importance where positive evidence of eye-witnesses against the accused persons is clear in relation to the offence; mere absence of motive, even if assumed, will not per se entitle the accused persons to acquittal, if otherwise, the commission of the crime is proved by cogent and reliable evidence. The medical evidence supported the ocular version inasmuch as the injuries found on the dead body of Kamal Singh revealed that multiple firearm injuries were received from the front side.

18. The trial court further observed that merely non-examination of independent witness Raghuvir Singh and Moolchand, the prosecution evidence can not be discarded on this ground alone. Moreover, it is a settled position of law that non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record.

19. The trial court further observed that the investigating officer has recorded the statement of PW-3 Rekha under Section 161 of Cr. PC. after 25 days of the incident, it is noteworthy that Rekha (PW-3) is named as an eye-witness in the FIR and it was not disputed that PW-3 Rekha had not seen the incident, if the I.O. committed any delay in recording the statement, it has no relevance. It is an admitted fact that the deceased Kamal Singh had not received any injury of lathies and eye-witnesses clearly stated that co-accused Raghunath

and Sahukar had not caused any injury to the deceased with lathies. The eye-witnesses PW-1, PW-2, and PW-3 reached the place of the incident after hearing the gunshots and they saw the incident from distance. It means that they had not heard the exhortation, therefore, the prosecution failed to prove the role of exhortation, against Raghunath Singh and Sahukar. There is no inconsistency between the ocular and the medical testimony with regard to the direction of the gunshot.

20. After analysing the evidence, the learned trial court concluded that the prosecution successfully proved the charges against the appellants Jagdish and Manoj Kumar under Section 302 read with Section 34 of I.P.C., beyond reasonable doubt, and thereby convicted and sentenced the appellants as above. The trial court acquitted co-accused Raghunath and Sahukar under Section 302 read with Section 34 of I.P.C. and the appellants under Section 25 of Arms Act.

21. Being aggrieved by the trial court's judgment and order, the appellants have preferred these appeals.

SUBMISSION BEFORE THIS COURT

22. We have heard Sri O. P. Singh, learned Senior counsel assisted by Sri Rajiv Singh, Sri Indrajit Singh for the appellants; Sri Ratan Singh learned A.G.A., for the State and have perused the record.

23. Mr. O. P. Singh, learned Senior counsel for the appellants has raised several arguments before us during the course of the hearing for assailing the judgment of the trial court and vehemently urged that PW-1 Mangal Singh, PW-2 Lakhan Singh, and PW-3 Rekha are chance witnesses. The presence of PW-1, and PW-2, at the tubewell of Prem Singh, has not been satisfactorily explained and proved. The presence of PW-3 Rekha on her plot at the time of the incident has also not been satisfactorily explained and proved. The presence of the eye-witnesses is highly doubtful and unbelievable because they kept mum till the accused persons fled away from the spot and there are material inconsistencies in their testimony about their presence thereof, which leads cast serious doubt in the prosecution version. The prosecution witnesses are relative /inimical witnesses and the independent witnesses Raghuvir, Moolchand have not been examined and have been purposely withheld by the prosecution. The medical evidence is in conflict with the ocular testimony of alleged eye-witnesses and it materially affects the reliability of the witnesses.

24. Learned counsel for the appellants further submitted that there are overwriting in the Chick FIR, by which the time of registering of the FIR, the time of the incident, and the distance between the place of the incident and the police station were corrected, which suggested that the FIR was lodged ante-timed and a false prosecution story was developed. The trial court did not appreciate and consider the entire evidence on record in the correct legal perspective. The prosecution has failed to prove the case against the appellants beyond reasonable doubt inasmuch as it has failed to prove that the incident occurred in the manner alleged, therefore, impugned judgment and order are liable to be set aside.

25. **Per contra**; the learned AGA has supported the judgment of the trial court

and has refuted the arguments made on behalf of the appellants and submitted that this is a case of broad daylight murder with direct evidence to prove the guilt. The incident took place on 10.11.2007 at 9:30 A.M. in the field of Prem Singh and PW-1 Mangal Singh and PW-2 Lakhan Singh saw the incident from the tubewell of Prem Singh and PW-3 Rekha saw the incident from her plot and they reached the place of the incident immediately after seeing the occurrence. The FIR was lodged by the informant against the appellants and the co-accused on the same day at 10:35 A.M. promptly i.e. within 1 hour and 5 minutes of the incident. The ocular testimony of eye-witnesses is corroborated by the medical evidence. The doctor (PW-7), who conducted the post-mortem examination had clearly suggested that death might have been taken place within 8 hours, which suggests that the incident has occurred at the time put by the prosecution. There is a sufficient reason put forth with regard to the delay caused in sending the SR Report; there is no inordinate delay in recording the statement of PW-3 Rekha under Section 161 of Cr. PC.

26. Learned A.G.A. further submitted that the prosecution has successfully proved the prosecution case. The trial court has properly appreciated the evidence and rightly held the appellants guilty. The findings recorded by the trial court are based on proper appreciation of the evidence. The judgment and order of the trial court are liable to be affirmed. Hence, the appeals are liable to be dismissed.

ANALYSIS OF THE PROSECUTION EVIDENCE

27. Before we proceed to test and analyse the respective submissions, it would be apposite to notice the arguments on behalf of the appellants in detail. The appellants' arguments are: *Firstly*; the FIR of the present case was lodged ante-timed which casts a complete shadow of doubt on the prosecution case for the reasons below:

(a) There are overwriting in serial no. 5, 6, and 9 of the Chick FIR, by which corrected the distance between the place of the incident and the police station on digit '6' of digit '16 Km', the registering time of the FIR on the digit '0' of time '10:35 A.M.' and the time of the incident on the letter 'A' after '9:30 A.M.'. Initially, the distance between the place of the incident and the police station was '12 Km', the registering time of the FIR was 11:35 A.M., and the time of the incident was 9:30 P.M. were written.

(b) The special report (SR Report) has been sent after an unexplained delay of about 6 hours at 16:20 hours on 10.11.2007.

(c) There is an inconsistency between the testimony of PW-1 Mangal Singh on one hand and PW-4 S.I. Rakesh Kumar Awasthi on the other hand with regard to the scribe of the complaint (Ex.Ka.-1). According to PW-1 Mangal Singh, Mahavir Singh is a writer of the complaint; whereas, PW-4 stated that Mahavir did not state that he had written the complaint.

(d) PW-1 Mangal Singh has given a self-contradictory statement, with regard to the writer of the complaint (Ex.Ka.-1); he stated in his examination-in-chief that the report of the incident was written by Mahavir Singh; whereas he stated in his cross-examination that on the day of the incident he had not met with Mahavir Singh.

(e) The scribe of the complaint, Mahavir Singh had not been examined by the prosecution to prove the complaint (Ex.Ka.-1).

(f) The informant had not lodged the FIR, because the informant had not signed on the first page of the complaint (Ex.Ka.-1).

Secondly; PW-1 Mangal Singh, PW-2 Lakhan Singh, and PW-3 Rekha are chance witnesses, their presence is highly doubtful, and as alleged that they saw the incident from distance. The presence of PW-1, and PW-2, at the tubewell of Prem Singh at the time of the incident, has not been satisfactorily explained and proved. The prosecution also failed to explain and prove the presence of PW-3 Rekha near the field of Prem Singh at the time of the incident, therefore, the testimony of PW-1, PW-2, and PW-3 does not appear reliable and does not inspire confidence in the prosecution case, which, seriously affects the credibility of PW-1, PW-2, and PW-3. Which emerges from the following circumstances:

(a) Prem Singh has not been examined by the prosecution to prove the presence of PW-1 and PW-2 at the tubewell at the time of the incident.

(b) PW-1 and PW-2 saw the incident from a distance of 150 steps and saw the appellants and co-accused with lethal weapons before the incident but they kept mum till the accused persons did not flee away from the spot after committing the offence.

(c) PW-3 saw the incident from the plot and saw the accused persons with lethal weapons before the incident but she also kept mum till the accused persons have not been fled away from the spot after committing the offence.

(d) PW-3 Rekha has given a self-contradictory statement with regard to the place of her presence. PW-3 Rekha stated in her examination-in-chief that she was coming from the field after dumping the cow dung at that time and rushed to the spot; whereas PW-3 Rekha stated in cross-examination that she was dumping cow dung in her plot located near the field of Prem Singh.

(e) PW-1, PW-2, and PW-3 being eye-witnesses of the incident neither made any hue and cry before the incident nor they attempted to save the deceased.

(f) There is no satisfactory explanation put forth with regard to the delay of 25 days after the incident in recording the statement of PW-3 Rekha under section 161 of Cr. PC.

(g) PW-1 Mangal Singh has given a self contradictory statement about the direction of the gunshot, firstly he stated that Raghunath Singh and Sahukar surrounded the deceased from the front side, Jagdish and Manoj fired from his backside; further, he stated that Raghunath Singh and Sahukar stopped the deceased from the front side, as soon as he turned back, Jagdish and Manoj fired upon him.

(h) There is a material inconsistency between the ocular evidence and the medical evidence about the manner of the direction of gunshot, PW-1 Mangal Singh stated that Raghunath Singh and Sahukar stopped the deceased from the front side, as soon as he turned back, Jagdish and Manoj fired upon him; whereas according to PW-7 Dr. Surendra Singh, all firearm injuries caused to the deceased could not be caused from the front side.

(i) Role of exhortation attributed to co-accused Raghunath Singh and Sahukar had not been proved and the prosecution failed to prove the role of exhortation against the co-accused Raghunath Singh and Sahukar.

(j) There is no recovery of empty cartridges from the place of occurrence,

even though all the eyewitnesses have stated that three gunshots were fired and they reached immediately at the place of the incident.

Thirdly; The eye-witnesses are related/inimical witnesses their testimony was not corroborated by any independent witnesses, though Raghuvir Singh and Moolchand are independent eye-witnesses as alleged in the FIR, they have not been examined. The other independent eyewitnesses Prem Singh, Tej Singh, Lekhraj, Padam Singh, and Harbhajan, as stated by PW-1 Mangal Singh had also not been questioned by the I.O.

Fourthly; The motive to commit the murder of Kamal Singh assigned to the appellants has not been proved by the prosecution.

28. Before we proceed to dwell upon the merit of the contentions raised before us, it will be apposite to have a close scrutiny of the entire ocular evidence, which is as follows:

29. **PW-1** Mangal Singh stated in his examination-in-chief that the incident took place at 9:30 A.M. on 10.11.2007 when his son Kamal Singh was returning home after defecation, at the same time Manoj and Jagdish, who had unlicensed guns (Paunia) and Raghunath and Sahukar having lathies in their hands, surrounded Kamal Singh in the field of Prem Singh. Raghunath and Sahukar shouted that his father poses himself to be a great litigant, kill him, and don't let him escape. Manoj and Jagdish shot fire at Kamal Singh from their unlicenced guns (Paunia). Hearing the sound of the gunshot, he and his eldest son Lakhan, who were standing on Prem Singh's tubewell reached the spot. On hearing the noise, Raghuvir, Moolchand, and his daughter Rekha reached the spot. On seeing the people coming, the accused persons fled away towards their house. Kamal Singh ran towards his house after being shot and fell down after walking 10 steps and died on the spot. On 2.7.2007, Jagdish, Sahukar, Raghunath, and Vinod had beaten Kamal Singh and Lakhan Singh, in this regard a criminal case is pending in the court. He has a plot of 200 yards in the village which is in his possession, he had dug the foundation in the plot 10-12 days before 2.7.2007, but the accused persons restrained him from raising construction over the plot. He had filed a Civil Suit against Jagdish and others, in which a Court Ameen inspected the spot. Kamal Singh used to do *Pairavi* of the case, due to this enmity Jagdish, Manoj, Raghunath, and Sahukar murdered his son. The complaint *(Tahrir)* of the incident was written by Mahavir Singh.

30. PW-1 Mangal Singh in his cross-examination stated that he along with Lakhan went to ask Prem Singh to get water from the tubewell of Prem Singh for irrigation of his field, which is located near his field, at that time Prem Singh was present on his tubewell. The incident took place when they were returning from the tubewell after talking to Prem Singh. He heard the sound of 3 gunshots. Prem Singh's tubewell is situated on the eastern side about 150 steps away from the place of the occurrence. Kamal Singh was shot from a distance of 5-6 steps. Sahukar and Raghunath Singh surrounded Kamal Singh from the front side, Jagdish and Manoj were fired from his backside. He further stated that Raghunath and Sahukar stopped Kamal Singh from the front side, as soon as he turned back, Jagdish and Manoj fired at him. Raghunath and Sahukar did not cause any injury to Kamal Singh with lathies. Kamal Singh had run towards Gutia's house after being shot, which is about 20 steps away from the place where he had fallen.

He had not found any *Tiklee*, empty cartridge, and pallets on the spot. The dead body was lying in the field of Prem Singh. Moolchand and Lakhan went to the police station with him to lodge the report. He did not meet Mahavir on that day. Moolchand and Raghuvir did not see the incident, so their names were not written in the complaint as eye-witnesses. Though, they are witnesses of the inquest report. Prem Singh, Tej Singh, Lekhraj, Padam Singh, and Harbhajan also witnessed the incident. He, while writing the complaint, did not tell the names of the above eyewitnesses to the scriber.

31. PW-1 Mangal Singh in his cross-examination further stated that he left home at 9 o'clock to go to the tubewell of Prem Singh and arrived within 7-8 minutes. He returned at 9:30 A.M., till then the incident had taken place. Prem Singh's field is adjacent to the outskirts of the village but the field is about 5 *Khet* far from his house. The distance between the house of accused and the place of the incident is one Khet, there is no other *Khet* in the middle. Houses of Mehilal, Ranvir, and Gutia are adjacent to the field of Prem Singh. The house of Gutia is situated between his house and the place of the incident. When he dug up the foundation of the plot, the accused persons restrained him then he filed a civil suit against Jagdish and others. Jagdish appeared in the civil suit and he filed his written statement. Kamal Singh used to do *Pairavi* of the cases with him, and used to take him to court, this fact was neither written in the complaint nor told to the police. On 2.7.2007, Jagdish, Sahukar, Raghunath, and Vinod had beaten Kamal and Lakhan, this fact had not been written in his complaint but he told this fact to the police. He had told about the enmity, it is not known to him whether it was written in the report or not because he was upset at that time.

32. Durng the cross-examination, certain suggestions were put to the witness, which have been specifically denied by P.W.-1 and he stated that it is wrong to say that our unlicensed pistol was fired during our scrumble, which hit Kamal Singh. It is wrong to say that the incident had not taken place in the field of Prem Singh, and it had taken place at our house. It is wrong to say that he wanted to encroach unpartitioned land unauthorisedly and lodged a false report against them. It is also wrong to say that the complaint had not been written on his instructions and he had not signed at the time which is shown in the report.

33. It is worthy to note that PW-1 consistently stated that he along with Lakhan went to ask Prem Singh to get water from the tubewell of Prem Singh for irrigation of his field at the time of the incident and they saw the incident from the tubewell. At that time Prem Singh was present at his tubewell. The incident took place in the field of Prem Singh. Raghunath and Sahukar stopped Kamal Singh from the front side, as soon as he turned back, Jagdish and Manoj fired upon him. Kamal Singh was shot from a distance of 5-6 steps. PW-1 and PW-2 Lakhan reached the spot immediately, and after hearing the noise PW-3 Rekha reached the place of the occurrence, and he along with his son Lakhan, and Moolchand went to the police station to lodge the report and the inquest proceedings were commenced at 11.05 A.M. at the spot.

34. After considering testimony and having a close scrutiny of the testimony of PW-1, it is noticeable that the above facts have not been controverted on behalf of the

appellants. The presence of PW-1 Mangal Singh along with PW-2 Lakhan at the tubewell of Prem Singh and conduct of PW-1 just before or after the incident have not been disputed. There is no cross-examination directed against his testimony to discredit his evidence on the above facts. The evidence of PW-1 was not shaken in the cross-examination and nothing infirm has been elicited to cast doubt on his veracity.

35. Apart from this, it is relevant to note that there is no dispute with regard to the place and time of the incident; his presence at the tubewell of Prem Singh at the time of the incident with PW-2 Lakhan Singh; purpose of his presence along with PW-2 Lakhan Singh at the tubewell of Prem Singh; at the time of the incident the deceased was returning home after defecation; the role attributed to the appellants; happening of the incident dated 2.7.2007; his behaviour at the time of the incident and after the incident; arrival of PW-3 Rekha at the spot after hearing the noise; lodging the FIR by PW-1 Mangal Singh at 10:35 A.M. on 10.11.2007. It is significant that, no suggestions have been put to the witness regarding his presence along with PW-2 Lakhan Singh at the tubewell of Prem Singh at material time; time and place of the incident; their arrival on the place of the incident immediately after the incident; arrival of PW-3 Rekha at the spot after hearing the noise; lodging the FIR by this witness at 10:35 A.M. on 10.11.2007 and about the incident dated 2.7.2007. In addition to above, without disputing the time and place of the occurrence, a suggestion was put to the witness that our unlicenced pistol was fired during scrumble at our house, which hit Kamal Singh, which has been specifically denied by PW-1 Mangal Singh.

36. After considering the evidence of PW-1 Mangal Singh, the inferences may safely be drawn which are: (a) the incident took place in the outskirts of the village which is adjacent to another field of Prem Singh; (b) the place of the incident is 150 steps away from the tubewell of Prem Singh; (c) there is no obstruction because of the visibility between the place of the incident and the tubewell of Prem Singh; (d) at the time of the incident the deceased Kamal Singh was returning home after defecation; (e) the incident took place in the open field and there was no crop standing in the adjacent fields; (f) the field of PW-1 is situated near the tubewell of Prem Singh; (g) after receiving the gunshot, Kamal Singh ran towards his house but after 10 steps he fell and died on the spot; (h) PW-1 usually visited his field which is located near the tubewell of Prem Singh; (i) PW-1 was not presented coincidentally or by chance at the tubewell of Prem Singh at the time of the incident.

37. **PW-2** Lakhan Singh stated in his examination-in-chief that the incident took place at 9:30 A.M. on 10.11.2007 when his brother Kamal Singh was returning home after defecation. When he reached the field of Prem Singh, at the same time Manoj, Jagdish, who had unlicensed guns (Paunia) and Raghunath, Sahukar having lathies in their hands surrounded Kamal Singh in the field of Prem Singh. Raghunath and Sahukar shouted that his father poses himself to be a great litigant, kill him and don't let him escape. Manoj and Jagdish shot at Kamal Singh from their unlicenced guns (Paunia). Kamal Singh ran towards

his house after receiving gunshot injuries and fell down at the place wherefrom the shot was fired and after running 10-15 steps, he died on the spot. Hearing the gunshots, he and his father, who were standing at the tubewell of Prem Singh, reached the spot. His sister Rekha, who was coming home after dumping cow dung from the field also saw the incident and reached the spot. Raghuvir Singh and Moolchand also witnessed the incident. After the incident, the accused persons fled away towards their house. His father has a plot of 200 yards in the village which is in our possession, there was enmity with the accused persons regarding the plot. The report was lodged by his father.

38. PW-2 Lakhan Singh stated in his cross-examination that on the day of the incident, he went to the tubewell of Prem Singh along with his father to ask him to take water for irrigation of his field. There are other persons' tubewells nearby his field but the tubewell of Prem Singh is located nearest to his field. Fields of Kishori, Govind Singh, Hari Singh are also situated adjacent to his field. He did not see the tubewells of other persons. Indeed, the field of the tubewell of Prem Singh is far away as compared to the field of Kishori. He did not tell that how these persons irrigate their fields. The water of the tubewell of Prem Singh was not saline. He and his father had witnessed the incident from the tubewell of Prem Singh, where from the place of the incident would be 40-50 steps away. The place of the incident would be about 2 *Khet* away from the tubewell. The incident took place within 2 minutes after reaching the tubewell. The accused persons had surrounded his brother from all sides. Further, he stated that the accused persons did not surround the deceased from all sides. He had wrongly stated earlier that the accused persons surrounded his brother from all sides. Raghunath and Sahukar did not cause any injury to his brother with lathies. He had heard 3 gunshots. Kamal Singh ran 10-15 steps from the place of the incident and then fell down. When he saw that the accused persons had gone away, he reached the spot after 4-5 minutes, at that time Kamal Singh did not say anything and he died in front of him. He saw the blood in both places, some blood at the place of the incident and some blood on the spot where he had fallen. The police had taken blood from both the places. If the police had not shown the place in the site plan where the blood is taken, he cannot tell its reason. He cannot tell the reason, why the murder took place on the day of the incident.

39. PW-2 Lakhan Singh further stated in his cross-examination that the accused persons had come from the same direction in which his brother had gone after the incident. When we reached on the spot, at that time Mehilal, Ranvir, and Gutia also reached there, who told us that the accused persons had shot fire at Kamal Singh, we had also seen the incident. Prem Singh also reached on the spot. He can not tell whether the name of Mehilal, Ranvir, and Gutia had been written as eye-witnesses in the report or not. It is correct to say that the houses of Mehilal, Ranvir, and Gutia are situated between the place of the incident and his house, and the houses of Mehilal, Ranvir, and Gutia are situated adjacent to the field of Prem Singh. The Houses of the accused persons and his house are located nearby. The place of the incident would be about 250 steps away from the house of the accused persons.

40. PW-2 Lakhan Singh further stated in his cross-examination that the deceased went for defecation at 9:15 A.M on the day

of the incident and his time of going for defecation was not fixed. He used to go for defecation at half-past eight, sometimes at quarter to nine or at nine O'clock. It is correct to say that when he and his father returned from defecation, his brother went for defecation. Usually, he and his father, and his brother used to go to defecation in his field, his field would be about one hundred steps away from the place of the incident and the path of his field goes through the field of Prem Singh, where the incident took place. The land dispute with the accused persons was going from one year. The dispute was going on from 4-5 months before 2.7.2007. Kamal Singh had stopped studying 2-3 years before the date of the incident. The police station would be 10-11 Km away from the place of the incident.

41. During his cross-examination, certain suggestions were put to this witness, which have been specifically denied by P.W.-2 and he stated that it is wrong to say that the water of the tubewell of Prem Singh was saline and Prem Singh used to irrigate his field with the tubewells of Kishori, Govind Singh, and Hari Singh. It is wrong to say that his brother had not been killed by the accused persons. It is wrong to say that the incident had not taken place in the field of Prem Singh. It is wrong to say that the incident took place at some other place and was committed by other persons. It is wrong to say that a false report has been lodged to grab the land of the accused persons.

42. It is noteworthy that the presence of PW-2 at the tubewell challenged on the ground that at the time of the incident, the water of tubewell of Prem Singh was saline and there were other tubewells of other persons, why PW-2 asked to get water from the tubewell of Prem Singh and why he and his father both had gone to the tubewell, one person could have asked. Prem Singh used to irrigate his field from the tubewells of Kishori, Govind Singh, and Hari Singh.

43. Upon considering the testimony of PW-2 Lakhan Singh, reveals that there is no dispute with regard to the location of the tubewell of Prem Singh; his presence at the tubewell of Prem Singh at the time of the incident with PW-1 Mangal Singh; at the time of the incident the deceased was returning home after defecation; the role attributed to the appellants; his behaviour at the time of the incident and after the incident; arrival of PW-3 Rekha at the spot after hearing the noise; lodging the FIR by PW-1 Mangal Singh at 10:35 A.M. on 10.11.2007; about the incident dated 2.7.2007. It is relevant to note that three suggestions have been asked first time to PW-2 Lakhan Singh as: first, that the water of the tubewell of Prem Singh was saline; second, the incident took place at some other place and committed by other persons; third, there is other tubewells of other farmers and Prem Singh himself used to irrigate his field with other tubewells because these suggestions were not made to PW-1 Mangal Singh.

44. It is worthy to note that, no suggestions have been put to the witness regarding his presence along with PW-1 Mangal Singh at the tubewell of Prem Singh at material time; time and place of the incident; their arrival on the place of the incident immediately after the incident from the tubewell of Prem Singh; about the incident dated 2.7.2007; arrival of PW-3

Rekha at the spot after hearing the noise; lodging the FIR by PW-1 at 10:35 A.M. on 10.11.2007.

45. PW-2 Lakhan Singh consistently stated in his testimony that PW-2 went to the tubewell of Prem Singh along with his father PW-1, to ask him to take water for irrigation of his fields and his field is located near to the tubewell of Prem Singh. They had witnessed the incident from the tubewell of Prem Singh. The incident took place after 2 minutes of reaching the tubewell. The incident took place at 9:30 A.M. on 10.11.2007, when his brother Kamal Singh was returning home after defecation. Jagdish and Manoj shot fire his brother from the front site and his father lodged the report.

46. After considering the testimony of PW-2 and having close scrutiny, it is noticeable that the above facts have not been controverted on behalf of the appellants. The presence of PW-2 Lakhan along with PW-1 Mangal Singh at the tubewell of Prem Singh at the time of the incident and conduct of PW-2 just before or after the incident have not been disputed. There is no cross-examination directed against his testimony to discredit his evidence on the above facts. The evidence of PW-2 was not shaken in the cross-examination and nothing infirm has been elicited to cast doubt on his veracity.

47. After considering the testimony of PW-2, the inferences may safely be drawn that: (i) the path of his field goes through the field of Prem Singh wherein the incident took place; (ii) there is no obstruction in view of the visibility between the place of the incident and the tubewell of Prem Singh; (iii) at the time of the incident, the deceased Kamal Singh was returning home after defecation; (iv) the incident took place in the open field and there was no crop standing in the adjacent fields; (v) PW-2 usually visited his field which is located near the tubewell of Prem Singh; (vi) PW-2 was not present coincidentally or by chance at the tubewell of Prem Singh at the time of the incident.

48. **PW-3** Rekha, younger sister of the deceased in her testimony deposed that the incident took place a year and two months ago when her brother was returning home through the field of Prem Singh after defecation at 9:30 A.M. At that time she was dumping the cow dung in the field near the field of Prem Singh. When her brother reached the field of Prem Singh, at the same time, Raghunath, Sahukar having lathis, Jagdish and Manoj having unlicensed guns (Puniya) and surrounded her brother. Raghunath exhorted that *"Isaka Pita Bahut Mukdame Karta Hai Is Saale Ko Mar Do Bachne N Paye"* (his father litigates a lot, kill him and he does not escape). Then Jagdish and Manoj shot her brother Kamal with their unlicensed guns (Puniya), which hit her brother. One fire was hit on his arm and another fire hit on his stomach. Her brother ran some distance after being shot, then fell down and died on the spot. Her father and brother Lakhan, who were taking water from the tubewell of Prem Singh, came to the place of occurrence and they picked up the body of Kamal Singh and kept it on a cot (wooden cot). Apart from her father and brother Lakhan, Moolchand, Raghuvir and Gutia had also witnessed the incident. She also witnessed the incident. Accused persons wanted to dispossess her father from his plot, due to this enmity her brother was killed and they fled away towards Nagla Bohre after threatening.

49. PW-3 Rekha stated in her cross-examination that on the day of the incident, she was dumping cow dung in her plot located near the field of Prem Singh. She heard 3 gunshots at that time she was dumping cow dung in the plot. When she reached near her brother, she came to know that her brother received gunshots, at that time he was breathing. After being shot, his brother went 20-25 steps. It is true that no injury was caused to Kamal Singh by lathies. The tubewell of Prem Singh would be 40-50 steps away from the spot. The place of incident is not visible from the house of the accused. The accused persons had come from their house and ran towards their house. The accused persons had gone back from the path they had come from. The other residents, who resided near Gutia's house had not seen the incident, because these people had come on the spot after the incident. She does not know after how long they came. She had not seen Prem Singh at the place of the incident.

50. PW-3 Rekha stated further in her cross-examination that the field of Prem Singh would be 50 steps away from her house. The tubewell of Prem Singh would be 60-70 steps away from her house. Her father's field is 15 steps away from the field of Prem Singh. Field of accused persons situated between the field of her father and the field of Prem Singh. She does not know how many fields are there because she is illiterate. She does not know whose fields are located on the way between her home and her field. She further stated that the fields of the accused and Prem Singh are located. The length and breadth of the plot in question are not known but it's area is 200 yards. At the time of the incident, she does not know how many buffaloes or cows she had, she does not know that she had one cow at that time. At the time of the incident, she had two cows. But she does not know that at that time we had 5-6 buffaloes and 8-10 cows or not. She used to prepare cow dung cake in the plot. But on the day of the incident, she had gone to dump cow dung in the plot situated adjacent to the field of Prem Singh.

51. PW-3 Rekha stated further in her cross-examination that she does not know that when this plot was purchased and how big it is. She does not know the length and breadth of this plot. She does not know what is all around this plot, she further stated that the houses of Moolchand, Lakhan, Gutia, and Mishrilal are situated towards the field of Prem Singh. She does not know that she celebrates Gowardhan Puja or not. She does not know as to whether cow dung is used in making the statue of Lord Gowardhan or not. She had gone to dump one *Tasla* cow dung from her home at 9:00 A.M. Her brother Kamal went for defecation 1-2 minutes before her. She does not know whether at that time her father and brother Lakhan were at home or not.

52. PW-3 Rekha stated further in her cross-examination that the police had come to the spot at around 11 o'clock and took away the dead body. Who had placed the dead body on the cot, she does not know because she was crying at that time. The police did not carry the corpse along with the cot. She does not know whether the police vehicle had reached the field or not. She had told to the police that her plot is located near the field of Prem Singh and she has also told about the dumping of cow dung in that plot, if it is not written in her statement then she can not tell the reason. The accused persons wanted to take possession of her plot and for this reason,

they had enmity. She told this fact to the police, if it is not written this fact in her statement, then she cannot tell any reason.

53. PW-3 Rekha further stated in her cross-examination that at that time her field was empty, *Pareh* (irrigation of field before seeding) was going on. She does not know when *Pareh* started. The water of the tubewell of Prem Singh was sweet at the time of the incident. Since 2-3 months after the incident, she was residing in Delhi with her maternal grandfather and grandmother. The accused persons wanted to kill her. Since the accused paid 3 lakh rupees to kill her, so she had gone to Delhi for saving her life. This fact was revealed 3 months after the incident. Her statement was recorded 25 days after the incident. She does not know how many times the police had come to the village during this period. We do not go for defecation in our field because our field is far away, so we go to the field of Prem Singh for defecation. Raghunath is her real uncle. It is true that the incident took place on the day of Goverdhan Puja.

54. During her cross-examination, certain suggestion were put to the witness, which have been specifically denied by P.W.-3 and she stated that it is wrong to say that she has been residing in Delhi even before the incident and is telling false that she was dumping cow dung in the plot located near the field of Prem Singh. It is wrong to say that her brother was not murdered by the accused persons. It is wrong to say that Raghunath Singh was not present at the time of the incident.

55. The presence of PW-3 Rekha near the place of the occurrence at the time of the incident has been assailed by the appellants as; *firstly*; the incident took place on Gowerdhan Puja, on that day the statue of Lord Gowerdhan is made by cow dung and therefore, no question arises for dumping the cow dung on that day and she is unaware about the numbers of her cattle; *Secondly*; she is unaware the surroundings of the plot, where it is alleged that at the time of the incident, she was dumping the cow dung at 9:30 A.M.; the deceased went to defacation 1 or 2 minutes from the home before her at 9:00 A.M., therefore she reached the plot after 30 minutes, which is improbable because her plot is situated nearest to her house; *thirdly*; she stated in her statement-in-chief that her father and brother, who were taking water from the tubewell of Prem Singh, came to the place of occurrence and they picked up the body of the deceased and placed it on a cot; whereas she denied in her cross-examination that she was unaware as to who placed the body on cot; *fourthly*; she stated that at the time of the incident her father and bfrother Lakhan were taking the water from the tubewell; whereas according to the prosecution case, they went to the tubewell to ask for taking the water for irrigation; *fifthly*; she stated in her cross-examination that at the time of the incident, she was dumping the cow dung in her plot near the field of Prem Singh; whereas in examinatiin-in-chief, she stated that at that time she was coming from her field after dumping the cow dung.

56. Upon a close scrutiny of the evidence of PW-3 Rekha, reveals that she was dumping cow dung in her plot at the time of the incident which is situated near to the field of Prem Singh. The houses of Moolchand, Lakhan, Gutia, and Mishrilal are situated adjacent to her plot, towards the field of Prem Singh. It is noticeable that the field of PW-3 is situated near the tubewell of Prem Singh. The incident took place in the field of Prem Singh which is located adjacent to the

outskirts of the village. There is no field of PW-3 located adjacent to the place of the incident. The plot where she is claimed herself to be present at the time of the incident and the field of her father are different places. There is inconsistency in her testimony with regard to her presence at the time of incident. She stated in her examination-in-chief that she was dumpting the cow dung in the field located near the field of Prem Singh, whereas, she stated in her cross-examination that her plot is situated near the field of Prem Singh and at that material time she was dumping cow dung in that plot if it is not written in her statement she can not tell the reason.

57. It is relevant to note that there is no dispute with regard to arrival of her father (PW-1 Manal Singh) and her brother (PW-2 Lakhan Singh) at the place of the incident after the occurrence from the tubewell of Prem Singh and her arrival at the spot after hearing the noise. It is significant that, no suggestions have been put to the witness regarding the above fact.

58. **PW-4** S.I. Rakesh Kumar Awasthi (I.O.) stated in his examination-in-chief that he received the investigation of Case Crime No. 681 of 2007 on 10.11.2007. On 10.11.2007, he recorded the statement of the eye-witnesses, informant Mangal Singh, Lakhan Singh, Raghuvir Singh, Moolchand and he prepared the site plan after inspecting the place of the incident on pointing out of the informant. He took the blood-stained and plain earth from the place of occurrence in the presence of Padam Singh and Jaggnath and prepared a seizure memo. The proceedings of the inquest were conducted by S.I. Netrapal Sharma on his direction on 10.11.2007 at the place of the incident in presence of *Panchan* (witnesses), and prepared the inquest report and other requisite police papers for getting the post-mortem and dead body was sent for post-mortem. He proved the inquest report and police papers. On 13.11.2007, he arrested the accused Raghunath Singh and Sahukar and recorded their statements then sent them to judicial custody. Accused Jagdish was arrested on 18.11.2007, and an unlicenced gun (Paunia), 4 live and 1 empty cartridge were recovered on his pointing out in presence of witnesses, Padam Singh, Jaggnath Singh, and a seizure memo was prepared by S.I. Netrapal Sharma under his direction. He also prepared a site plan of the place of the recovery. He proved the seizure memo of the unlicenced gun as Ex.Ka.-9 and lodged an FIR of Case Crime No. 708 of 2007 under Section 25 of Arms Act against the appellant Jagdish.

59. PW-4 S.I. Rakesh Kumar Awasthi (I.O.) further stated in his examination-in-chief that he recorded the statements of eye-witnesses Rekha and Digamber on 5.12.2007 and after completing the investigation, he submitted the charge sheet against the appellant Jagdish and co-accused Raghunath and Sahukar. The proceedings under Section 82 and 83 of Cr. PC. against the appellant Manoj Kumar were completed on 19.1.2008. The appellant Manoj Kumar surrendered before the court on 28.1.2008 and on 31.1.2008, his statement was recorded in Jail after receiving the permission of the court. He received some documents regarding the dispute of plot from the eye-witness Lakhan Singh and his further statement was recorded. After receiving the police custody remand (PCR) of the appellant Manoj Kumar from the court on 3.2.2008, he recovered an unlicenced gun .12 bore (Paunia), two live and one empty cartridge as pointed out by the appellant Manoj

Kumar in presence of the witnesses and thus, a seizure memo was prepared. After completing the investigation, he submitted a charge sheet against the appellant Manoj Kumar and sent all recovered articles for forensic examination to the Forensic Science Laboratory, Agra. He proved all the articles which were recovered during the investigation as material Ex.-1 to material Ex.-22 before the trial court.

60. PW-4 S.I. Rakesh Kumar Awasthi (I.O.) stated in his cross-examination that statement of eyewitness Rekha was recorded on 5.12.2007. He could not give any reason as to why he recorded the statement of Rekha so late. The statement of *Tahrir* writer Mahavir Singh was recorded on 5.12.2007, but Mahavir Singh did not state in his statement that he had written the *Tahrir*, Mahavir Singh gave his statement as a witness of the inquest report. In the Chick FIR, the distance from the police station is written as '16 Km', in which there is an overwriting on digit '6' of digit '16 Km'. After '9:30 A.M.' in the Chick FIR, there is no overwriting at letter 'A', rather it is the darkness of the pen. Similarly, it is no overwriting on the letter '0' of time '10:35 A.M.', it is the darkness of the pen.

61. PW-4 S.I. Rakesh Kumar Awasthi (I.O.) further stated in his cross-examination that in the site plan, the firing was shown from the house of the accused persons, which was hit at 'A' place. This distance between the two places must be about 60 steps, but he did not mention this distance in the site plan as well as the place where the blood was found. The place wherefrom Rekha saw the incident is also not shown in the site plan. It is correct to say that the informant and the witnesses of the FIR are not the witnesses of the inquest report. The informant had told in his statement that there was enmity with regard to the plot but he had not given any document in this regard. Lakhan told on 31.1.2008 that the dispute regarding the land is pending in the court and he had given him the documents of the dispute with regard to the plot. He made those documents as a part of the investigation but he could not get Lakhan's signature on those documents. Prem Singh was not an eye-witness of the incident, he did not record the statement of Prem Singh. Apart from the witnesses of the FIR, there were no other eye-witnesses of the incident. It was not clear that in whose field the deceased had come after defecation. Rekha had not told him about dumping of cow dung in any plot, but she told him about dumping cow dung in her field.

62. During his cross-examination, many suggestions were put to the witness, which have been denied by P.W.-4 and stated that it was suggested to this witness, that it is wrong to say that Rekha was not present at the place and at the time of the incident because at that time she has been residing outside Mathura with her maternal grandfather's house in Delhi and with other relatives. It is wrong to say that by overwriting on letter 'P' was converted into the letter 'A', making it '9:30 A.M.'. It is wrong to say that the FIR was not lodged on the date and time, as shown but the same was lodged after the proceedings of the inquest of the dead body.

63. It is noteworthy to emphasis that PW-4 S.I. Rakesh Kumar Awasthi surprisingly stated in his cross-examination, *firstly*; he could not give any reason as to why he recorded the statement of Rekha so late on 5.12.2007; *secondly*; the scribe of the complaint Mahavir Singh

did not state that he had written the complaint; *thirdly*; according to the site plan, the firing was shown from the house of the accused person. But in the site plan (Ex.Ka.-2), there is no sign or indication to show that the firing was shown from the house of the accused person and contrary to the above fact the way for reaching the accused persons at the spot has been shown at serial no. 2 of the site plan.

64. After considering the cross-examination of this witness it is revealed that the material facts had not been disputed, which are: (a) the FIR was registered at 10:35 A.M. by PW-5 HC Ramesh Chand on the basis of the complaint of PW-1 Mangal Singh; (b) the inquest proceedings were commenced on 11.05 A.M. on 10.11.2007 at the spot (*Khet* near the Neem tree); (c) the Crime No. 681 of 2007 under section 302 IPC which was registered at 10.35 A.M. is written in the inquest report (Ex.Ka.-4); (d) the inquest report and other police papers (Ex.Ka.-5 to Ex.Ka.-8) were prepared in presence of *Panchan* (witnesses) at the spot; (e) PW-4 sent the dead body for post-mortem with the copy of the FIR and other police papers; (f) PW-4 recorded the statements of PW-1 and PW-2 on 10.11.2007 under section 161 Cr. PC. (g) PW-4 took the blood-stained and plain earth from the spot. There is no suggestion about the above facts.

65. **PW-5** HC 124 Ramesh Chand in his examination-in-chief stated that on 10.11.2007, he was posted as Head *Mohrrir* at PS. Highway, Mathura, he registered an FIR as case crime no. 681 of 2007 under section 302 IPC at 10:35 A.M., against the appellants and co-accused on the basis of the written complaint of the informant and endorsed it in G.D.Report No. 19 at 10:35 A.M. on 10.11.2007.

66. PW-5 HC 124 Ramesh Chand in his cross-examination stated that Lakhan and Moolchand had come with the informant Mangal Singh to the police station to lodge the report, Mahavir Singh did not accompany them. It is true that at the end of the main page of the complaint, no signature was made by the informant, but there is written as *'Prathee'* at the bottom of the complaint. The special report of the case was sent at 16:20 hours by G.D. Report No. 29 dated 10.11.2007 through Constable Dhanesh on the same day. It takes time to prepare a special report, therefore, there was a delay in sending it. It is true that the *Ravanagi* G.D. Report No. 29 is signed by constable Dhanesh but there is no signature of Constable Dhanesh on the *Vapisi* G.D. Report No. 46. It is also true that there is no date under the signature of Circle Officer. It is wrong to say that Constable Dhanesh did not return on the same day and the FIR has been lodged anti-timed after stopping the G.D. The FIR was received at the CJM office on 13.11.2007. The overwriting shown in the letter 'A'; after digits '10:35 A.M.; and '6' in the Chick FIR had been caused by a bonafide mistake.

67. Many suggestion have been asked to P.W.-5, H.C. Ramesh Chand during his cross-examination which have been denied by this witness and stated that it is wrong to say that Mangal Singh did not lodge the report and after lodging the report, the signature of Mangal Singh was obtained. It is wrong to say that the FIR was not lodged at 10:35 A.M. It is wrong to say that the

records of sending the special report are forged. It is wrong to say that the FIR was lodged after the proceedings of the inquest report and its G.D. Report No. 19's entry was prepared after the time as shown in the Report. It is also wrong to say that the informant was not available on 10.11.2007 and his signature was obtained on any other date.

68. The registration of the FIR has been assailed by the appellants on the ground that, *firstly*; there is overwriting in the Chik FIR in serial no. 4, 5, and 9, the time of the incident wherein it was written as 9:30 A.M., the letter 'A' is written over letter 'P' in serial no. 4; in serial no. 5 originally digit '1' was written but after overwriting on digit '1' has been converted into digit '0' at the time of registering the FIR '10:35' A.M.; the distance between the place of the occurrence and Police Station originally digit '2' was written but after overwriting digit '2' has been converted into the digit '6' at serial no. 9 as '16 Km; *secondly*; the delay of about 6 hours in sending the special report to the Magistrate; *thirdly*; the FIR is received in the office of CJM on 13.11.2007.

69 It is noteworthy that there is no overwriting in the G.D. entry of the Chick FIR, which is entered into the G.D. Report No. 19, at 10:35 A.M. dated 10.11.2007, with regard to the time of registration of the FIR. This fact has not been disputed and there is no suggestion in this regard. There is overwriting in 3 places, serial no. 4 and 5 have no significance because the appellants have not disputed the time of the incident and the distance between the place of the occurrence and the Police station to PW-5. In addition to the above, according to the complaint, the incident took place at 9:30 A.M. is clearly mentioned.

70. PW-7 Dr. Surendra Singh in his examination-in-chief stated that he was posted as Medical Officer at District Hospital Mathura on 10.11.2007 and conducted the post-mortem of the body of Kamal Singh at 3:40 P.M. on 10.11.2007. The post-mortem report (Ex.Ka.-23) disclosed multiple firearm ante-mortem injuries on the corpse of Kamal Singh. The deceased was a simple saddle, aged about 18 years, rigor mortis was present all over the body. He found the following ante-mortem injuries:

1. Multiple wounds of entry of firearms size 0.5 cm x 0.5 cm skin deep present on the right hand, their margins were inverted.

2. Multiple wounds of entry of firearms size 0.5 cm x 0.5 cm x cavity deep present on the chest and the back of the neck, their margins were inverted.

3. Multiple wounds of entry of firearms size 0.5 cm x 0.5 cm skin deep present on the abdomen, their margins were inverted.

71. PW-7 Dr. Surendra Singh further stated in his statement-in-chief that during the post-mortem, 10 pellets (3 from heart, 2 from the right lung, 3 from the left lung, and 2 from the liver) were recovered from the corpse which was handed over to the concerned constable in a sealed cover envelope. The membranes of the brain of the deceased were yellow, and accumulated blood was present, both lungs were torn, the stomach was empty, liver was torn and both kidneys were also yellow. The doctor further opined that death would have caused 8 hours earlier to the post-mortem. He further stated that he had received 9 police papers with the dead body at the time of post-mortem, which is paper nos. 4A/13 to 4A/21, and he handed over all the

police papers along with the post-mortem report to the concerned Constable.

72. PW-7 Dr. Surendra Singh in his cross-examination stated that the injuries of the deceased might have been caused 8-12 hours before the post-mortem. It is true to say that if a shot is fired from the front, then all such injuries could not be caused. It has been suggested to this witness that he had not received the police papers at the time of the post-mortum and he signed them later. P.W.7 specifically denied the above suggestion.

73. It is surprising fact elicited from the cross-examination of this witness, PW-7 Dr. Surendra Singh stated in his cross-examination that it is true to say that if a shot is fired from the front side, then all such injuries could not be caused. But contrary to the above fact, the post-mortem report (Ex.Ka.-23) shows that injury no. 2 is written as "Multiple wounds of entry of firearms size .5 cm x .5 cm x cavity deep on both side chest & neck, margins inverted". Injury no. 1 is on the right arm & forearm and injury no. 3 is on the abdomen. There is no other firearm injury was found on the back side of the deceased.

74. After a close scrutiny of the testimony of PW-7 Dr. Surendra Singh, it is elicited from the evidence that three gunshot injuries caused to the deceased in front of his body but this fact has not been disputed and no suggestion was asked on this account. The doctor deposed that he received the sealed dead body with 9 police papers, without disputing the above fact with regard to receiving the copy of the FIR, it has been suggested only that he had not received the police papers at the time of the post-mortum.

75. Having noticed the contentions of learned counsel for the parties and having taken a glimpse of the evidence on record, now we shall consider the argument of learned counsel for the appellants.

76. It has been submitted that PW-1 Mangal Singh, PW-2 Lakhan Singh, and PW-3 Rekha are relatives and interest/inimical witnesses, the testimony of PW-1, PW-2, and PW-3 is not reliable.

77. It is a settled position of law that the testimony of a relative is not to be treated as inherently tainted, the court only needs to ascertain whether the evidence is inherently probable, cogent, and consistent. The mere fact that they are related to the deceased itself is no ground to discard their evidence unless something critical is brought on record that the witness being an interested witness was speaking falsely to implicate the appellant. In **Nagappan v. State by Inspector of Police, Tamil Nadu**6, it has been held that where the evidence of 'interested witnesses' is consistent and duly corroborated by medical evidence, it is not possible to discard the same merely on the ground that they are interested witnesses. In other words, relationship is not a factor to affect the credibility of a witness.

78. In **Yogesh Singh v. Mahaveer Singh and Others, (2017) 11 C 195**, the Apex Court observed as under: (SCC p. 212, para 28)

"28. A survey of judicial pronouncements of this Court on this point leads to the inescapable conclusion that the evidence of a closely related witness is required to be carefully scrutinised and

appreciated before any conclusion is made to rest upon it, regarding the convict/accused in a given case. Thus, the evidence can not be disbelieved merely on the ground that the witnesses are related to each other or to the deceased. In case the evidence has a ring of truth to it, is cogent, credible and trustworthy, it can, and certainly, should be relied upon. (See: Anil Rai v. State of Bihar7, State of U. P. v. Jagdeo8, Bhagaloo Lodh v. State of U. P.9, Dahari v. State of U.P.10, Raju v. State of T.N.11, Gangabhavani v. Rayapati Venkat Reddy12 and Jodhan v. State of M.P.13)

79. Keeping in mind, the settled position of law, we are of the view that merely because PW-1 Mangal Singh, PW-2 Lakhan Singh, and PW-3 Rekha, are family members of the deceased, their evidence cannot per se be discarded. The mere statement that being relatives of the deceased they are likely to falsely implicate the appellants cannot be a ground to discard the evidence of eyewitnesses, which is otherwise cogent and credible.

80. Now we deal with the next contention of the learned counsel for the appellant, that the prosecution failed to prove the motive against the appellants and the motive alleged has not been proved. On the behalf of the appellants, it is emphasised that there is enmity against the informant but not against the deceased, the prosecution has failed to prove that the deceased was doing *Pairavi* against the appellants.

81. A conspectus of the evidence noticed above indicates that there is enmity between the PW-1 Mangal Singh and the appellants, because of; *firstly*; on 2.7.2007 (about 4 months before the incident), Jagdish, Sahukar, Raghunath, and Vinod had beaten Kamal Singh (the deceased) and Lakhan (PW-2) and in this regard, a criminal case was pending against them; *secondly*; the informant PW-1 Mangal Singh had instituted a Civil Suit with regard to the plot in question against the appellant Jagdish and others. PW-1 Mangal Singh stated that Kamal Singh was doing *Pairavi* of the cases, so he was murdered. He further stated in his cross-examination that Kamal Singh used to do *Pairavi* of the cases with him, and used to take him to court. He had dug the foundation in the plot 10-12 days before 2.7.2007, but the accused persons restrained him from doing construction over the plot, thereafter, he instituted a Civil Suit against the appellant Jagdish and others (father & brothers of Jagdish).

82. It would be useful to notice the law with regard to the role of the motive in assessing the credibility of the prosecution case. In **Stalin v. State represented by the Inspector of Police, (2020) SCC 524**, (3 Judge), the Supreme Court has observed as under: (SCC p. 535, para no. 9)

"9. As observed and held by this Court in Jafel Biswas v. State of West Bengal14, the absence of motive does not disperse a prosecution case if the prosecution succeed in proving the same. The motive is always in the mind of person authoring the incident. Motive not being apparent or not being proved only requires deeper scrutiny of the evidence by the courts while coming to a conclusion. When there are definite evidence proving an incident and eye-witnesses account prove the role of accused, absence in proving of the motive by prosecution does not affect the prosecution case."

83. In **Yogesh Singh v. Mahabeer Singh (2017) 11 SCC 195**, the Supreme Court observed as under: (SCC p. 219, para 46)

"46...It is a settled legal proposition that even if the absence of motive, as alleged, is accepted that is of no consequence and pales into insignificance when direct evidence establishes the crime. Therefore, in case there is direct trustworthy evidence of the witnesses as to commission of an offence, motive looses its significance. Therefore, if the genesis of the motive of the occurrence is not proved, the ocular testimony of the witnesses as to the occurrence could not be discarded only on the ground of absence of motive, if otherwise the evidence is worthy of reliance. (Hari Shankar v. State of U.P.15, Bikau Pandey v. State of Bihar16, State of U.P. v. Kishanpal17, Abu Thakir v. State of T. N.18 and Bipin Kumar Mondal v. State of W.B.19)

84. It is trite law that even though the existence of motive loses its significance when there is a reliable ocular account but where the ocular testimony appears to suspect the existence or absence of motive acquires some significance regarding the probability of the prosecution case. (vide: **Badam Singh** v. **State of M.P.**20)

85. The instant case is based on direct evidence of the eye-witnesses PW-1 Mangal Singh, PW-2 Lakhan Singh, and PW-3 Rekha, it is settled in various pronouncements of the Apex Court that the motive is always in the mind of the person authoring the incident. In case there is direct trustworthy evidence of the witnesses as to the commission of an offence, motive loses its significance.

86. It has been submitted that the entire prosecution story is an afterthought and the real occurrence had not been truly reported and pointed out *firstly*; the special report (SR Report) has been sent after an unexplained delay of about 6 hours; *secondly*; the time of registration of the FIR has been corrected by overwriting in the Chik FIR; the FIR was first received by the learned Magistrate on 13.07.2007; *thirdly*; the scriber of the complaint (Ex.Ka.-1) Mahavir Singh has not been examined; the FIR of the present case has not been lodged by the informant because the written complaint (Ex.Ka.-1) had not been signed by the informant and the sign of the informant on back of the complaint was made on any other date; clearly indicating that the FIR was registered ante-timed.

87. We have noticed (supra) that PW-1 and PW-2 consistently stated that they went to lodge the FIR along with Moolchand, this fact has not been controverted and even there is no suggestion with regard to this fact. It has also not been disputed that he had received a copy of the FIR after registering the FIR at Police Station at 10:35 A.M. or not; his signature on the complaint was obtained by PW-5 HC Ramesh Chand any other time. PW-4 S.I. Rakesh Kumar Awasthi clearly stated that at 11:05 A.M. on 10.11.2007, the inquest report (Ex.Ka.-4) was prepared at the spot, wherein crime no. 681 of 2007, time of information of crime and time of conducting the inquest report are written. There is no dispute with regard to the above facts and not asked any single suggestion to PW-1 Mangal Singh. In addition to the above, PW-5 HC Ramesh Chand clearly stated that he registered the FIR of the present case at 10:35 A.M. on the basis of the complaint of the informant Mangal Singh, at that time Mangal Singh,

his son Lakhan and Moolchand had come to the police station to lodge the FIR, this fact has not been disputed to PW-5. It has also not been disputed to P.W.-5 that a copy of the FIR had been given to the informant after registering the FIR or not, and no suggestion was asked to PW-5 on the above facts.

88. So far as the overwriting in Chick FIR is concern, P.W.-5 HC Ramesh Chand stated that the overwriting is a result of a mistake. The trial court observed with regard to the overwriting in Chick FIR that all overwriting were a result of a bonafide mistake of PW-5. We have noticed above that the overwriting at serial no. 4 and 9 have no significance because the post-mortem has been conducted at 3:40 P.M. on 10.11.2007. There is no dispute with regard to the G.D. Entry of Chick FIR as G.D.Report No. 19, wherein the time of registeration of the FIR at 10:35 A.M. has been written and there is no suggestion in this regard.

89. PW-5 HC Ramesh Chand explained the delay in sending the special report and stated that it takes time to prepare the special report due to this reason the special report was sent at 16:40 hours, after about 6 hours. It is to be noted that PW-5 HC Ramesh Chand, stated that the special report was dispatched through Constable Dhanesh at 16:20 hours on 10.11.2007. It is admitted fact that the Chick FIR containing the signature of CJM on 13.11.2007, but it is not necessary that it was received in the office of CJM on 13.11.2007. We have noticed above that the PW-4 S.I. Rakesh Kumar Awasthi consistently stated that he recorded the statements of eye-witnesses PW-1 and PW-2 on 10.11.2007 under section 161 Cr.PC, this fact has not been disputed even though there is no suggestion with regard to the recording of the statements.

90. It would be useful to notice the law with regard to the importance of sending the special report as well as the FIR before the jurisdictional Magistrate in assessing the credibility of lodging the FIR. In the case of **Sheikh Hasib alias Tabarak v. State of Bihar,(1972) 4 SCC 773** (3 Judge) the Apex Court has held as under: (SCC p. 776, para 4)

"4...The legal position as to the object, value and use of first information report is well-settled. The principal object of first information report from the point of view of the informant is to set the Criminal Law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party. The first information report, we may point out, does not constitute substantive evidence though its importance as conveying the earliest information regarding the occurrence cannot be doubted. It can, however, only be used as a previous statement for the purpose of either corroborating its maker under Section 157 of the Indian Evidence Act or for contradicting him under Section 145 of that Act. It cannot be used for the purpose of corroborating or contradicting other witnesses. ..."

91. In **Balram Singh & Anr. v. State of Punjab, (2003) 11 SCC 286,** (3 Judge) the Apex Court has observed as under: (SCC p. 291, para 10)

"10...At any rate, while considering the complaint of the appellants in regard to the delay in the F.I.R. reaching the jurisdictional Magistrate, we will have to also bear in mind the credit worthiness of the ocular evidence adduced by the

prosecution and if we find that such ocular evidence is worthy of acceptance the element of delay in registering a complaint or sending the same to the jurisdictional Magistrate by itself would not in any manner weaken the prosecution case."

92. In **Yogesh Singh v. Mahabeer Singh (2017) 11 SCC 195**, the Supreme Court observed as under: (SCC p. 216-17, para 40)

"40. It has been consistently held by this Court through a catena of judicial decisions that although in terms of Section 157 Cr.PC., the police officer concerned is required to forward a copy of the FIR to the Magistrate empowered to take cognizance of such offence promptly and without undue delay, it cannot be laid down as a rule of universal application that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable and the trial stands vitiated. When there is positive evidence to the fact that the FIR was recorded without unreasonable delay and investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the Court, then in the absence of any prejudice to the accused, it cannot be concluded that the investigation was tainted and the prosecution story rendered unsupportable. (See: Pala Singh v. State of Punjab21, Sarwan Singh v. State of Punjab22, Anil Rai v. State of Bihar23, Munshi Prasad v. State of Bihar24, Aqeel Ahmad v. State of U.P.25, Dharamveer v. State of U.P.26 and Sandeep v. State of U.P.27)

93. In the present case there is prompt lodging of the FIR and thereafter the investigating officer had recorded the statement of the informant P.W.-1 Mangal Singh and P.W.-2 Lakhan Singh and prepared the inquest report at the spot at 11;05 AM, dispatched the dead body to the mortuary and the post mortem of the deceased was conducted same day at 3:40 P.M. and copy of the F.I.R. and other police papers were handed over to PW-7 Dr. Surendra Singh and these papers also contained the signature of PW-7; PW-5 HC Ramesh Chand explained the delay of about 6 hours in sending the special report. In these circumstances, the delay in sending the special report to the Magistrate is immaterial. So far as the submission of the counsel for the appellants that there is a delay in reaching the F.I.R. to the jurisdictional Magistrate on 13.11.2007 is concerned. On account of delay in reaching of F.I.R. to the Jurisdictional Magistrate, the prosecution case cannot be disbelieved. There is no overwriting in the G.D. Report No. 19 wherein the FIR of the case had been entered into it, prepared at 10:35 A.M. Moreover, it has not been suggested to P.W.-1 that he had signed at the bottom of the complaint at any other date. In view of the above circumstances, we have no reason to entertain any doubt in our mind that the F.I.R. was not registered at 10:35 A.M. on 10.11.2007, we are of the considered view that the FIR had not been registered ante-timed.

94. It has been submitted that PW-1 Mangal Singh, PW-2 Lakhan Singh, and PW-3 Rekha are the chance witnesses and their presence have not been satisfactorily explained, and their presence was not natural, the named independent witnesses Raghuvir Singh and Moolchand have not been examined, and other independent witnesses Prem Singh, Tej Singh, Lekhraj, Padam Singh, and Harbhajan Singh have

not been questioned by the I.O. during the investigation, non-examination of material witnesses crucially affects the prosecution version and creates a sense of doubt. PW-1, PW-2, and PW-3 are interested witnesses and their implication is due to the inimical disposition towards the appellants, hence the testimony of PW-1, PW-2, and PW-3 is not reliable, has to be discarded, as it has deliberately not cited the independent material witnesses, therefore, their testimony has also untrustworthy and unreliable.

95. The word 'chance witness' has been defined and explained by His lordship Mahajan, J., in **Puran v. The State of Punjab**28 as; 'such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence.' If the court comes to the conclusion that the testimony of a chance witness is credible, the evidence cannot be thrown out merely on the ground that the witness happened to be present by chance (Vide: **Sarvesh Narain Shukla v. Daroga Singh & Ors.**29). Non-examination of independent witnesses by itself may not give rise to an adverse inference against the prosecution, but when the evidence of the alleged eye-witnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witnesses would assume significance (Vide: **Hem Raj & Ors. v. State of Haryana**30)

96. Hence, we will have to first consider whether the evidence of PW-1, PW-2, and PW-3 eye-witnesses raises serious doubts on the point of their presence near the place of the incident at the time of the occurrence.

97. It is a well-settled legal principle that the evidence of a chance witness cannot be brushed aside simply because he is a chance witness but his presence at the place of occurrence must be satisfactorily explained by the prosecution to make his testimony free from doubt and thus, reliable. It would be useful to notice few decisions of the Apex Court. In **Jarnail Singh v. State of Punjab, (2009) 9 SCC 719** the Supreme Court observed as under: (SCC p. 725 para 21 to 23)

"21. In Sachchey Lal Tiwari v. State of U. P.31, this Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and passerby had deposed that he had witnessed the incident, observed as under:

'If the offence is committed in a street only a passerby will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere chance witness. However, there must be an explanation for his presence there.'

The Court further explained that the expression 'chance witness' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country like India where people are less formal and more casual, at any rate in the matter of explaining their presence.

22. The evidence of a chance witness required a very cautious and close scrutiny and a chance witness must adequately explain his presence at the place of occurrence (Satbir v. Surat Singh32, Harjinder Singh v. State of Punjab33, Acharaparambath Pradeepan & Anr. v. State of Kerala34 and Sarvesh

Narain Shukla v. Daroga Singh & Ors.35). Deposition of a chance witness whose presence at the place of incident remains doubtful should be discarded. (Vide: Shankarlal v. State of Rajasthan36)

23. Conduct of the chance witness, subsequent to the incident may also be taken into consideration particularly as to whether he has informed anyone else in the village about the incident. (Vide: Thangaiya v. State of Tamil Nadu37).…"

98. In **Rana Pratap and others v. State of Haryana, (1983) 3 SCC 327**, the Supreme Court observed as: (SCC p. 329, para 3)

"3.....We do not understand the expression 'chance witnesses'. Murders are not committed with previous notice to witnesses, soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a brothel, prostitutes and paramours are natural witnesses. If murder is committed on a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witnesses' is borrowed from countries where every man's home is considered his castle and every one must have an explanation for his presence elsewhere or in another man's castle. It is a most unsuitable expression in a country whose people are less formal and more casual. To discard the evidence of street hawkers and street vendors on the ground that they are "chance witnesses", even where murder is committed in a street, is to abandon good sense and take too shallow a view of the evidence."

99. Keeping in mind the aforesaid position of law, we shall examine the arguments advanced by the parties as also the evidence on record. Thus, the real test is whether the testimony of PWs 1 to 3 are intrinsically reliable or not and their presence is satisfactorily explained or not.

100. It has been submitted that the presence of PW-1 Mangal Singh and PW-2 Lakhan at the tubewell of Prem Singh at the time of the incident has not been satisfactorily explained; they are chance witnesses and they kept mum till the accused persons did not flee away from the spot.

101. In **Rana Pratap Singh**'s case (supra) it has been observed that every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves removed from the spot as far as possible. Yet others rush to rescue the victim, even going to the extent of counter-attacking the assailants. Everyone reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate the evidence in a wholly unrealistic and unimaginative way.

102. Upon consideration of the entire testimony of PW-1 Mangal Singh and PW-2 Lakhan Singh, it reveals that on behalf of the appellants, no question was asked with

regard to the conduct of the eyewitnesses at the time of the incident as well as after the incident. From the evidence of PW-1 and PW-2 discussed supra, it is amply clear that at the time of the incident *Pareh* (irrigation of fields before seeding) was going on; PW-1 along with PW-2 went to ask Prem Singh to get water from this tubewell for irrigation of his field, which is located near the tubewell of Prem Singh, at that time Prem Singh was present at the tubewell; the incident took place at 9:30 A.M. on 10.11.2007, when Kamal Singh was returning home after defecation; they saw the incident from the tubewell of Prem Singh; co-accused Raghunath and Sahukar stopped Kamal Singh from the front side, as soon as he turned back Jagdish and Manoj shot fire upon him from a distance of 5-6 steps; they reached the spot immediately; PW-1, PW-2, and Moolchand went to the police station to lodge the report; the FIR of the incident was registered promptly against the appellants and the co-accused at 10:35 A.M. on 10.11.2007.

103. After analysing the evidence of PW-1 Mangal Singh, we have noticed above that the incident took place in the outskirts of the village in open field of Prem Singh, which is 150 steps away from the tubewell; there is no obstruction in view of the visibility between the place of the incident and the tubewell, there was no crop standing in the adjacent fields; after receiving the gunshot, Kamal Singh ran towards his house but after 10 steps he fell down and died on the spot; PW-1 usually visited his field and he was not present coincidentally or by chance at the tubewell at the time of the incident.

104. We have noticed above that PW-1 consistently supported the prosecution version during his cross-examination and stated that he along with Lakhan went to ask Prem Singh to get water from his tubewell for irrigation of his field at the time of the incident and they saw the incident from the tubewell. At that time Prem Singh was present at the tubewell. The incident took place in the field of Prem Singh. Raghunath and Sahukar stopped Kamal Singh from the front side, as soon as he turned back, Jagdish and Manoj fired upon him. Kamal Singh was shot fire from a distance of 5-6 steps. PW-1 and PW-2 Lakhan reached the spot immediately, and after hearing the noise PW-3 Rekha reached the place of the occurrence, and he along with his son Lakhan, and Moolchand went to the police station to lodge the report and the inquest proceedings were commenced at the spot 11.05 A.M. at the spot. Significantly, that the above facts have not been controverted on behalf of the appellants. The presence of PW-1 Mangal Singh along with PW-2 Lakhan at the tubewell of Prem Singh and conduct of PW-1 just before or after the incident has not been disputed. There is no cross-examination directed against his testimony to discredit his evidence on the above facts. The evidence of PW-1 was not shaken in the cross-examination and nothing infirm has been elicited to cast doubt on his veracity.

105. Moreover, the material facts have also not been disputed by the appellants to PW-1 which are; *firstly*; the incident took place at 9:30 A.M. on 10.11.2007, when his son Kamal Singh was returning home after defecation and reached the field of Prem Singh; *secondly*; the appellants Jagdish and Manoj having unlicenced guns (Paunia) in their hands and surrounded the deceased in the field of Prem Singh; *thirdly*; on 2.7.2007, the

appellant Jagdish, Raghunath Singh, Sahukar, and Vinod had beaten the deceased and PW-2 Lakhan, and a criminal case was pending in the court; *fourthly*; after hearing the noise, PW-3 Rekha reached the spot; *fifthly*; PW-1 Mangal Singh went to the police station to lodge the report along with PW-2 Lakhan and Moolchand.

106. It is also significant that the appellants had not asked any suggestion to PW-1 on the material facts which are; PW-1 along with PW-2 was present at the tubewell of Prem Singh at the time of the incident; the incident took place at 9:30 A.M. on 10.11.2007 when his son Kamal Singh was returning home after defecation; PW-1 had seen the incident from the tubewell of Prem Singh and the occurrence took place at the field of the Prem Singh; after hearing the gunshot, PW-1 and PW-2 reached the place of occurrence immediately after the incident; on 2.7.2007, the appellant Jagdish, Raghunath Singh, Sahukar, and Vinod had beaten the deceased and PW-2 Lakhan, and a criminal case was pending in the court; PW-1, his son Lakhan (PW-2), and Moolchand went to the police station to lodge the report and police; after hearing the noise, PW-3 Rekha reached the spot.

107. The testimony of PW-1 Mangal Singh has been fully corroborated by PW-2 Lakhan. We have noticed above that PW-2 Lakhan consistently stated that he went to the tubewell of Prem Singh along with PW-1 to ask him to take water for irrigation of his fields; he witnessed the incident from the tubewell of Prem Singh, the incident took place within 2 minutes after his reaching; the incident took place at 9:30 A.M. on 10.11.2007 when his brother Kamal Singh was returning home after defecation and reached in the field of Prem Singh; the appellants Jagdish and Manoj having unlicenced guns (Paunia) in their hands and surrounded the deceased in the field of Prem Singh; Jagdish and Manoj shot fire his brother from the front and PW-2 lodged the report. The above facts have not been controverted by the appellants. It is also relevant to note that the path of the field of PW-1 goes through the field of Prem Singh, wherein the incident took place. In addition to the above, there is no dispute with regard to the place of the incident, the conduct of PW-2 at the time of the incident or after the incident, to this witness. There is no cross-examination directed against his testimony to discredit his evidence on the above facts. The evidence of PW-2 was not shaken in his cross-examination and nothing infirm has been elicited to cast doubt on his veracity.

108. After considering the testimony of PW-2 Lakhan Singh, the presence of PW-2 has been disputed by the appellants as: *firstly*; the water of the tubewell of Prem Singh was saline, *secondly*; there were other tubewells of other farmers near to his field, why he had asked Prem Singh to take water for irrigation, *thirdly*; why PW-2 and his father PW-1 had gone to the tubewell of Prem Singh, one person could have asked. It is noticeable that testimony of PW-1 and PW-2 is similar and it has been observed above that testimony of PW-1 is fully corroborated by PW-2 and the above facts have not been disputed to PW-1 by the appellants. It is also relevant to note that the appellants have questioned the above facts first time to PW-2 Lakhan Singh.

109. Ongoing through the evidence of PW-1 Mangal Singh and PW-2 Lakhan Singh it is clear that they assigned a reason for his presence at the tubewell of Prem

Singh. We cannot be oblivious of the rural milieu. No adverse inference can be drawn that they were not going daily and their testimony that they were present at the tubewell on the fateful day should be brushed aside. There was nothing unusual, therefore, their being present at the material time more so when there is nothing on record to disbelieve their uncontroverted testimony. We are convinced that their evidence is neither doubtful nor creates any suspicion in our mind. We are of the considered view that the presence of PW-1 and PW-2 at the tubewell of Prem Singh, at the time of the incident satisfactorily explained and proved and they were not present coincidentally or by chance at the tubewell of Prem Singh at the time of the incident and we have no hesitation in holding that they satisfy the test of careful scrutiny and cautious approach. They can be relied upon.

110. It has been pointed out that there is a inconsistency between the testimony of PW-3 Rekha and PW-4 S.I. Rakesh Kumar Awasthi with regard to the presence of PW-3 near the place of the incident. PW-3 Rekha stated in her examination-in-chief that his brother was returning home from the field of Prem Singh after defecation at 9:30 A.M., at that time she was dumping the cow dung in the field; whereas in her cross-examination she stated that at the time of the incident she was dumping the cow dung in her plot and she told to the police that her plot situated near the field of Prem Singh and also told about dumping the cow dung in that plot if it is not written in her statement then she can not tell the reason; whereas PW-4 S.I. Rakesh Kumar Awasthi stated that Rekha had not told him about dumping the cow dung in the plot.

111. It has been settled in various pronouncements of the Apex Court that every improvement is not fatal to the prosecution case, in cases where an improvement creates a serious doubt about the truthfulness or credibility of a witness, the defence may take advantage of the same. (vide: **Ashok Vishnu Davare v. State of Maharashtra**38**, Radha Kumar v. State of Bihar** (now Jharkhand)39**, Sunil Kumar Sambhudayal Gupta (Dr.) & Ors. v. State of Maharashtra**40 and **Baldev Singh v. State of Punjab**41)

112. In **Yogesh Singh v. Mahabeer Singh & Ors. (2017) 11 SCC 195**, the Apex Court has observed as under; (SCC p. 212, para 29)

"29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs to special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission," (See: Rammi @ Rameshwar v. State of M.P.42; Leela Ram

(dead) through Duli Chand v. State of Haryana & Anr.43; Bihari Nath Goswami v. Shiv Kumar Singh & Ors.44; Vijay @ Chinee v. State of Madhya Pradesh45; Sampath Kumar v. Inspector of Police, Krishnagiri46; Shyamal Ghosh v. State of W.B.47 and Mritunjoy Biswas v. Pranab @ Kuti Biswas & Anr.48)

113. PW-1 Mangal Singh stated in his examination-in-chief that on hearing the noise, Raghuvir, Moolchand, and his daughter Rekha had reached the spot. He further stated in his cross-examination that Raghuvir, Moolchand had not seen the incident; whereas PW-2 Lakhan Singh in his examination-in-chief stated that his sister Rekha, who was coming home after dumping the cow dung from the field also saw the incident. We have noticed above that the plot and field of the informant (PW-1 Mangal Singh) are situated at different places. The plot is located adjacent to the houses of Moolchand, Lakhan, Gutia, and Mishrilal; whereas the field is situated near the tubewell of the Prem Singh, and the house of Gutia is situated 20 steps away from the place of the incident. In view of the above discussion, we are of the view that there is a material inconsistency with regard to the place where PW-1 Rekha was claiming to be present at the time of the incident, therefore, the presence of PW-3 Rekha, at her field at the time of the incident has not been satisfactorily explained by the prosecution.

114. Now we shall examine the next contention about the consequence of non-examination of the independent witness. It is admitted fact that the co-accused Raghunath Singh is real brother of the informant Mangal Singh. The appellant Jagdish and accused Sahukar are real brothers and the appellant Manoj Kumar is son of the appellant Jagdish and the informant and the appellants are cousin. It is also significant that the other eye-witnesses named in the FIR, Raghuvir Singh and Moolchand are also cousins of the informant. It is also not disputed that the plot in question is land of Gaon Sabha.

115. PW-1 Mangal Singh stated in his cross-examination that Moolchand and Raghuvir Singh did not see the incident. It is pertinent to mention here that the informant, the appellants, co- accused Raghunath Singh, Shahukar Raghuvir, Moolchand and scribe of the complaint Mahavir Singh are cousins and are kins of the same ancestor, therefore, Raghuvir Singh and Moolchand are not independent witnesses of the incident because they are also relatives of the informant, although, the appellants argued that they are independent witnesses of the incident.

116. It is a settled position of law that non-examination of independent witnesses by itself may not give rise to an adverse inference against the prosecution, but when the evidence of the alleged eyewitnesses raises serious doubts on the point of their presence at the time of actual occurrence, the unexplained omission to examine the independent witnesses would assume significance. It is also well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement. In **Raghubir Singh v. State of U. P.**49 it has been held that the prosecution is not bound to produce all the witnesses said to have seen the occurrence.

Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone need be produced with unnecessary and redundant multiplication of witnesses.

117. The consequence of non-examination of material witness has been considered in **State of H. P. v. Gian Chand, (2001) 6 SCC 71**, the Supreme Court held as under: (SCC p. 81, para 14)

"14...Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution. The Court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined. However, if the available evidence suffers from some infirmity or cannot be accepted in the absence of other evidence which though available has been withheld from the court, then the question of drawing an adverse inference against the prosecution for non-examination of such witnesses may arise…"

118. Keeping in the mind the position of law, we are of the view that the testimony of the eye-witnesses cannot be discarded merely on the ground of non-examination of Raghuvir Singh and Moolchand, however, they are not independent witnesses. We, therefore, do not find any merit in the submission made by the learned counsel for the appellants that the prosecution story should not be believed because the prosecution has not examined Raghuvir Singh, Moolchand before the court.

119. It has been submitted on behalf of the appellants that there is inconsistency between the ocular evidence and the medical evidence.

120. Taking the advantage of the opinion of PW-7 Dr. Surendra Singh as he stated in his cross-examination that if a shot is fired from the front side, then all such injuries could not be caused to the deceased, it has been submitted that there is variance between the ocular and medical evidence. We have noticed above that all the injuries have been received by the deceased from the front side. PW-1 Mangal Singh and PW-2 stated consistently that the appellants shot fire to the deceased from the front side.

121. In **Yogesh Singh v. Mahabeer Singh (2017) 11 SCC 195**, the Supreme Court held observed as under: (SCC p. 217, para 43)

"43....In any event, it has been consistently held by this Court that the evidentiary value of medical evidence is only corroborative and not conclusive and, hence in case of a conflict between oral evidence and medical evidence, the former is to be preferred unless the medical evidence completely rules out the oral evidence. (See: Solanki Chimanbhai Ukabhai v. State of Gujarat50, Mani Ram

v. State of Rajasthan51, State of U.P. v. Krishna Gopal52, State of Haryana v. Bhagirath53, Dhirajbhai Gorakhbhai Nayak v. State of Gujarat54, Thaman Kumar v. State (UT of Chandigarh)55, Krishnan v. State56, Khambam Raja Reddy v. Public Prosecutor57, State of U.P. v. Dinesh58, State of U.P. v. Hari Chand59, Abdul Sayeed v. State of M. P.60, and Bhajan Singh v. State of Haryana61)"

122. It is undisputed fact that the deceased received 3 gunshot injuries, injury no. 1 is on right arm and forearm; injury no. 2 is on both chest and neck, and injury no. 3 is on the abdomen and above three injuries having multiple firearm injuries. PW-1 Mangal Singh and PW-2 Lakhan Singh consistently stated that the appellants shot fire to the deceased by unlicenced guns (Paunia) from the front side from a distance of 5-6 steps. Apart from this, there is no dispute with regard to injury no. 2, as mentioned in the post-mortem report, and on behalf of the appellants, no question was put to PW-7 Dr. Surendra Singh regarding injury no. 2, which has been caused on 'both chest and neck'. In view of the above, we are of the considered view that ocular testimony of PW-1 and PW-2 is fully corroborated by medical evidence.

123. It has also been submitted that there is no recovery of empty cartridge/s from the place of occurrence, even though all the eyewitnesses have stated that three gunshots were fired and PW-1, PW-2, and PW-3 have reached on the spot immediately and the weapons recovered could not be connected with the crime.

124 It is a settled position of law that any omission on the part of the investigating officer cannot go against the prosecution case if it is otherwise supported by reliable and credible evidence. It is also settled that unless the lapses on the part of the investigation are such as to cast reasonable doubt about the prosecution story or seriously prejudice the defence of the accused, the court will not set aside the conviction. In **C. Muniappan and Ors. v. State of Tamil Nadu, AIR 2010 SC 3718,** the Apex Court observed as under;

"The defect in the investigation by itself cannot be ground for acquittal. If primacy is given to such designed or negligent investigation or to the omissions or lapses be perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the Court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation."

125. Thus, the prosecution case cannot be doubted merely on the ground of non-recovery of 'empties' fired from the unlicenced guns (Paunia) at the deceased.

126. The next and last submission of learned counsel for the appellants is that the

Sessions Judge acquitted co-accused Raghunath Singh and Sahukar under Section 302 read with 34 of IPC, therefore, on the same evidence the appellants should not have been convicted by the Sessions Judge.

127. It is needless to observe that it has been established through a catena of judgments of the Apex Court that the maxim *'falsus in uno falsus in omnibus'* is not a sound rule to apply in the conditions in this country and therefore, it is the duty of the Court in cases where a witness has been found to have given unreliable evidence in regard to certain particulars, to scrutinise the rest of his evidence with care and caution. If the remaining evidence is trustworthy and the substratum of the prosecution case remains intact, then the court should uphold the prosecution case to the extent it is considered safe and trustworthy. (vide: **Deep Chand v. State of Haryana**62)

128. In **Sucha Singh & Anr. v. State of Punjab, (2003) 7 SCC 643,** the Supreme Court observed as: (SCC p. 652, para 18)

"18..Stress was laid by the accused-appellants on the non-acceptance of evidence tendered by some witnesses to contend about desirability to throw out the entire prosecution case. In essence, prayer is to apply the principle of 'falsus in uno falsus in omnibus' (false in one thing, false in everything). This plea is clearly untenable. Even if a major portion of evidence is found to be deficient, in case residue is sufficient to prove the guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained. It is duty of the court to separate the grain from the chaff. Where chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove the guilt of other accused persons. Falsity of a particular material witness or a material particular would not ruin it from the beginning to the end. The maxim 'falsus in uno falsus in omnibus' has no application in India and the witnesses cannot be branned as liars. The maxim 'falsus in uno falsus in omnibus' not received general acceptance nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'. (See: Nisar Ali v. State of U.P.63). Merely because some of the accused persons have been acquitted, though evidence against all of them so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted. (See: Gurcharan Singh v. State of Punjab64). The doctrine is a dangerous one, especially in India for if a whole body of the testimony were to be rejected, because a witness was evidently speaking an untruth in some aspect, it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the

same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be sifted with care. The aforesaid dictum is not a sound rule for the reason that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishment. (See: Sohrab v. State of M.P.65 and Ugar Ahir v. State of Bihar66. An attempt has to be made to, as noted above, in terms of the felicitous metaphor, separate the grain from the chaff, truth from falsehood. Where it is not feasible to separate the truth from falsehood, because grain and chaff are inextricably mixed up, and in the process of separation an absolutely new case has to be reconstructed by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, the only available course to be made is to discard the evidence in toto. (See: Zwinglee Ariel v. State of M.P.67 and Balaka Singh v. State of Punjab68). As observed by this Court in State of Rajasthan v. Kalki69 normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to lebel the category to which a discrepancy may be categorised. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted recently in Krishna Mochi v. State of Bihar70.."

129. As discussed above the role assigned to the appellants and co-accused Raghunath Singh, Sahukar are different. The principle of *"falsus in uno falsus in omnibus"* is not applicable in India. It is the duty of the court to separate the grain from the chaff. Falsity of a witness would not ruin it from the beginning to the end. In view of the above, it cannot be said that the ground of acquittal of Raghunath Singh and Sahukar under section 302 read with section 34 IPC, the prosecution case can be doubted and the testimony of PW-1 Mangal Singh and PW-2 Lakhan Singh can be disbelieved against the appellants.

SUMMARY OF OUR ANALYSIS AND THE CONCLUSION DERIVED THEREFROM

130. Ongoing through the entire evidence and keeping in mind the settled position of law, we are unhesitatingly of the opinion that the testimony of eye-witnesses PW-1 Mangal Singh and PW-2 Lakhan Singh is reliable, cogent, and trustworthy to prove the guilt of the appellants. In view of the above discussion, we hold that PW-1 and PW-2 are not chance witnesses. In support of this conclusion regard being had to the following circumstances.

(a) At the time of the incident, *Pareh* (irrigation of fields before seeding) was going on, and it was the intervening period between two crops *(Kharif and Ravi)*.

(b) The field of PW-1 is located near to the tubewell of Prem Singh, which is in the vicinity of the outskirts of the village, PW-1 and PW-2 used to go for defecation daily in his field from the way which goes through the field of Prem Singh.

(c) On the way, between the house of PW-1 and the field of PW-1, there is a field of Prem Singh which is adjacent to the outskirts of the village, wherein the

incident took place, then the other field of the Prem Singh located after it then the tubewell is situated. PW-1 and PW-2 had used to go to their field through this way usually.

(d) The presence of PW-1 and PW-2 near their field at the tubewell of Prem Singh is natural at the material time because it was the intervening period of two crops. At that time commonly the farmers do the work in their field to keep out their *Kharif* crop outside from their fields and prepare the fields for *Ravi* crop.

(e) PW-1 Mangal Singh has lodged the F.I.R. promptly within one hour and 5 minutes after the incident.

131. Upon close scrutiny of the entire evidence, we have observed that the appellants did not put any questions or suggestions to the eye-witnesses PW-1 Mangal Singh and P.W.2 Lakhan Singh on material facts such as: (i) the incident took place at 9:30 A.M. on 10.11.2007, when Kamal Singh was returning home after defecation, (ii) the appellants having unlicenced guns (Paunia) in their hands and surrounded the deceased in the field of Prem Singh and shot fire the deceased from the front side, (iii) PW-1 Mangal Singh along with PW-2 Lakhan was present at the tubewell of Prem Singh at the time of the incident, (iv) PW-1 along with PW-2 had seen the incident from the tubewell of Prem Singh and they reached the spot immediately after the incident, (v) PW-3 Rekha reached the spot after hearing the noise, (vi) the FIR of the case has been lodged by PW-1 at 10:35 A.M. on 10.11.2007.

132. For all the reasons recorded and discussed above, we are of the considered view that the prosecution has successfully proved the charge of offence punishable under section 302 read with section 34 IPC against the appellants Jagdish and Manoj Kumar beyond reasonable doubt. The finding of the trial court is based on proper appreciation of the evidence. Therefore, we affirm the conviction and sentence awarded to the appellants Jagdish and Manoj hold them guilty for offence punishable under section 302 read with section 34 IPC. We, thus, do not find any merit in these appeals. The Criminal Appeals no. 3271 of 2011 and 3210 of 2011 are **dismissed** accordingly. The appellants are in jail.

133. Let a certified copy of this judgment with original record be sent to the trial court for information and compliance forthwith. The office is directed to provide the certified copy of the judgment separately to the appellants promptly.

(2021)07ILR A198
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.11.2020

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE SAUMITRA DAYAL SINGH, J.

Jail Appeal No. 4354 of 2015

Ramendra Yadav ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
From Jail, Sri Brijesh Sahai, Sri Sarvesh Kumar Dubey, Sri Shashi Shekhar

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 374(2) - Indian Penal Code,1860-Section 302-appellant posted as a guard on duty-the two

deceased had gone to pick some goods-appellant restrained them, the two deceased entered into altercation, they were ex-guards-passion surged from both sides-the appellant lost self control and fired two shots in quick succession-appellant is entitled to the benefit of exception 1 of section 300-the sentence of appellant reduced from life imprisonment to 10 years rigorous imprisonment.(Para 1 to 31)

B. The test of grave and sudden provocation is whether a reasonable man, belonging to the same class of society, to which the accused was placed, would be so provoked to lose his self control.

The appeal is partly allowed. (E-5)

List of Cases cited:

1. Bhagwan Munjaji Pawade Vs St. of Mah. (1978) 3 SCC 330 Para 6

2. K.M. Nanavati Vs St. of Mah.(1962) AIR SC 605

(Delivered by Hon'ble Manoj Misra, J.

1. This jail appeal has been filed against the judgment and order of conviction dated 11.02.2015 and order of sentence dated 13.2.2015 passed by the Additional Sessions Judge, Second, Gautam Budh Nagar in S.T. No.381 of 2011 (State Vs. Ramendra Yadav) whereby the appellant Ramendra Yadav has been convicted for offence punishable under Section 302 IPC and has been sentenced to undergo imprisonment for life along with fine of Rs.50,000/- and default sentence of one year simple imprisonment.

2. The prosecution case, in nutshell, as taken in the FIR (Ex. Ka 1) is that PW-2's (informant's) brother-in-law, Indrajeet Singh Rathore (deceased no.1 - D-1) and one Sachin Tomar (deceased no.2 - D-2) were working for Pawan Security for the last two months. About four days before the date of incident, they were removed. On 15.02.2011, at about 7 pm, PW-2 with D-1 and D-2 visited Colonel Hostel of Sharda University for settlement of their dues. When D-1 and D-2 went to fetch their belongings from the guardroom, the appellant-Ramendra Yadav, the gunman, restrained them from picking the goods on which a fight broke out. The gunman picked up his double barrel gun and fired one shot at D-1 and the other at D-2, resulting in serious injuries to both of them. PW-2 and Pawan Security Supervisor, namely, Gurvinder Singh (P.W.6), who were there, arrested the accused on the spot with his double barren gun. The two injured were rushed to Sharda Hospital where they were declared dead. The FIR of the incident was registered at P.S. Kasna, District Gautam Budh Nagar at 20.10 hours on 15.02.2011, which was proved by the informant (PW-2).

3. The postmortem report (Ex. Ka-5) of D-1 prepared and proved by Dr. Raj Singh (PW3) disclosed a circular 6 cm x 5 cm bone deep firearm entry wound at left inguinal region with same sized hole on overlying shirt and pant with blackening. All the vascular channels (femoral artery and vein) ruptured. A plastic wad and deformed metallic foreign body was recovered from inguinal region near femur. The cause of death was due to excessive bleeding on account of firearm injury to main vascular vessel.

4. The postmortem report of D-2 (Ex. Ka-6) prepared and proved by PW3 revealed a circular firearm entry wound 3

cm x 3 cm at left side chest and left side abdomen, 13 cm above umbilicus at 1 O'clock position, through which intestine was coming out. Blackening was found around the wound. Cause of death was due to shock and haemorrhage on account of ante mortem firearm injury.

5. Inquest was held at Sharda Hospital. Inquest reports were exhibited as Ex. Ka-7 and Ex. Ka-12 on the testimony of Sub Inspector Anang Pal Singh (P.W.4) as also constable Ravindra Singh (P.W.5). The investigation was carried out by Preetam Pal Singh, S.H.O. Kasna (P.W.7) resulting in charge sheet (Ex. Ka-22). Memorandum of taking possession of the weapon of assault i.e. double barrel gun with eight live cartridges was prepared and exhibited as Ex. Ka-4 on the testimony of PW2 and PW6. *Fard* of plain floor obtained from the guardroom of Colonel Hostel of Sharda University was marked Exhibit Ka-17 and *Fard* of blood stained floor picked up from guardroom of Colonel Hostel of Sharda University was marked Exhibit Ka-18 on the testimony of PW7. *Fard* of blood stained bed sheet, etc., picked up from the guardroom, was marked Exhibit Ka-19 on the testimony of PW7.

6. The prosecution examined two witnesses of fact, namely, PW-2 and PW-6. Four police witnesses, namely, Constable clerk Jeet Singh (P.W.1), who proved the Chik FIR (Ex.Ka1) and its G.D. Entry (Ex. Ka 2) at 20.10 hrs on 15.02.2011; P.W.4, who proved the inquest proceedings and the papers connected therewith; Constable Ravindra Singh (P.W.5) who took the sealed bodies for post-mortem to the mortuary; and PW7 who proved the various stages of the investigation. PW3 proved the post mortem reports.

7. PW-2 deposed that he along with two deceased had gone to Colonel Hostel of Sharda University. There, when the two deceased entered the guardroom to take their goods, the accused, who was there as a guard with gun, restrained them from picking the goods. This resulted in a quarrel. The accused thereafter picked up his gun and fired one shot each at the two deceased. Upon hearing gun shots, the other security guard (PW-6) rushed to the spot. Whereafter, PW2 with the help of PW6 arrested the accused on spot and took his gun with live cartridges. Thereafter, he went to the hospital with the two deceased where they were declared dead. Immediately, thereafter, he along with PW-6, went to the police station, handed over the accused and the gun to the police.

8. PW-6, the other security guard posted at the Hostel, stated that upon hearing gun shots, he rushed to the spot and found the accused with gun in his hand and two deceased lying injured and bleeding profusely. He stated that he with the help of PW2 arrested the accused on spot and took possession of his gun.

9. The incriminating circumstances borne out from the prosecution evidence were put to the accused under Section 313 Cr.P.C. The accused denied the prosecution case by stating that the prosecution case is incorrect and he has been falsely implicated. He, however, disclosed no reason for his false implication and led no evidence in defence.

10. The trial court after examining the prosecution evidence held that the prosecution was successful in proving the charge of murder punishable under section 302 IPC beyond reasonable doubt and punished the appellant accordingly.

11. We have heard Sri Brijesh Sahai, learned Senior Counsel, assisted by Sri

Sarvesh Kumar Dubey, for the appellant; Sri Ankit Srivastava, learned A.G.A., for the State.

12. Sri Brijesh Sahai, learned counsel for the appellant, submitted that as per the prosecution case the incident was witnessed only by PW-2 because PW-6 arrived at the spot on hearing the shots. Hence, actual firing has allegedly been witnessed only by PW2. PW-2 is a chance witness who resides in District Kanpur Nagar whereas the incident took place in District Gautam Budh Nagar. According to PW-2, he had come to Delhi on that day in the morning and had met his brother-in-law (D-1) at *Pari Chowk*. From there, they, along with D-2, went to Sharda University to settle the accounts. It has been submitted that PW-2 has been set up as a witness though he did not witness the incident. He next submitted that the alleged spot arrest of the accused is rendered doubtful from the testimony of PW-2, inasmuch as, according to PW-2, he and the other guard (PW-6) had arrested the accused with his double barrel gun and eight live cartridges on the spot and, later, the accused was handed over to the police with the double barrel gun and live cartridges at the police station, which is belied by the own testimony of PW-2 which is that after arresting the accused he had proceeded to the hospital with the two deceased in the ambulance. It has been submitted that the story that on return from the hospital he took the accused to the police station appears unbelievable because the accused admittedly had a gun with eight live cartridges and could easily have managed his escape therefore, it appears, the incident occurred in some other manner than alleged by the prosecution. In respect of PW-6, the other eye witness, the learned counsel for the appellant submitted that PW-6 is not an eye witness as he arrived at the spot when he heard gun shots. Hence, his testimony alone is not sufficient to record conviction.

13. In the alternative, the learned counsel for the appellant submitted that even if the court finds that the prosecution testimony is reliable then too an offence of murder cannot be said to have been committed as, admittedly, the accused was posted as a guard on duty at the time of the incident and in good faith he had restrained the two deceased from picking up goods lying in the guardroom which resulted in a sudden fight and the shots were fired in the heat of passion upon a sudden quarrel or it could be said that the two deceased by their conduct provoked the accused so much that he lost self control and fired the shots resulting in death. Thus, in any view of the matter, the offence, if any, committed by the accused would fall either in Exception 1 or Exception 4 of Section 300 IPC and therefore conviction could only be for an offence of culpable homicide not amounting to murder. To support the above contention, attention of the Court was invited to the postmortem reports to suggest that D-1 was shot not at vital part but at the inguinal region and the other shot fired at D-2 was in quick succession as a consequence of having already lost the power of self control on account of sudden surge of emotions caused by sudden quarrel and fight. He submitted that the accused has already suffered incarceration since 15.02.2011 and therefore it is a fit case where the sentence of the appellant be reduced to imprisonment already undergone.

14. **Per contra**, learned A.G.A. submitted that the prosecution story is natural. PW2's presence cannot be doubted because he is also witness of the inquest

proceeding which started at about 8.30 pm at Sharda Hospital. If he had been at Kanpur, as suggested by the defence, he could not have attended the inquest proceeding. Thus, his presence at the place of occurrence is not impossible but quite natural as having accompanied his brother in law for settlement of dues. Moreover, his presence is proved by PW6. He submitted that the place of occurrence is the guardroom of the hostel, close to which is the hospital, therefore it was quite natural for PW2 to rush the deceased to the hospital and on return reach the police station with the accused. More so, when there was another guard (PW6) to detain the accused who was apprehended with his gun on the spot. Hence, merely because the informant went to the hospital and on return took the accused along with other security guard (PW6) to the police station cannot be said to be an unnatural conduct on the part of the informant so as to cast a doubt on the prosecution story. He further submitted that there is no allegation of any kind of enmity or mala fide against PW2 or the police, therefore there is no reason at all to doubt the prosecution story which is corroborated by the facts and circumstances brought on record. Further, PW-6 corroborates the testimony of PW-2. Besides, there is no dispute with regard to the place and time of occurrence and the ocular version is fully corroborated by medical report. Hence, there is no shadow of doubt that the appellant is guilty. On the question of sentence, the learned A.G.A. submitted that it is not a case of a single gun shot but of two gun shots. Even if it is assumed that the first gun shot was on the inguinal region, the second gun shot was directly on vital part i.e. the abdomen near the chest. Thus, the trial court was justified in convicting the accused for an offence punishable under Section 302 IPC.

15. We have considered the rival submissions and have perused the record carefully.

16. In so far as the guilt of the appellant in respect of commission of culpable homicide is concerned, the prosecution evidence through PW2 is straight forward and leaves no shadow of doubt that the gun shots at the two deceased were fired by the appellant. The presence of PW2 at the place of occurrence is quite natural being brother in law of the deceased and having accompanied him to the University for settlement of his dues. His presence is also corroborated from police papers such as the FIR, inquest report and Fard of handing over the accused and his gun. Further, PW6 certifies P.W.2's presence on the spot at the time of the incident. With regard to the reliability of the testimony, there is no suggestion to PW2 as to why PW2 would be lying. Further, there is no suggestion to any of the prosecution witnesses that the two deceased were shot at by some other person in some other manner and at some other place or time. There is also no challenge to the prosecution evidence that the appellant was posted as a guard at Colonel Hostel of Sharda University where the incident took place. There is also nothing on record to show that the two deceased were armed and had caused any kind of injury to the accused. The prosecution story finds corroboration not only in the medical evidence but also in the testimony of PW6, who is an independent witness and, at the time of the incident, was in another room of the hostel and had rushed to the spot on hearing gun shots. There he found the appellant with gun in his hand and the two deceased lying on the floor. He corroborated the testimony of PW2 by stating that, thereafter, he, with the help of

PW2, who had come with the two deceased, apprehended the accused on spot.

17. In so far as the spot arrest of the appellant is concerned, it is not doubtful. It is to be noted that the gun used by the appellant was a double barrel gun. He had already fired two shots. It is thus possible that before he could reload the weapon there was ample opportunity for PW2 and PW6 to catch and overpower him. Thus the testimony that PW2 and PW6 had arrested the appellant and took away his gun and eight live cartridges is not unbelievable at all. The plea of the learned counsel for the appellant that spot arrest becomes doubtful because straightaway the accused was not produced at the police station but was produced after PW-2 returned from the hospital is not acceptable because Sharda Hospital is within the campus of Sharda University. This argument might have had some weight if the hospital had been far off and if there had been no other person to take control of the appellant. In the instant case, the incident occurred in the guardroom of the hostel. PW6 himself was there in another room as a guard and there were several other persons also present, as has come in the testimony. Therefore, if the appellant had been overpowered and his gun had been snatched, he could have easily been detained for sometime at the hostel before being taken to the police station. Thus, if he was produced at the police station by PW2 and PW6, after PW2 returned from the hospital, which was nearby, the prosecution case with regard to spot arrest of the accused-appellant is not rendered doubtful in any manner.

18. Under the circumstances, we do not find any such suspicious circumstance in the prosecution evidence which may lead us to disbelieve the straight forward prosecution evidence more so when no motive has been attributed to the witnesses to falsely implicate the appellant. Thus, we are of the view that the prosecution has been able to successfully prove beyond reasonable doubt that the appellant fired two shots, one at D-1 and the other at D-2. Even assuming that injury caused to D-1 was below his waist, near the inguinal region, the second gun shot fired at D-2 was above the umbilical region near the chest therefore, as both shots were from a close range, it can safely be concluded that the shot fired at D-2 was with the intention of causing such bodily injury as is likely to cause death of D-2.

19. Now, we shall proceed to examine the merit of the alternative submission made by the learned counsel for the appellant which is that the case of the appellant would fall in any one or more of the Exceptions provided under Section 300 IPC so as to make it an offence of culpable homicide not amounting to murder.

20. In this regard, the learned counsel for the appellant had strenuously urged that it is established from the prosecution evidence that the incident occurred in the guard-room of the University. The accused-appellant was the guard on duty. D-1 and D-2 wanted to take goods from the guard-room. The prosecution has not shown that D-1 and D-2 were authorised by any lawful order to take goods from the guard-room. Rather, admittedly, they were put off duty and had come to the campus only for settlement of their dues. Thus, the appellant, who was posted as a guard on duty, had every right to restrain D-1 and D-

2 from taking away the goods. As it is proved that when the appellant restrained D-1 and D-2 from taking away the goods altercation started between them, considering that there was no premeditated intention to cause death and the two shots were fired in quick succession, in the heat of passion, when the accused was provoked by the act of the two deceased, and such provocation was not sought by the appellant, it is a clear case where the shots were fired in the heat of the moment whilst deceased had lost the power of self control on account of grave and sudden provocation in a sudden fight upon a sudden quarrel, therefore his case would fall both in Exceptions 1 and 4 of Section 300 IPC.

21. In response to the above submission, the learned A.G.A. submitted that in so far as the first shot at D-1 is concerned, that is on or about the thigh / inguinal region whereas the second shot at D-2 is placed high on abdomen near the chest region. Thus, the accused has caused such bodily injury which he knew that it is likely to cause death. Hence, in view of clause (secondly) to section 300, it is murder. In so far as bringing the case under any of the Exceptions, no defence evidence has been led and it has not come on record that the accused suffered any injury therefore it appears just to be a case of quarrel and not sudden fight. Accordingly, Exception 4 of Section 300 would not come into play. In so far as Exception 1 is concerned, that would not be applicable because it is a case where a second shot was fired.

22. Before we take a decision on the rival submissions, on the above aspect, it would be apposite to notice few proven facts. D-1 was himself a security guard and was an ex-army personnel, as is the prosecution case. Likewise, D-2 was also a security guard though it has not come on record whether he was an ex-army personnel. Admittedly, both D-1 and D-2 were discharged by the security service which was managing the security at the University and, admittedly, at the time of the incident, the accused-appellant was on duty and had a gun in connection with his duty. According to the prosecution case, both D-1 and D-2 had gone to settle the accounts and when they had gone to the guardroom to collect their goods, the appellant, who was the guard on duty, restrained them from doing so. Nothing has been brought in the prosecution case to demonstrate that D-1 and D-2 had permission of any authority to pick up goods from the guardroom which they had shown to the accused-appellant. Further, nothing has been shown by the prosecution that the accused-appellant was aware that the goods, which D-1 and D-2 were planning to lift, were of D-1 and D-2. Under the circumstances, the appellant, being the guard, had a right to restrain them. This resulted in heated altercation between the guard on duty and the two deceased. In that heat of the moment, it appears, the deceased fired the first shot at D-1. This shot was from close range, as ascertainable from the post-mortem report which discloses blackening and presence of wad, and on the inguinal region not head/chest/ abdomen. Thus, it can be said that while firing the first shot, the appellant may not have had the requisite intention to cause such bodily injury as is likely to cause death. But the second shot fired at D-2 is above the umbilical region on or about the chest. This shot too was from close range as would be clear from presence of blackening, etc. This shot has been fired clearly with the knowledge that it is likely

to cause death therefore the act of the accused-appellant would fall in clause secondly of Section 300 IPC. As, it is not shown that D-1 and D-2 were armed or had caused any bodily injury to the accused-appellant, hence those shots being in self defence so as to attract Exception 2 of Section 300 IPC is out of question.

23. Now, we shall examine whether the act of the appellant would fall under Exception 4 of Section 300 IPC.

24. Exception 4 of Section 300 IPC reads as follows:-

*"**Exception 4**.- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.*

***Explanation.**- It is immaterial in such cases which party offers the provocation or commits the first assault".*

25. The ingredients of Exception 4 are (i) there must be a sudden fight; (ii) there was no pre-meditation; (iii) the act was committed in heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. If the said ingredients are present, the cause of quarrel would not be material as to who offered the provocation or started the fight. Although the term fight has not been defined in IPC but the consistent view is that it implies mutual assault by use of criminal force and not mere verbal duel. In ***Bhagwan Munjaji Pawade v. State of Maharashtra*, (1978) 3 SCC 330 (Para 6)**, it was observed that where the accused is armed and the deceased is unarmed, Exception 2 can have no application and Exception 4 to Section 300 would not apply if there is sudden quarrel but no sudden *fight* between the deceased and the accused. It was held that *"Fight' postulates a bilateral transaction in which blows are exchanged*.

26. In the instant case, the defence led no evidence and from the prosecution evidence, that is the testimony of PW2, it appears that only verbal duel and altercation took place, inasmuch as though he uses the words *"Vaad Vivad"* and *"Jhagda"* but does not state that any physical blows were exchanged. *Vaad Vivad* in vernacular is used for dispute and in the context of the case could be taken as verbal duel. *Jhagda* in vernacular is used for fight. But more often than not, in vernacular, it is also used for heated altercation. As the appellant seeks to bring his case within the four corners of an exception the burden is on him to demonstrate that his act falls within that exception. No doubt, even if no defence evidence is led, the accused can demonstrate from the facts and circumstances of the case, borne out from the prosecution evidence, that his case falls within that exception. But, here, the prosecution evidence is silent with regard to exchange of blows. Hence, we are of the considered view that the act of the appellant would not fall within the four corners of Exception 4 of Section 300 IPC.

27. Now, we shall examine whether the act of the appellant can come within the purview of Exception 1 of Section 300 IPC. Exception 1 of Section 300 IPC reads thus:

*"**Exception 1-- When culpable homicide is not murder.--** Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*

The above exception is subject to the following provisos:-

First.- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.- That the provocation is not given by anything done in obedience to the lawful exercise of the right of private defence.

Explanation.- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is question of fact."

28. To seek the benefit of Exception 1, following conditions are to be satisfied: (i) there must be provocation to the accused; (ii) the provocation must be grave; (iii) the provocation must also be sudden; (iv) the provocation must have deprived the accused of his power of control; (v) the offence must have been committed during loss of self control; and (vi) the person killed must have been the person giving provocation, or another by mistake or accident. In **K.M. Nanavati V. State of Maharashtra, AIR 1962 SC 605** it was held that the test of grave and sudden provocation is whether a reasonable man, belonging to the same class of society, to which the accused was placed, would be so provoked to lose his self control.

29. Applying the above tests, we find from the evidence brought on record that the accused-appellant was posted as a guard on duty in the guardroom with a gun on the date and time of the incident. The two deceased had gone to the guardroom to pick up some goods. The appellant restrained them from doing so. This resulted in altercation between the appellant and the two deceased. In that heat of the moment the appellant lifted his gun and fired two shots in quick succession. One hit D-1 on the inguinal region. The other hit D-2 above the umbilical region near the chest. Considering that the appellant was guard on duty, his primary responsibility was to restrain unlawful entry and removal of goods / property from the campus/ place which he was supposed to guard. Nothing has come in the prosecution evidence that the two deceased had permission to enter the guard room and take goods from there and if any such permission was obtained that was shown to the accused-appellant. Under the circumstances, if the appellant had restrained them from picking up the goods, he was well within his authority as a guard. Therefore, the reaction of the two deceased which constituted the provocation for the appellant to react and commit the offence was not sought or voluntarily provoked as an excuse for killing or doing harm to them. Now, the issue is whether the heated quarrel or altercation which followed could be considered as grave and sudden provocation so as to deprive the appellant of the power of self-control. In this regard, we would have to take into consideration the class of society to which the appellant belonged. Admittedly, the appellant was a guard. Ordinarily, a guard is expected to be tough and no nonsense kind of a person because without that kind of an attitude a person would not be suitable for that job. Hence, a strong reaction is expected from a guard, if a guard on duty is provoked. In the

instant case, the two deceased not only tried to lift goods lying in the guardroom despite being restrained by the appellant but they also entered into altercation. Under the circumstances, keeping in mind that the two deceased were themselves ex-guards, the passions surged from both sides and, therefore, it was quite natural for the appellant to lose the power of self control, particularly, when he had the gun to exhibit his authority. Therefore, under that heat of passion or fit of rage, so to say, the appellant, who had a gun for duty, lost self-control and fired two shots in quick succession. Noticeably, it is not the prosecution case that the second shot was fired with some delay, that is when the passion had died down. Thus, both shots were fired by the appellant whilst he was deprived of the power of self control on sudden surge of emotions provoked by the two deceased who entered the guardroom and tried to lift goods despite being asked to desist from doing so and, thereafter, entered into a heated altercation with the appellant, who was the guard on duty. Hence, in our considered view, the appellant is entitled to the benefit of Exception 1 of Section 300. But since the injury caused to D-2 was such which the offender knew that it is likely to cause death, the appellant is liable to be convicted under Section 304-Part-1 IPC though not under Section 302 IPC.

30. On the question of sentence, though the maximum sentence prescribed for an offence punishable under Section 304 Part 1 is imprisonment for life but there are mitigating factors here. Firstly, the appellant was a guard on duty and, secondly, he did not act cruelly by repeating the shots or by assaulting the two deceased once they had fallen. It may also be noticed that no sooner the surge of emotions died down, the appellant neither tried to escape nor tried to reload his gun to fire another shot. All this suggests that his act was on account of sudden surge of emotions which deprived him of his power of self control and no sooner the emotions subsided he became calm, perhaps repentant of what he had done, and, therefore, could be arrested with his gun and eight live cartridges. It be noted that it is not the prosecution case that to overpower the accused-appellant any serious force had to be used. Under the circumstances, in our considered view, the ends of justice would be served if the sentence is reduced from life to 10 years of rigorous imprisonment along with fine as awarded by the court below.

31. Accordingly, the appeal is **partly allowed**. The conviction of the appellant under Section 302 IPC is converted to that under Section 304-Part-1 IPC. The sentence of the appellant is reduced from imprisonment for life to 10 years rigorous imprisonment. The fine of Rs.50,000/- and the default sentence of one year simple imprisonment awarded by the trial court is maintained. The appellant is in jail, he shall serve out the sentence awarded above.

32. Let a copy of this order be sent to the trial court concerned for compliance.

(2021)07ILR A207
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.07.2021

BEFORE

THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Revision No. 3 of 2018

Takla @ Dharmeshwar (Minor)
...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Amrendra Singh, Armendra Pratap Singh

Counsel for the Opposite Parties:
Govt. Advocate

Revisionist declared juvenile-thereafter moved Bail Application-rejected-Appeal rejected-victim stated that revisionist did not commit report on her.

Bail granted. (E-7)

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This criminal revision has been preferred by the revisionist/juvenile Takla @ Dharmeshwar through his mother Smt. Sushila Devi, under Section 102 of The Juvenile Justice (Care and Protection of Children) Act, 2015 (in short the "Act of 2015") against the judgement dated 28.11.2017 passed by learned Sessions Judge, Sitapur in Criminal Appeal No. 80 of 2017 as well as order dated 10.10.2017 passed by Principal Magistrate, Juvenile Justice Board, Sitapur in Case No. 60/2017 arising out of Crime No. 100/2017, under Section 376B Indian Penal Code (in short "I.P.C.") and Section 3/4 of The Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act"), Police Station Manpur, District Sitapur.

2. Brief facts necessary for disposal of this Criminal Revision are as follows:-

An F.I.R. bearing Case Crime No.100 of 2017 was registered against unknown persons on the basis of written complaint moved by the complainant Smt. Phoolmati narrating the facts that on 06.05.2017 at about 1 AM in the night, some dance function was going on in the marriage procession in front of house of the complainant. The grand-daughter of the complainant aged about 5 years went to watch the same. One unknown person came there and took her away near the pond situated in the village and committed rape on her. The investigation was made and during the course of investigation, the name of the revisionist and one other accused came into light. Subsequently, charge sheet was submitted in the Court. The Court concerned took cognizance of the matter. The revisionist claimed juvenility and he was declared juvenile by the Juvenile Justice Board, Sitapur vide order dated 21.09.2017. Thereafter, the revisionist/juvenile moved bail application before the Juvenile Justice Board, Sitapur. That was rejected vide order dated 10.10.2017. Against that order an appeal was preferred under Section 101 of the Act of 2015 and appeal too was dismissed by the Appellate Court vide judgment and order dated 28.11.2017. Being aggrieved with the said order/judgment, the revisionist/juvenile preferred the present revision.

3. Heard Sri Shivendra Singh Rathore, learned counsel for the revisionist and Sri Dhananjay Kumar, learned A.G.A. appearing on behalf of the State respondent. None turned up on behalf of the opposite party no. 2 despite of service of notice.

4. Learned counsel for the revisionist/juvenile submitted that revisionist is in jail since last four years. He was declared juvenile by the Juvenile Justice Board, Sitapur vide order dated 21.09.2017. He was not named in the first information report. During the course of investigation, police implicated him on the basis of the statement made by the complainant, wherein she stated before the Investigating Officer that one Lallu Ram

and Ram Nath told her that they both saw that Daroga @ Surjeet took the victim away forcibly and Takla @ Dharmeshwar was also there. They both committed rape on the victim. He also submitted that the victim in her statement recorded under Section 164 Cr.P.C. has mentioned that she was picked up by Surjeet and Takla and Surjeet committed rape on her but she said nothing about the commission of rape by revisionist/juvenile-Takla. He further submitted that according to provisions of Section 18(1)(g) of the Act of 2015, the juvenile in conflict with law can be sent to special home for such a period not exceeding three years. In the present matter, even if it is presumed that juvenile has committed a crime, he cannot be kept in protection home for more than three years. The revisionist/juvenile already has spent about four years in judicial custody. He further submitted that the case of revisionist/juvenile does not fall under any of the exceptions provided under Section 12(1) of the Act of 2015. Learned Principal Magistrate, Juvenile Justice Board and the Appellate Court both have wrongly concluded that the release of the juvenile will bring the juvenile into the contact of the unknown criminals and that will expose the juvenile to moral, physical and psychological danger and will defeat the ends of justice.

5. Learned A.G.A. countered the submissions made by the learned counsel for the revisionist and submitted that revisionist/juvenile committed rape on an innocent child aged about five years. Medical report of the victim shows brutality in committing the crime. Doctor has noted that " There are signs suggestive of recent use of force/forceful penetration of vagina/anus" so the revision of the juvenile should be dismissed.

6. Considered the rival submissions and perused the record.

7. It is undisputed that revisionist/juvenile is in judicial custody for a period of about four years. There is a report of Principal Magistrate, Juvenile Justice Board, Sitapur dated 15.07.2019 disclosing that the case of the juvenile has been transferred under Section 18(3) of the Act of 2015 to POCSO Court/Additional Sessions Judge, Court No. 8, Sitapur for trial. It means that the trial of the revisionist is being conducted as an adult. In such situation, the revisionist is not entitled for the benefit of provisions under Section 18(g) of the Act of 2015.

8. As per the report of District Probation Officer, Sitapur, the age of revisionist/ juvenile was found 17 years and 9 months. About four years have passed, since then, so the revisionist/juvenile now has turned major aged about 21 years and some months.

9. Considering the above facts and circumstances and the settled position of law as well as the statement made by the victim wherein she has stated that this revisionist/juvenile did not commit rape on her, the order of Juvenile Justice Board and the judgment of the appellate court are not sustainable. Therefore, it appears just to set aside the order passed by the Juvenile Justice Board and the judgement passed by the Appellate Court.

10. The revision is allowed. Impugned order dated 28.11.2017 passed

by the Sessions Judge, Sitapur in Criminal Appeal No.80 of 2017 and order dated 10.10.2017 passed by Principal Magistrate, Juvenile Justice Board, Sitapur in Case No.60/2017 arising out of Crime No.100/2017, under Section 376-D I.P.C. and Section 3/4 of POCSO Act, Police Station Manpur, District Sitapur, are hereby set aside.

11. The **juvenile (Takla @ Dharmeshwar)** shall be released on bail in Case Crime No.100/2017 (supra). It is pertinent to mention here, since the revisionist has turned an adult and of age more than 21 years, he shall be released upon furnishing a personal bond himself and two sureties each of the like amount to the satisfaction of the trial Court concerned. Out of two sureties, one shall be mother/father or close relative of the revisionist, subject to following conditions :-

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

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

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

(iv) The revisionist shall remain present in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

(v)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

(vi) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vii) 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)07ILR A210
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.07.2021

BEFORE

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

Criminal Revision No. 113 of 2021

Khushi (Minor) ...Revisionist (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Prabha Shanker Mishra

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

Revisionist declared juvenile-Bail rejected-Appeal rejected-short lived association of Revisionist with Amar Dubey a close associate of Vikas Dubey-her participation in gruesome crime-subsequent conduct in observation home-firmly placed her case in category where if released on bail-would come into association with known criminals-causing moral, physical and psychological danger to her.

Held, Not only the spontaneous elimination of eight policemen in action and six others left injured, is a horrendous crime that shocks the conscience of the society, but also an act that strikes at the roots of the State's authority in its territory. It speaks about the unfathomable extent of the lack of fear of the State in the minds of those who conceived and executed the dastardly act. Prima facie, if not at the center stage of this diabolical act, certainly as an important player, the revisionist seems to have actively participated. In the circumstances, permitting the revisionist to walk out free on bail would shake the law abiding citizens' faith in the rule of law and the State's authority. If that were to be done, it would certainly defeat the ends of justice. (para 15)

Criminal Revision dismissed. (E-7)

List of Cases cited:

1.Raju @ Ashish Vs State of U.P. & anr. 2018 SCC OnLine All 3100

2.Raju (Minor) Vs St.of U.P. & anr., 2020 (6) All. LJ 451

3. Mangesh Rajbhar Vs St. of U.P, (2018) 6 ADJ 60

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

This Criminal Revision is directed against a judgment and order of Mr. Ranjeet Kumar, the Additional District and Sessions Judge, Court No. 13/Special Judge (POCSO Act), Kanpur Dehat dated 24.11.2020, dismissing Criminal Appeal No. 40 of 2020 and affirming orders dated 15.09.2020 and 13.10.2020 passed by the Juvenile Justice Board, Kanpur Dehat refusing bail to the revisionist pending trial, in the case arising out of Case Crime No. 192 of 2020, under Sections 147, 148, 149, 302, 307, 396, 332, 333, 412, 353, 504, 506, 34, 120B of the Indian Penal Code, 18601 and Section 7 of The Criminal Law (Amendment) Act, 1961 and Section 3/4 of The Explosive Substances Act, 1908, Police Station - Chaubeypur, District - Kanpur Nagar.

2. It appears that the nuptials were hardly over for the revisionist, Khushi and her husband Amar Dubey, on July the 3rd, 2020, when the infamous incident at Village Bikru, Kanpur Nagar took place. It all happened at the house of one Vikas Dubey, whom the Police, in strong numbers, had gone to arrest. It is the prosecution case that Vikas Dubey, who was a dreaded gangster, somehow, laid in wait, along with his henchmen, for the Police to arrive. Vikas's associates, that included his relatives, had positioned themselves at strategic points, atop the roof of his house and those abutting it. They opened indiscriminate fire on the incoming police force, which led to eight police personnel being shot dead and another six sustaining grievous gunshot injuries. A private driver of the then Station House Officer of the local police station also sustained injuries. It is the prosecution case, much of which figures in the eye-witness account of the surviving police personnel, recorded in their statements under Section 161 of the Code of Criminal Procedure, 19732 that while the menfolk

pumped bullets into the police personnel, the wives of all the accused were aiding and instigating their husbands. The revisionist is also credited with the role of instigating the menfolk to do the policemen to death. She is stated to have been atop a house adjoining Vikas Dubey's, during entire course of the brutal assault.

3. The revisionist applied to be declared a juvenile to the Juvenile Justice Board, Kanpur Dehat3. She was found to be 16 years, 10 months and 12 days old on the date of occurrence. She was, thus, well below 18 years of age. She was declared a juvenile by the Board, *vide* order dated 01.09.2020. The revisionist then made an application for bail to the Board, which came up for determination on 15.09.2020. It was rejected by the Board. She then preferred a second application for bail to the Board, that came to be rejected again by an order dated 13.10.2020.

4. Aggrieved by the orders dated 15.09.2020 and 13.10.2020, declining bail, the revisionist carried an appeal to the learned Sessions Judge, Kanpur Dehat, under Section 101 of the Juvenile Justice (Care and Protection of Children) Act, 20154. The appeal came up for determination before the learned Additional District and Sessions Judge, Court No. 13/ Special Judge (POCSO Act) Kanpur Dehat, on 24.11.2020. The learned Judge dismissed the appeal and affirmed the Board.

5. Disillusioned by concurrent refusal of bail pending trial by the two courts below, this revision has been instituted.

6. Heard Mr. Prabha Shanker Mishra, learned Counsel for the revisionist in support of this revision and Mr. Manish Goyal, the learned Additional Advocate General assisted by Mr. Rajesh Mishra, learned Additional Government Advocate on behalf of the State.

7. The submission of Mr. Prabha Shanker Mishra, learned Counsel for the revisionist, made very persuasively, is that the revisionist has been implicated in this crime, because she had the misfortune of marrying Amar Dubey, a few days before the occurrence. It is urged by Mr. Mishra that the revisionist is a minor and a young girl, a month and some days shy of 17 years. She or her family, that is to say, her parents and siblings, have no criminal antecedents. In her own right, she was neither an associate of the principal accused, Vikas Dubey, or a member of his gang. She was no more than an innocent person in the wrong place, at the wrong time. Mr. Mishra says that she had reasons perfectly compatible with her innocence, to be at or about Vikas Dubey's house, as her husband, Amar Dubey, was a relative of Vikas's. It was that, that she was there with her husband when this skirmish took place. She had not the slightest role in the entire episode. All that has been said about her is utter concoction by the Police, who have gone after every family member, relative and associate of Vikas Dubey, after the occurrence, with a vindictiveness that does not behove a state law enforcement agency. Quite apart, it is argued by Mr. Mishra that Khushi, being a child in conflict with law, is entitled to bail by dint of Section 12(1) of the Act of 2015 and placed in the care of her father, who has applied for bail on her behalf. He says that Khushi's father is a respectable man and can keep her insulated from all kind of moral, physical and psychological danger. Her father can well ensure that she does not come into association with any known criminal, while

on the liberty of bail. He submits that Khushi being not at all *particeps criminis*, it is not a case where extending her the liberty of bail would lead to ends of justice being defeated.

8. Mr. Manish Goyal, the learned Additional Advocate General, on the other hand, submits that Khushi was no silent spectator to the gruesome crime committed by Vikas Dubey and his gang, that included her deceased husband Amar Dubey. He has drawn the Court's attention to the statements of more than one policemen, who were part of the beleaguered police party, eight of whose members fell in action, and six others sustained grievous gunshot injuries. He emphasized with reference to the statements of the survivors of that ghastly episode, that Khushi was an active participant throughout the assault. She was aiding and instigating the men not to spare any policeman. Mr. Goyal then submits that Khushi, though a child in conflict with law and adjudged to be so by the Board, is nevertheless above the age of 16 years, though less than 18. She has been subjected by the Board to an inquiry under Section 15 of the Act of 2015. Considering that she is above 16 years of age, and the offence involved is heinous in nature, it is pointed out that the Board have opined, on a preliminary assessment, that the revisionist has the requisite mental and physical capacity to commit the offence, as also the ability to understand the consequences. The Board have also considered the circumstances in which she committed the dereliction and doing all this, opined, in exercise of powers under Section 18(3) of the Act of 2015, that it is fit case where the revisionist deserves to be tried as an adult. In consequence, by the order dated 17.12.2020, the Board have transferred the revisionist's case for trial to the Children's Court of competent jurisdiction. Mr. Goyal has drawn the Court's attention to the last mentioned order, annexed as Annexure SCA-1 to the supplementary counter affidavit dated 24.06.2021.

9. Mr. Goyal has further drawn the Court's attention to the conduct of the revisionist, while interned in the Government Observation Center (Girls) at Barabanki. In this connection, he has placed before this Court a copy of the memo dated 23.10.2020 addressed by the Assistant Superintendent of the Observation Home at Barabanki to the Board. The Assistant Superintendent has drawn the Board's attention to the fact that the Center have two rooms at their disposal, where 48 girls are interned. The revisionist has been reported to be wayward. It is said that she tells the other inmates that she has contacts with persons of great influence. She also repeatedly threatens other inmates that she can get anyone abducted from the Center any time, and that no one in the Observation Center can hold her to account. A copy of the said letter has been annexed as Annexure SCA-2 to the supplementary counter affidavit dated 24.06.2021 filed on behalf of the State. In the circumstances in which the gruesome crime has been committed and the apparent participation of the revisionist there, Mr. Goyal submits that it is a case where enlarging the revisionist on bail pending trial would defeat the ends of justice. In support of his contention, Mr. Goyal has placed reliance on a decision of this Court in **Raju *alias* Ashish v. State of U.P. & Another**5 and counted on another decision of this Court in **Raju (Minor) v. State of U.P. and Another**6.

10. This Court has given a thoughtful consideration to the submissions made on both sides and perused the record. It is true that bail to a child in conflict with law has to be granted as a matter of right dehors the merits of the case against him/her. The aforesaid rule of universal bail is subject only to the three disentitling grounds, envisaged under the proviso to Section 12(1) of the Act of 2015. Section 12(1) reads :

12. Bail of juvenile.--

(1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety 1[or placed under the supervision of a Probation Officer or under the care of any fit institution of fit person] but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

11. The case here is one where the association between the revisionist and her deceased husband might have been short; it was not sweet. This Court has carefully looked into the submissions of Sub-Inspector Vishwanath Mishra, Constable Rajiv Kumar, Sub-Inspector Azhar Ishrat, Sub-Inspector Kunwar Pal Singh and Constable Sudhakar Pandey, besides Constable Nem Singh. These statements are recorded in C.D. No. 1 dated 03.07.2020, C.D. No. 4 dated 06.07.2020, C.D. No. 72 dated 10.09.2020, C.D. No. 74 dated 12.09.2020 and C.D. No. 86 dated 25.09.2020. Sub-Inspector Vishwanath Mishra, in his statement under Section 161 of the Code, has stated that there were women atop the house, who were exhorting that no police personnel should go back alive, and were instigating the men to do so. The Sub-Inspector has stated that he inquired about the identity of the women and came to know that they were - Smt. Bhavna, wife of Samir Dubey *alias* Sanju, Smt. Khushi, wife of Amar Dubey (the revisionist), Smt. Rekha Agnihotri, wife of Daya Shanker *alias* Kallu. All the officers and men, whose statements have been recorded, have credited the revisionist with the role of instigating and exhorting the men to do every man in the police party to death. Constable Rajiv Kumar, who was in the thick of action, has stated that Vikas Dubey and his men looked around the entire place, searching out police officers and men to shoot them. He has said that he saw Smt. Rekha Agnihotri, wife of Daya Shankar standing atop the rooftop of Vikas Dubey's house, exhorting men to shoot down the police personnel, and his companions present on the spot told him that Khushi, along with Bhavna Dubey and Shanti Devi were giving out locations of the policemen, who had concealed themselves to save their lives and exhorting Vikas Dubey's men to do the policemen to death. Likewise, in the statement of Sub-Inspector Azhar Ishrat recorded under Section 161 of the Code, it is said that there were a few women atop the other houses located around Vikas Dubey's house, who were exhorting Dubey's associates to eliminate all policemen. He has further stated that he inquired about the identity of those women, and came to know that they were Smt. Bhavna, wife of Samir Dubey *alias* Sanju, Smt. Khushi, wife of Amar

Dubey (the revisionist), Smt. Rekha Agnihotri, wife of Daya Shanker *alias* Kallu. There are, thus, accounts of various policemen about the very overt participation of the revisionist in the gruesome murder of as many as eight policemen in uniform, who were about their duty. She is credited with the role of exhorting men in Vikas Dubey's gang to eliminate every one of the policemen. The officers and men, whose statements have been recorded under Section 161, were all part of the police party that was in the thick of action, when they came under heavy fire from Vikas Dubey and his men, on the fateful night. Their statements on account of the occurrence at this stage, therefore, cannot be ignored.

12. It may be true, as already said, that the revisionist was married to Amar Dubey a few days before the occurrence, but from the account of all the eye-witnesses, she was certainly not one who was an idle spectator. She played a decisive role *prima facie* in the gruesome crime. The question now is that the revisionist, being a child in conflict with law, does her case fall into any of the exceptions to the universal rule of bail, postulated under the proviso to Section 12(1) of the Act of 2015? This Court does not know under what circumstances and by what origins of association she was married to Amar Dubey, who was, apparently, a faithful associate of Vikas Dubey. It is quite possible that the marriage was short-lived, but the association was long, on account of which, a newly-wed bride was seen moving around with men wielding guns, directing their fire to hidden policemen, and exhorting them to shoot each policemen to death. If the witnesses, who were all policemen and members of the party, many of whom fell in action, are to be believed, the revisionist's act in standing atop the roof of a house close to Vikas Dubey's, in the thick of gunfire and exhorting Dubey's men to eliminate all members of the police party, is conduct not even remotely compatible with the picture of a newly-wed bride, who was caught unawares, that Mr. Mishra wants this Court to believe.

13. This Court also cannot ignore the conduct of the revisionist reported by the Assistant Superintendent of the Observation Home, where she is interned. There is no reason why the Assistant Superintendent would come forward with complaints of that kind against an inmate, contents whereof we have noticed above. Whatever has been reported by the Assistant Superintendent, shows the revisionist's continuing close association with hardened criminals, inasmuch as she has threatened other inmates of her resources to get anyone abducted from the Observation Home. This Court is of considered opinion that the short-lived association of the revisionist's with Amar Dubey, a close associate of Vikas Dubey's, followed by her participation in the gruesome crime, and her subsequent conduct in the observation home, firmly place her case in the category where, if released on bail, she would come into association with known criminals. That, in turn, would cause moral, physical and psychological danger to her. Quite apart, the submission advanced by Mr. Mishra, that the merits of the charge is irrelevant to the bail plea of a juvenile, in view of the provision under Section 12(1) of the Act of 2015, is not well founded. The merits of the prosecution case *ipso facto* may not be relevant to judge a juvenile's bail plea, but

is certainly one of the factors to be taken into account while assessing whether grant of bail to the juvenile would lead to ends of justice being defeated. I have extensively dealt with this issue in **Mangesh Rajbhar v. State of U.P.**7 where I have held :

24. This court from what appears on a furter (sic further) reading of the judgment in Raja (minor) (supra) did not construe the last of the three grounds for the refusal of bail to a juvenile in the proviso to Section 12(1) of the Act ejusdem generis; rather, this court in that case referred to the merits of the case and related the ground for denying bail to the juvenile being released on bail "would defeat the ends of justice" with the merits of the prosecution case. In other words, this Court found in the expression "defeat the ends of justice" a repose for the society to defend itself from the onslaught of a minor in conflict with law by certainly making relevant though not decisive, the inherent character of the offence committed by the minor. In this connection paragraph nos. 11, 12 and 13 of the judgment in Raja (minor) (supra) may be gainfully quoted.

"11. The report of the medical examination of the victim clearly shows that the revisionist had forced himself upon the victim, who was seven years old child and in the statements under sections 161 Cr.P.C. and 164 Cr.P.C., the child had clearly deposed about how she was taken away by the revisionist and later on caught on the spot by the public and he pretended to be taking a bath. In the orders impugned, there is specific mention about the fact that the revisionist was accused by name by the victim, who was studying in class II and the release on bail of the revisionist would defeat the ends of justice.

12. Having gone through the record of the case including statement under section 161 Cr.P.C. and the statement under section 164 Cr.P.C. given by the victim and also the report of the medical examination of the victim, which shows penetration by force and resultant injury, I am of the opinion that there is no legal infirmity in the orders impugned as the release on bail of the revisionist would indeed defeat the ends of justice.

13. No doubt, the Juvenile Justice Act is a beneficial legislation intended for reform of the juvenile/child in conflict with the law, but the law also demands that justice should be done not only to the accused, but also to the accuser."

25. It is not that this aspect of the gravity of the offence has been considered irrelevant to the issue of grant or refusal of bail to a minor in the past and before the present Act of 2015 came into force. In a decision of this Court under the Juvenile Justice Act, 2000 where the interest of the society were placed seemingly not on a level of playing field with the juvenile, this Court in construing the provisions of Section 12 in that Act that were pari materia to Section 12 of the Act in the matter of grant of bail to a minor held in the case of Monu @ Moni @ Rahul @ Rohit v. State of U.P., 2011 (74) ACC 353 in paragraph Nos. 14 and 15 of the report as under:

"14. Aforesaid section no where ordains that bail to a juvenile is a must in all cases as it can be denied for the reasons".....if there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice."

15. In the light of above statutory provision bail prayer of the juvenile revisionist has to be considered on the

surrounding facts and circumstances. Merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right. The Act has a solemn purpose to achieve betterment of juvenile offenders but it is not a shelter home for those juvenile offenders who have got criminal proclivities and a criminal psychology. It has a reformative approach but does not completely shun retributive theory. Legislature has preserved larger interest of society even in cases of bail to a juvenile. The Act seeks to achieve moral physical and psychological betterment of juvenile offender and therefore if, it is found that the ends of justice will be defeated or that goal desired by the legislature can be achieved by detaining a juvenile offender in a juvenile home, bail can be denied to him. This is perceptible from phraseology of section 12 itself. Legislature in its wisdom has therefore carved out exceptions to the rule of bail to a juvenile."

26. The Hon'ble Supreme Court in the case of Om Prakash vs. State of Rajasthan and another, (2012) 5 SCC 201: 2012 (2) ACR 1825 (SC) has brought in due concern in matters relating to juveniles where the offences are heinous like rape, murder, gang-rape and the like etc., and, has indicated that in such matters, the nature and gravity of the offence would be relevant; the minor cannot get away by shielding himself behind veil of minority. It has been held in Om Prakash (supra) by their Lordships thus:

"3. Juvenile Justice Act was enacted with a laudable object of providing a separate forum or a special court for holding trial of children/juvenile by the juvenile court as it was felt that children become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. But when an accused is alleged to have committed a heinous offence like rape and murder or any other grave offence when he ceased to be a child on attaining the age of 18 years, but seeks protection of the Juvenile Justice Act under the ostensible plea of being a minor, should such an accused be allowed to be tried by a juvenile court or should he be referred to a competent court of criminal jurisdiction where the trial of other adult persons are held.

23. ..... Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him."

27. It seems thus that the suggestion of the learned counsel for the revisionist that bail to a juvenile or more properly called a child in conflict with law can be denied under the last ground of the proviso to Section 12 ejusdem generis with the first two and not with reference to the gravity of the offence, does not appear to be tenable. The gravity of the offence is

certainly relevant though not decisive. It is this relevance amongst other factors where gravity of the offence committed works and serves as a guide to grant or refuse bail in conjunction with other relevant factors to refuse bail on the last ground mentioned in the proviso to Section 12 (1) of the Act, that is to say, on ground that release would "defeat the ends of justice".

28. Under the Act, as it now stands there is further guidance much more than what was available under the Act, 2000 carried in the provisions of Section 15 and 18 above extracted and the definition of certain terms used in those sections. A reading of Section 18 of the Act shows that the case of a child below the age of 16 years, who has committed a heinous crime as defined in the Act is made a class apart from cases of petty offence or the serious offence committed by a child in conflict with the law/juvenile of any age, and, it is further provided that various orders that may be made by the Board as spelt out under clause (g) of Section 15 depending on nature of the offences, specifically the need for supervision or intervention based on circumstances as brought out in the social investigation report and past conduct of the child. Though orders under Section 18 are concerned with final orders to be made while dealing with the case of a juvenile, the same certainly can serve as a guide to the exercise of power to grant bail to a juvenile under Section 12(1) of the Act which is to be exercised by the Board in the first instance.

29. Read in the context of the fine classification of juveniles based on age vis-a-vis the nature of the offence committed by them and reference to a specifically needed supervision or intervention, the circumstances brought out in the social investigation report and past conduct of the child which the Board may take into consideration, while passing final orders under Section 18 of the Act it is, in the opinion of this court, a good guide for the Board while exercising powers to grant bail to go by the same principles though embodied in Section 18 of the Act, when dealing with a case under the last part of the proviso to Section 12 (1) that authorizes the Board to deny bail on ground that release of the juvenile would "defeat the ends of justice."

30. Thus, it is no ultimate rule that a juvenile below the age of 16 years has to be granted bail and can be denied the privilege only on the first two of the grounds mentioned in the proviso, that is to say, likelihood of the juvenile on release being likely to be brought in association with any known criminal or in consequence of being released exposure of the juvenile to moral, physical or psychological danger. It can be equally refused on the ground that releasing a juvenile, that includes a juvenile below 16 years would "defeat the ends of justice." In the opinion of this Court the words "defeat the ends of justice" employed in the proviso to Section 12 of the Act postulate as one of the relevant consideration, the nature and gravity of the offence though not the only consideration in applying the aforesaid part of the disentitling legislative edict. Other factors such as the specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child would also be relevant that are spoken of under Section 18 of the Act.

31. In this context Section 12 and 18 and also Section15 (Section 15 not relevant in the case of a child below 16 years) and other relevant provisions all of which find place in Chapter IV of the Act are part of an integrated scheme. The power to grant bail to a juvenile under

Section 12(1) cannot be exercised divorced from the other provisions or as the learned counsel for the revisionist argues on the other specific disentitling provisions in the grounds mentioned in the proviso to Section 12(1) of the Act. The submission made based on the rule of ejusdem generis urged by the learned counsel for the revisionist is misplaced, in the opinion of this Court."

14. In the context of the aforesaid decision in **Mangesh Rajbhar** *(supra)* I have held in **Raju *alias* Ashish** *(supra)* :

11. Going by the aforesaid principle it cannot be said that bail to a juvenile can be denied on the first two grounds mentioned in the proviso alone or that the 3rdground that speaks about the result of release being to defeat the ends of justice would have no reference to the nature and gravity of the offence. Its impact on the society certainly deserves some consideration of the prosecution case prima facie. Of course, other facts such as specific need for supervision or intervention or circumstances brought out in the social investigation report and past conduct of the child would also be relevant that find mention in Section 18 of the Act.

12. The facts of the case in hand show that it is a case where the revisionist along with co-accused to begin with indulged in an act of eve teasing followed by molestation of one of the victims who was a minor girl, and, when her brother came to her rescue they engaged in an altercation with him, and then, pushed both the brother and the sister into a well. The entire act in itself about which there is prima facie good evidence and a deeper finding not warranted, is an act that shakes the conscience of the society. The offence is heinous. It is a double murder preceded by molestation of a young girl. It precisely falls, in the opinion of the court, into that category of cases where if, release on bail were to be ordered, it would defeat the ends of justice.

15. An overall look on the circumstances of the case brings to mind the fact that the occurrence, in which the revisionist was involved, was not of an ordinary kind. Not only the spontaneous elimination of eight policemen in action and six others left injured, is a horrendous crime that shocks the conscience of the society, but also an act that strikes at the roots of the State's authority in its territory. It speaks about the unfathomable extent of the lack of fear of the State in the minds of those who conceived and executed the dastardly act. *Prima facie*, if not at the center stage of this diabolical act, certainly as an important player, the revisionist seems to have actively participated. In the circumstances, permitting the revisionist to walk out free on bail would shake the law abiding citizens' faith in the rule of law and the State's authority. If that were to be done, it would certainly defeat the ends of justice.

16. This Court, therefore, finds the revisionist disentitled to bail under all the three exceptions to the rule, envisaged under the proviso to Section 12(1) of the Act of 2015.

17. It is, however, clarified that the remarks here are confined to judging the revisionist's bail plea and should, in no

way, be understood or construed as comments on the merits of the case, that is to be judged at the trial.

18. In the result, this criminal revisions **fails** and stands ***dismissed***.

19. Let this order be communicated to the Children's Court, Kanpur Dehat concerned as well as the Juvenile Justice Board, Kanpur Dehat, through the learned Sessions Judge, Kanpur Dehat, by the Registrar (Compliance).

(2021)07ILR A220
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.07.2021

BEFORE

THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Revision No. 169 of 2020

Ram Kishan Yadav (Minor) ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sukh Deo Singh, Ashutosh Mishra, Paritosh Shukla, Shailendra Kumar Singh

Counsel for the Opposite Parties:
Govt. Advocate

Revisionist declared juvenile- 15 years 7 months and 5 days-bail rejected-Appeal rejected-Report of District Probation Officer states no previous criminal antecedents-co-accused granted bail-case not under three exception u/s 12 (1) of Act,2015.

Bail granted. (E-7)

List of Cases cited:

1.Dharmendra (Juvenile) Vs State of U.P. & ors. in Criminal Revision No. 141 of 2017

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This Criminal Revision has been preferred by the juvenile Ram Kishan Yadav through his father Rajendra Prasad Yadav, under Section 102 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (in short Act of 2015) against the order dated 18.12.2019 passed by learned Additional Sessions Judge/Special Judge POCSO Act, Sultanpur, in Criminal Appeal No.128 of 2019 Ram Kishan Yadav Vs. State of U.P. and also against order dated 21.11.2019 passed by the Principal Magistrate, Juvenile Justice Board Sultanpur, in Case Crime No. 208 of 2019, under Sections 302, 201 of Indian Penal Code (in short I.P.C.) and Section 3(2)(V) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short SC/ST Act), Police Station Kudwar, District Sultanpur.

2. Brief facts necessary for disposal of this Criminal Revision are as under:-

3. A First Information Report bearing Case Crime No. 208 of 2019 was presented by complainant Sher Bahadur alleging that his brother Sunny Gautam went out from the home on 05.05.2019 at about 11:00 am. When he did not come back the family members became worried. On 06.05.2019 in the evening at about 7:00 pm the brother-in-law of the complainant inquired on telephone about the whereabouts of Sunny Gautam. The complainant told him that he had gone out, on this point his brother-in-law informed him that some unknown persons have killed Sunny and threw the dead body in the forest of Purwa Majre Sohgauli, Sultanpur. On this

information the complainant reached on the spot and recognized the dead body as of his brother Sunny Gautam. After cremation on 07.05.2019 he went to lodge the First Information Report.

4. Investigation was made. During the investigation the name of this revisionist came into light on the basis of confessional statement of co-accused Anil Kumar Yadav whose name was disclosed by the witnesses with whom the deceased was last seen.

5. The revisionist claimed the juvenility and was declared juvenile by the Juvenile Justice Board vide order dated 22.10.2019. His age was found 15 years 7 months and 5 days on the date of incident. The revisionist/juvenile moved his bail application before Juvenile Justice Board, which was rejected by the Principal Magistrate of the Board on 21.11.2019. Against that order an appeal was preferred by the juvenile under Section 101 of the Act of 2015, that too was dismissed by Additional Sessions Judge/ Special Judge, POCSO (The Protection of Children from Sexual Offences), Act Sultanpur per order dated 18.12.2019. Being aggrieved of the above order and judgment the juvenile preferred this revision.

6. Heard Mr. Ashutosh Mishra, learned counsel for the applicant and Mr. Ashwani Kumar, learned Additional Government Advocate for the State. None turned up on behalf of opposite party No.2, despite of sufficient service of notice.

7. Learned counsel for the juvenile/revisionist submitted that the impugned judgment of the appellate court and order of the Juvenile Board have been passed in transgression of the settled law relating to Juveniles. The bail for juvenile can be denied only in three conditions mentioned in the provisio to Section 12(1) of the Act, of 2015, not otherwise. Juvenile was not named in the F.I.R., his name came into light on the basis of confessional statement made by co-accused who was named by the witnesses in their statements. Another co-accused Rahul Yadav, who was an adult whose name also came into light on the basis of the confessional statement made by the same co-accused Anil Kumar Yadav was granted bail by the co-ordinate Bench of this Court in Criminal Appeal No. 1692 of 2019.

8. Learned counsel further submitted that there is no material on record to bring the case of the juvenile/revisionist under the exceptions given in Section 12 of the Act of 2015, hence the judgment and order passed by both the courts below deserve to be set-aside, as they are against the law.

9. Learned A.G.A. on the other hand opposed the contentions of the counsel for the revisionist and submitted that the revisionist/juvenile alongwith other co-accused persons murdered the brother of the complainant and threw the dead body in the forest to destroy the evidence. Hence this revision should be dismissed. However the learned A.G.A. did not dispute the parity with co-accused Rahul Yadav.

10. Considered the rival submissions and perused the record. Section 12 (1) of the Act of 2015, in this regard lays down as under:-

"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, 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."

11. Thus it is law that a bail application of a juvenile can be rejected only :-

(i) If there appears reasonable ground for believing that the release is likely to bring the juvenile into association with any known criminal; or,

(ii) expose the juvenile to moral, physical or psychological danger; or,

(iii) release of the juvenile would defeat the ends of justice.

12. In the present matter the Principal Magistrate of Juvenile Justice Board, came to the conclusion that if the juvenile /applicant was released on bail then it would cause moral, physical and psychological danger to him, and ends of justice stand defeated.

13. Legal position is that, for a juvenile in conflict with law bail is the Rule. The bail application of a juvenile can be rejected exceptionally.

14. The Appellate Court while confirming the order of the Principal Magistrate, Juvenile Justice Board concluded that the matter of the applicant/juvenile falls within the exceptions given in the proviso to Section 12(1). If he is released on bail, then he will come in association with "unknown" criminals which will cause moral, physical and psychological danger to the juvenile. He also concluded that release will defeat the ends of justice and dismissed the appeal of the juvenile.

15. In the report of District Probation Officer available on record as Annexure No.9 no previous criminal antecedents of juvenile have been mentioned. The family status is average. It has been mentioned that step brother of the applicant Anil Yadav and one another Rahul were also accused in crime and they both are detained in District Jail of Sultanpur. The possibility of committing the crime again by the juvenile cannot be ruled out. There is need of better guardianship for the moral upliftment of the juvenile. No bad habit of the juvenile has been mentioned in the report. Further as pointed out by the revisionist counsel that an adult co-accused Rahul Yadav whose case stands on similar footing as his name also came into light on the basis of confessional statement made by co-accused Anil Kumar Yadav has been admitted to bail by the co-ordinate Bench of this Court vide order dated 05.11.2019 in Criminal Appeal No. 1692 of 2019.

16. The fact that apart from juvenility the case of this revisionist stands on similar footing as that of co-accused Rahul Yadav, has not been disputed by the learned Additional Government Advocate. If an adult offender having similar role is enlarged on bail, then certainly juvenile in

conflict with law on the same charge and evidence would also be entitled to bail.

17. In **Dharmendra (Juvenile) Vs. State of U.P. and others in Criminal Revision No. 141 of 2017** the co-ordinate Bench of Allahabad High Court has observed as under:-

"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws guaranteed under Article 14 of the Constitution.

11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories of denial contemplated by the proviso. It is not the rule about bail in Section 12 of the Act that in case a child in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls in one or the other exceptions, where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except the three categories contemplated by the proviso comes into play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso."

18. There is no dispute that revisionist has been declared juvenile. His age was found 15 years, 7 months and 5 days, on the date of incident. Co-accused Rahul Yadav (adult) whose case stands on similar footing has already been enlarged on bail by co-ordinate Bench (supra). If an adult offender is granted bail, whose case stands on similar footing as of juvenile, then the juvenile apart from special provisions for bail is also entitled for bail. Even in the report of District Probation Officer, there is no specific mention that if the juvenile released on bail, he will come into association of "known criminals". District Probation Officer has mentioned in the report that juvenile needs a better guardianship. The father of the juvenile through whom revision has been

preferred has written in his affidavit that the family members of the revisionist are educated, well settled and are living peaceful life together. After release of the revisionist, he shall be living in custody of his parents and will keep distance from any kind of moral activities /personalities.

19. In the light of above, discussion the case of the revisionist/juvenile does not fall in any of the three exceptions provided under the proviso to section 12(1) of the Act of 2015, so as to deprive the juvenile of the liberty of bail. Hence impugned order passed by Principal Magistrate Juvenile Justice Board dated 21.11.2019 as well as the judgment and order dated 18.12.2019 of the appellate court passed in appeal deserves to be set-aside.

20. Revision is **allowed**.

21. The order passed by Principal Magistrate, Juvenile Justice Board dated 21.11.2019 and judgment dated 18.12.2019 passed by Appellate Court are hereby set-aside.

22. Let the **revisionist/juvenile (Ram Kishan Yadav)** be released on bail in Case Crime No. 208 of 2019, under Sections 302, 201 of I.P.C. and Section 3(2)(V) of SC/ST Act, Police Station Kudwar, District Sultanpur and be given in custody of his father on his furnishing a personal bond and two solvent sureties each in the like amount to the satisfaction of the Principal Magistrate of Juvenile Justice Board, Sultanpur subject to following conditions :-

(i) That the father of the juvenile shall 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 be exposed to any moral, physical or psychological danger and he will ensure that the juvenile do not repeat the offence.

(ii) The father will further furnish an undertaking to the effect that he will encourage the juvenile to pursue his studies.

(iii) The revisionist Ram Kishan Yadav and his fatehr Rajendra Prasad Yadav will report to the District Probation Officer on the first Monday of every month with effect from the first Monday of the month next after release from custody, and if during any calendar month, the first Monday falls on a holiday then on the following working day.

(iv) 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, Sultanpur on such periodical basis as the Juvenile Justice Board determines.

(v) The party shall file a computer generated copy of such order downloaded from the official website of High Court Allahabad.

(vi) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vii) The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)07ILR A224
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.07.2021

BEFORE

THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Revision No. 474 of 2020

Aman Kashyap ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:

Vivek Pandey, Ashish Raman Mishra

Counsel for the Opposite Parties:
G.A.

Juvenile Justice Act, 2015 - Section 12 (1)-Revisionist declared juvenile-Bail rejected-Appeal rejected-Report of District probation officer-no criminal history-studying in class 11 at the time of incident-no possibility of association of the juvenile with known or unknown criminals-case donot falls under the exceptions of Section 12 (1) of the Act, 2015-Bail granted.

Revision allowed. (E-7)

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This criminal revision has been preferred by the juvenile Aman Kashyap through his mother, under Section 102 of The Juvenile Justice (Care and Protection of Children) Act, 2015 (in short '***Act of 2015***') against order dated 28.8.2020 passed by Additional District and Sessions Judge/Special Judge(POCSO Act), Gonda in Criminal Appeal No.21 of 2021 (Aman Kashyap Vs. State of U.P.) and order dated 2.7.2020 passed by Principal Magistrate, Juvenile Justice Board, Gonda in Case No.18/2020 (State of U.P. Vs. Aman Kashyap in Case Crime No.10/2020, under Sections 363, 366, 506, 376 (3) Indian Penal Code (in short '***I.P.C.***') and Section 3/4 of The Protection of Children from Sexual Offences Act, 2012 (in short '***POCSO Act***'), Police Station Kotwali Nagar, District Gonda.

2. Brief facts necessary for disposal of this criminal revision are as under :-

3. An F.I.R. bearing Case Crime No.10/2020 was registered against the revisionist at police Station Kotwali Nagar, District Gonda under Sections 363, 366, 506, 376 (3) I.P.C. and under Section 3/4 of POCSO Act.

In the F.I.R., allegations against the revisionist are that he enticed away the daughter of the complainant on 8.12.2019 at about 9.00 p.m. in the night. He left the victim back on 29.12.2019 and threatened to kill her if she tells anybody about the incident. In her statement recorded under Sections 161 and 164 Cr.P.C., the victim has stated that Aman (revisionist) took her away forcibly and committed rape upon her.

The revisionist was declared juvenile by the Juvenile Justice Board per order dated 8.6.2020. He moved application to release him on bail which was rejected by the Juvenile Justice Board per order dated 2.7.2020.

4. Being aggrieved by the order of the Juvenile Justice Board, the applicant preferred appeal under Section 101 of the Act of 2015 which was decided by the Additional District and Sessions Judge/Special Judge, POCSO Act, Gonda per order dated 28.8.2020 wherein appeal of the applicant juvenile was dismissed.

5. Being aggrieved by the order passed in appeal, this revision has been preferred.

6. The revisionist juvenile has assailed the impugned order mainly on the ground that the court below has overlooked the report of the District Probation Officer wherein nothing adverse has been noted against the revisionist. No reason has been assigned by the appellate court to arrive at the conclusion that if the applicant will be

released on bail, he would associate with criminals and that will cause moral, physical or psychological danger to the applicant/revisionist. There is also no reason to conclude that if the revisionist is released on bail, that will defeat the ends of justice.

7. It has also been stated that the bail application of the juvenile can be rejected only if there exists either of the conditions provided in the proviso to Section 12(1) of the Act of 2015. It has further been stated that the impugned orders passed by the appellate court as well as Juvenile Justice Board are without application of mind and illegal.

8. Notice was served upon respondent no.2 the informant but none turned up.

9. Counter affidavit was filed by respondent no.1 State of U.P. wherein it has been stated that if the applicant is released on bail, then there is possibility that law and order situation may worsen and the applicant may abscond.

10. Heard learned counsel for the revisionist and learned A.G.A.

11. Learned counsel for the revisionist/juvenile submitted that the revisionist is a minor. The victim and the applicant are students in the same school. Both are minor. The victim herself accompanied the applicant juvenile. Furthermore, the settled legal position is that the bail application of the juvenile in conflict with law can be rejected only on the ground mentioned in the proviso of Section 12 of the Act of 2015 and not otherwise.

He further submitted that there is no material on record to infer that the applicant juvenile if released on bail, shall come in association of known criminals or his release will defeat the ends of justice. The applicant is in judicial custody since 10.1.2020. Therefore, the applicant may be released on bail and the order dated 28.8.2020 passed by the learned Additional Sessions Judge/ Special Judge, POCSO Act as also order 2.7.2020 passed by Juvenile Justice Board be set aside.

12. Learned A.G.A. opposed the revision and submitted that the applicant juvenile enticed away the minor daughter of the informant and committed rape upon her. This has been proved by the statement of the victim under Section 164 Cr.P.C. So the application should be rejected.

13. Considered the rival submissions and perused the record.

14. Section 12(1) of the Act of 2015, in this regard lays down as under :-

"12. (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 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."

Legal position is that, for a juvenile in conflict with law bail is the Rule.

15. It is settled law that a bail application of a juvenile can be rejected only -

(i). If there appears reasonable ground for believing that the release is likely to bring the juvenile into association with any known criminal ; or,

(ii). exposed the juvenile to moral, physical or psychological danger ; or,

(iii). release of the juvenile would defeat the ends of justice.

16. In the present matter, the Juvenile Justice Board came to the conclusion that if the Juvenile applicant was released on bail, then it will cause moral, physical and psychological danger to him and it will defeat the ends of justice and the juvenile would commit offence again in the association with known or unknown criminals.

17. The appellate court concluded that there exists reasonable ground to believe that if the juvenile is released on bail, he will be exposed to moral, physical or psychological danger and confirmed the order of the Juvenile Justice Board and rejected the appeal of the juvenile.

18. In the report of the District Probation Officer, which is Annexure -5 to the affidavit filed in this revision, it has been stated that the juvenile is in State Juvenile Home since 10.1.2020. He has no criminal history. He was studying in Class-11 at the time of the incident. In the report, there is no mention that there is any possibility of the association of the juvenile with known or unknown criminals.

Perusal of this report shows that there is nothing in this report to lead to the conclusion that the case of the revisionist falls within any of the three exceptions mentioned in the proviso to Section 12 (1) of the Juvenile Justice Act, 2015.

Juvenile Justice Board and appellate court have not given reasons on what basis they came to the conclusion mentioned in the impugned order/ judgment.

19. Considering the above facts and circumstances and the settled position of law, the order of Juvenile Justice Board and the judgment of the appellate court are not sustainable. Therefore, it appears just to set aside the orders passed by the Juvenile Justice Act and the judgement passed in appeal.

20. The revision is **allowed**. Impugned order dated order dated 28.8.2020 passed by Additional District and Sessions Judge/Special Judge, POCSO Act, Gonda in Criminal Appeal No.21 of 2021 (Aman Kashyap Vs. State of U.P.) and order dated 2.7.2020 passed by Principal Magistrate, Juvenile Justice Board, Gonda in Case No.18/2020 (State of U.P. Vs. Aman Kashyap in Case Crime No.10/2020, under Sections 363, 366, 506, 376 (3) I.P.C. and Section 3/4 of POCSO Act, Police Station Kotwali Nagar, District Gonda, are hereby set aside.

21. The bail application moved on behalf of the revisionist by his mother Madhuri is ***allowed***.

The juvenile(**Aman Kashyap**) shall be released on bail in Case Crime No.10/2020(supra) and be given in custody of his mother, on her furnishing a personal bond and two sureties each in the like amount to the satisfaction of the Principal Magistrate of Juvenile Justice Board, Gonda subject to following conditions :-

i). That the mother of the juvenile shall 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 be exposed to any moral, physical or psychological danger and further that the mother will ensure that the juvenile do not repeat the offence.

(ii). The mother will further furnish an undertaking to the effect that she will encourage the juvenile to pursue his studies.

(iii). The revisionist Aman Kashyap and his mother Madhuri will report to the District Probation Officer on the first Monday of every month with effect from the first Monday of the month next after release from custody, and if during any calendar month, the first Monday falls on a holiday then on the following working day.

(iv). 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, Gonda on such periodical basis as the Juvenile Justice Board determines.

(2021)07ILR A228
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.07.2021

BEFORE

THE HON'BLE MRS. SAROJ YADAV, J.

Criminal Revision No. 861 of 2019

Vipin Mali (Minor) ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Dhirendra Kumar Mishra, Anil Kumar Tiwari, Nitesh Yadav, Ramakar Shukla

Counsel for the Opposite Parties:
Govt. Advocate, Gyanendra Mishra

(A) Criminal Law - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 18(1)(g) - orders regarding child found to be in conflict with law , Section 12 - Bail to a person who is apparently a child alleged to be in conflict with law, Section 102 - Revision , Indian Penal Code, 1860 - Sections 363, 366, 504, 506 - The Protection of Children from Sexual Offences Act, 2012 - Section 7/8 - rejection of bail application of a juvenile - ground - (i) If there appears reasonable ground for believing that the release is likely to bring the juvenile into association with any known criminal (ii) expose the juvenile to moral, physical or psychological danger, or (iii) release of the juvenile would defeat the ends of justice - for a juvenile in conflict with law bail is the Rule - bail application of a juvenile can be rejected exceptionally. (Para - 11,14)

F.I.R. registered against revisionist/juvenile and four other co-accused persons - written complaint - daughter of the complainant aged about 17 years - taken away by revisionist/juvenile - revisionist claimed juvenility - declared juvenile by the Juvenile Justice Board - revisionist/juvenile moved bail application before the Juvenile Justice Board - rejected - appeal preferred - dismissed by the Appellate Court - revisionist/juvenile preferred the present revision. (para - 2,3)

HELD:- There is nothing against the juvenile in the report, so as to bring his case under the exceptions provided in proviso to Section 12(1) of the Act of 2015. The order passed by

Principal Magistrate, Juvenile Justice Board and judgment passed by Appellate Court are set-aside. The bail application made on behalf of the revisionist/juvenile through his mother is allowed. (Para -15,18)

Criminal Revision allowed. (E-6)

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. This criminal revision has been preferred by the revisionist/juvenile Vipin Mali through his mother Smt. Pushpa Devi, under Section 102 of The Juvenile Justice (Care and Protection of Children) Act, 2015 (in short the "Act of 2015") against the judgement dated 30.05.2019 passed by learned Additional Sessions Judge Ist, Sultanpur in Criminal Appeal No. 55 of 2019 as well as order dated 18.04.2019 passed by Principal Magistrate, Juvenile Justice Board, Sultanpur in Case Crime No. No. 541/2018, under Sections 363, 366, 504, 506 Indian Penal Code (in short "I.P.C.") and Section 7/8 of The Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act"), Police Station Lambhua, District Sultanpur.

2. Brief facts necessary for disposal of this Criminal Revision are as follows:-

An F.I.R. bearing Case Crime No.541 of 2018 was registered against the revisionist/juvenile and four other co-accused persons on the basis of written complaint moved by the complainant Ram Bahadur Yadav narrating the facts that on 15.11.2018 at about 9 AM, the daughter of the complainant aged about 17 years, who was studying in Class 12th in Sarvodaya Inter College, Lambhua, Sultanpur went to her School and when she did not come back, he made a search for her but could not know anything. On the next date, the complainant enquired about her daughter in her School, he came to know that his daughter did not reach the School on 15.11.2018. Thereafter, the complainant made a further search and came to know that Vipin Mali resident of the same village was also missing from the date of incident. Arjun and Dheeraj Yadav, who were friends of Vipin Mali told the complainant that Vipin Mali has taken away his daughter. Thereafter, he met with the father and brother of Vipin Mali, they assured that his daughter would be brought back within two days. On 18.11.2018, when the complainant went to the house of Vipin Mali to enquire about his daughter, then the father of the Vipin Mali abused him and threatened of dire consequences.

3. After investigation, the revisionist and four other accused persons were charge-sheeted. The Court concerned took cognizance of the matter. The revisionist claimed juvenility and was declared juvenile by the Juvenile Justice Board, Sultanpur vide order dated 18.04.2019. Thereafter, the revisionist/juvenile moved bail application before the Juvenile Justice Board, Sultanpur that was rejected vide order dated 09.05.2019. Against that order an appeal was preferred under Section 101 of the Act of 2015 and that appeal too was dismissed by the Appellate Court vide judgment and order dated 30.05.2019. Being aggrieved with the said order/judgment, the revisionist/juvenile preferred the present revision.

4. Heard Sri Anil Kumar Tiwari, learned counsel for the revisionist and Sri Rao Narendra Singh, learned A.G.A. appearing on behalf of the State

respondent. None turned up on behalf of the opposite party no. 2 despite of service of notice.

5. Learned counsel for the revisionist/juvenile submitted that revisionist is in Juvenile Home since 14.02.2019. He was declared juvenile by the Juvenile Justice Board, Sultanpur vide order dated 18.04.2019. The age of the revisionist was found 12 years 11 months and 5 days at the time of incident. He further submitted that Juvenile Justice Board did not consider properly, the report of District Probation Officer (in short D.P.O.), while deciding the bail application. He further submitted that the victim lived with the revisionist about three months, which shows that victim was a consenting party. Apart from it, according to provisions of Section 18(1)(g) of the Act of 2015, the juvenile in conflict with law can be sent to special home for a period not exceeding three years. In the present matter, even if it is presumed that juvenile has committed a crime, he cannot be kept in protection home for more than three years. The revisionist/juvenile already has spent about 2-1/2 years in judicial custody. He further submitted that the case of revisionist/juvenile does not fall under any of the exceptions provided in Section 12(1) of the Act of 2015. Learned Principal Magistrate, Juvenile Justice Board and the Appellate Court both have wrongly concluded that the release of the juvenile will bring the juvenile into the contact of the known criminals and that will expose the juvenile to moral, physical and psychological danger and will defeat the ends of justice.

6. Learned A.G.A. countered the submissions made by the learned counsel for the revisionist and submitted that the victim in her statement recorded under Section 164 Cr.P.C. has made allegations against the revisionist of committing rape on her, so the revision of the juvenile should be dismissed.

7. Considered the rival submissions and perused the record.

8. It is undisputed that revisionist/juvenile is in judicial custody for a period of about 2-1/2 years.

9. Revisionist was declared juvenile by Juvenile Justice Board, finding his age 12 years, 11 months and 5 days at the time of incident.

10. Section 12(1) of the Act of 2015 in this regard lays down as under :-

"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, 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."

11. Thus, it is law that a bail application of a juvenile can be rejected only:-

(i) If there appears reasonable ground for believing that the release is likely to bring the juvenile into association with any known criminal; or,

(ii) expose the juvenile to moral, physical or psychological danger; or,

(iii) release of the juvenile would defeat the ends of justice.

12. In the present matter the Principal Magistrate of Juvenile Justice Board, came to the conclusion that if the juvenile/revisionist was released on bail then there is possibility of his coming in association of known criminals which will cause moral, physical and psychological danger to him, and ends of justice stands defeated.

13. The Appellate Court while confirming the order of the Principal Magistrate, Juvenile Justice Board has also accepted the conclusion given by the Principal Magistrate and dismissed the appeal.

14. Legal position is that, for a juvenile in conflict with law bail is the Rule. The bail application of a juvenile can be rejected exceptionally.

15. In the report of the D.P.O. available on record, which has been filed through supplementary affidavit, no criminal antecedents of juvenile has been mentioned. The family status is average. There is nothing against the juvenile in the report, so as to bring his case under the exceptions provided in proviso to Section 12(1) of the Act of 2015.

16. Considering the facts and circumstances of the case, it appears just to set aside the order dated 18.04.2019 passed by the Principal Magistrate, Juvenile Justice Board, Sultanpur as well as the judgment dated 30.05.2019 passed by the Appellate Court.

17. **The Revision is allowed.**

18. The order passed by Principal Magistrate, Juvenile Justice Board dated 18.04.2019 and judgment dated 30.05.2019 passed by Appellate Court are set-aside. The bail application made on behalf of the revisionist/juvenile through his mother is allowed.

19. Let the revisionist/juvenile **(Vipin Mali)** be released on bail in Case Crime No. 541 of 2018, under Sections 363, 366, 504, 506 IPC and Section 7/8 POCSO Act, Police Station Lambhua, District Sultanpur and be given in custody of his mother on her furnishing a personal bond and two solvent sureties each in the like amount to the satisfaction of the Principal Magistrate of Juvenile Justice Board, Sultanpur subject to following conditions :-

(i) That the mother of the juvenile shall 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 be exposed to any moral, physical or psychological danger and she will ensure that the juvenile do not repeat the offence.

(ii) The mother will further furnish an undertaking to the effect that she will encourage the juvenile to pursue his studies.

(iii) The revisionist Vipin Mali and his mother Smt. Pushpa Devi will report to the District Probation Officer on the first Monday of every month with effect from the first Monday of the month next after release from custody, and if during any calendar month, the first Monday falls on a holiday then on the following working day.

(iv) 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, Sultanpur on such periodical basis as the Juvenile Justice Board determines.

(v) The party shall file a computer generated copy of such order downloaded from the official website of High Court Allahabad.

(vi) The computer generated copy of such order shall be self attested by the counsel of the party concerned.

(vii) The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)07ILR A232
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.07.2021

BEFORE

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

Criminal Revision No. 1481 of 2021

Ashok Gupta ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Chandrajeet, Sri Babu Lal Ram

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 451 - Order for custody and disposal of property pending trial in certain case , Section 457 - procedure of police upon seizure of property , Public Gambling Act, 1867 - Section ¾ - power of the court under Section 451 of the Code for passing of an order for custody and disposal of property can be invoked, only during the course of an inquiry or at the stage of trial - proceedings relating to investigation are not within the realm of either inquiry or trial - powers of the court under Section 451 cannot be invoked at the stage of investigation.(Para - 18)

Application filed by the applicant-revisionist under Section 451 of the Code before Chief Metropolitan Magistrate for release of the amount which had been seized by the police - dismissed - hence present revision.

HELD:- In the facts of the present case, the case was pending at the stage of the investigation and the stage of trial had not yet reached . The court below has thus rightly held that since investigation was pending no order for custody or disposal of property could be passed in exercise of powers under Section 451 of the Code. (Para - 16,19)

Criminal Revision dismissed. (E-6)

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

1. Heard Sri Babu Lal Ram holding brief of Sri Chandrajeet, learned counsel for the revisionist and Ms. Sushma Soni,

learned Additional Government Advocate for the State-opposite party.

2. The present revision has been preferred against the order dated 30.01.2021 passed by the Chief Metropolitan Magistrate, Kanpur Nagar in Criminal Misc. Application No.516 of 2021 (State vs. Ashok Gupta and others) arising out of Case Crime No.346 of 2020, under Section 3/4 of Public Gambling Act, 1867, Police Station Fazalganj, District Kanpur Nagar, pending before the Chief Metropolitan Magistrate, Kanpur Nagar whereby he has dismissed the application filed by the revisionist under Section 451 of the Code of Criminal Procedure, 19731 with regard to release of the amount in favour of the revisionist during the pendency of the case.

3. Records of the case indicate that the application dated 20.01.2021 was filed by the applicant-revisionist under Section 451 of the Code for release of the amount which had been seized by the police. The Chief Metropolitan Magistrate, Kanpur Nagar while considering the application has looked into the material on record and has held that the recovery memo *prima facie* indicates that the amount recovered from the possession of the applicant had been used for the purpose of gambling and since the investigation was pending it was not appropriate to issue any direction for release of the amount.

4. Learned counsel for the revisionist has sought to assail the aforesaid order by referring to the facts of the case and the defence of the revisionist.

5. Learned AGA submits that the contention which is sought to be raised by the revisionist would relate to disputed questions of fact and appreciation of evidence, which could not be seen at this stage. It is further pointed out that an order for custody and disposal of property under Section 451 of the Code can be sought only during the pendency of the trial or inquiry and not at the stage of investigation.

6. The scheme under Sections 451 to 459, which fall under Chapter XXXIV of the Code, contain elaborate provisions regarding disposal of property; (a) in respect of which an offence appears to have been committed, or (b) which appears to have been used for the commission of an offence, or (c) which has been produced before the Court, or (d) which is in the custody of the Court.

7. Detailed provisions have been made in regard to the property seized by the police during the course of investigation including provisions for passing of interim orders for the custody and disposal of such property pending inquiry or trial and of final orders at the conclusion of inquiry or trial.

8. Section 451 empowers the Court to pass appropriate orders for the custody of property produced during any inquiry or trial and in the event of speedy decay the Court may direct the sale or otherwise disposal of property. The application under Section 451 can be made during the pendency of the inquiry or trial on production of property in the Court. Section 452 confers power on the Court to direct disposal of the property at the conclusion of trial or inquiry. Section 451 can therefore, be invoked during pendency of inquiry or trial whereas Section 452 would be applicable after the termination of the

inquiry or trial and under both the provisions the powers would be exercisable when the property is in the custody of the Court or produced before the Court. The provisions under Sections 451 or 452 would not be applicable where the case is still at the stage of investigation.

9. Section 457 provides that whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of the Code, and such property is not produced before a Criminal Court during any inquiry or trial, the Magistrate is empowered to give suitable directions regarding disposal or delivery of the property.

10. Section 451 of the Code, which relates in particular to the controversy at hand, reads as follows:

"451. **Order for custody and disposal of property pending trial in certain cases.** When any property is produced before any Criminal Court during any 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."

11. The words "inquiry" and "investigation" have been defined under Section 2(g) and 2(h) of the Code, respectively, and the same are as follows:

"(g) "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court;

(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf;"

12. The word "trial" though not defined under the Code is commonly understood to refer to a judicial proceeding which commences after framing of charge and concludes with either conviction or acquittal.

13. In terms of the provisions contained under Section 451 of the Code where 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 conclusion of the 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.

14. As per clause (a) of the Explanation to Section 451, any kind of property which is either produced before the court or is in custody of the court would be within the purview of the section. Section 451 would have no application unless the property is produced before the court during the inquiry or trial.

15. The section empowers the court to make orders for interim custody for disposal of the property produced before it during an inquiry or trial. This order may be passed in respect of both (i) property produced before the court during the inquiry or trial, and (ii) property regarding which the offence appears to have been committed or which appears to have been used for commission of any offence.

16. In the facts of the present case, the case was pending at the stage of the investigation and the stage of trial had not yet reached.

17. The case is registered under the provisions of Public Gambling Act, 1867, and in terms of the scheme of the Act, the Magistrate or the Officer authorised is empowered to search, seize and take possession all instruments of gaming, and of moneys and security of money and articles of value, reasonably suspected to have been used or intended to have been used for the purpose of gaming which are found therein.

18. The power of the court under Section 451 of the Code for passing of an order for custody and disposal of property can be invoked, only during the course of an inquiry or at the stage of trial. The proceedings relating to investigation are not within the realm of either inquiry or trial and therefore the powers of the court under Section 451 cannot be invoked at the stage of investigation.

19. The court below has thus rightly held that since investigation was pending no order for custody or disposal of property could be passed in exercise of powers under Section 451 of the Code.

20. Counsel for the revisionist has not been able to dispute the aforesaid factual and legal position. He, however, submits that the revisionist may have liberty of invoking the jurisdiction of the court for release of property at the appropriate stage during the course of the trial.

21. No material error or illegality having been pointed out in the order passed by the court below, the revision stands dismissed.

22. However, this would not preclude the revisionist from invoking the jurisdiction of the court for an order for custody or disposal of the property at the appropriate stage.

(2021)07ILR A235
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2021

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Criminal Revision No. 3449 of 2019

Meghraj Sharma ...Revisionist (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Sikandar B. Kochar

Counsel for the Opposite Parties:
A.G.A., Sri Sharique Ahmed

(A) Criminal Law -Indian Penal Code, 1860 - Sections 302, 201, 364A - The Juvenile Justice (Care And Protection Of Children) Act, 2000 - Section 7A - Claim of juvenility - Procedure to be followed when claim of juvenility is raised before any court - The

Juvenile Justice (Care & Protection of Children) Rules 2007- Uttar Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2004 - proceedings prescribed in 2007 Rules have to be followed strictly and only in the absence of the document specified in rule 12 (3)(a) can recourse be taken to the other methods prescribed - Question of juvenility is to be determined on the date of the incident -(Para - 8,33)

Revisionist claiming to be a juvenile on the basis of his High School Certificate - indicating his date of birth as 21.4.1996 - application before Special Chief Judicial Magistrate - declared juvenile - Criminal Appeal dismissed - Criminal Revision - Special Chief Judicial Magistrate no jurisdiction to decide claim of juvenility - matter remanded back - question of juvenility by the Juvenile Justice Board - Board disbelieving the High School Certificate and placing reliance on the medical report, held that the revisionist was not a juvenile on the date of the incident - determined juvenility on the basis of procedure prescribed under the Rules framed by the State Government in 2004. (Para - 5,6)

HELD:- Board has committed error in determining the Juvenile claim by taking recourse to Rules of 2004 and has erred in not placing reliance on the High School Certificate, which is on record. Even otherwise also, the reasoning given by the Board in rejecting the claim of juvenility is wholly arbitrary. Revisionist is declared juvenile on the date of the commission of the alleged offence in view of his age being 21.4.1996 as indicated in the High School Certificate.(Para - 45,46)

Criminal Revision allowed. (E-6)

List of Cases cited:

1. Jai Prakash Tiwari Vs St. of U.P. & anr., 2016, 97 ACC 592

2. Parag Bhati (juvenile) Vs St. of U.P., 2007 SCC (Crl.) 819, 2013 SCC online All

3. Abuzar Hossain @ Gulam Hossain Vs St. of West, (2012) 10 SCC 489, 2013 1 SCC (Cri.) 83

4. Jai Prakash Tiwari Vs St. of U.P. and anr., 2016 (97) ACC 592

5. Jai Prakash Tiwari Vs St. of U.P., 2016 (97) ACC 592

6. Ashwani Kumar Saxena Vs St. of M.P., 2013 SCC (Cri), 2012 9 SCC 570

7. Parag Bhati (Juvenile) Through Legal Guardian Mother Rajni Bhati Vs St. of U.P. & anr., (2016) 12 SCC 744

8. Abuzar Hossain @ Gulam Hossain Vs St. of West, (2012) 10 SCC 489

9. Om Prakash Vs St. of Raj., 2012 (77) ACC 654 (SC)

10. Brijesh Kumar Vs St. of U.P., Criminal Revision No. 64 of 2018

11. M.C. Gupta Vs C.B.I., (2012) 8 SCC 669

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

1. Heard Sri Sikandar B. Kochar, counsel for the revisionist, Sri Sharique Ahmad, counsel appearing on behalf of the Opposite Party No. 2 as well as Sri Manoj Kumar Dwivedi, learned AGA appearing on behalf of the State and perused the record.

2. The present revision has been filed challenging the order dated 16.11.2018 passed by the Juvenile Justice Board, Kanpur Nagar in Misc. Case No. 6500036 of 2014 (State Vs. Meghraj Sharma and others) arising out of Case Crime No. 213 of 2013, under Sections 302, 201, 364A IPC, Police Station Swaroop Nagar, District Kanpur Nagar, whereby the claim of juvenility pleaded by the revisionist was rejected by the Court ,as well as the order dated 4.7.2019 passed by the Special Judge (POCSO Act)/Additional Sessions Judge, Court No. 7, Kanpur Nagar in Criminal

Appeal No. 224 of 2018 (Meghraj Sharma Vs. State of U.P.),whereby the appeal filed against the order dated 16.11.2018 was dismissed.

Facts in brief:

3. Facts which are the genesis of the present dispute are that an FIR dated 23.12.2013 was registered as Case Crime No. 213 of 2013 against some unknown persons initially under Section 363 IPC which was subsequently converted into Section 364A, 302, 201 IPC, Police Station Swaroop Nagar, District Kanpur Nagar.

4. In the said FIR, the date of incident alleged was 22.12.2013. The investigations were carried out and a chargesheet dated 18.2.2014 was filed against the revisionist and the co-accused persons.

5. The revisionist claiming to be a juvenile on the basis of his High School Certificate indicating his date of birth as 21.4.1996, filed an application before Special Chief Judicial Magistrate, Kanpur Nagar, for being declared a juvenile. The Special Chief Judicial Magistrate relying on the High School Certificate declared the revisionist a juvenile vide order dated 2.4.2014. The said order dated 2.4.2014 was challenged by means of a Criminal Appeal No. 81 of 2014. The appeal too was dismissed vide order dated 14.9.2015 and the order declaring the revisionist a juvenile was upheld in appeal. Aggrieved against the said order passed by the appellate authority on 14.9.2015, a revision was preferred before this Court being Criminal Revision No. 3839 of 2015. This Court heard the matter and finally held that the Special Chief Judicial Magistrate did not have jurisdiction to decide the claim of juvenility and held that it was Juvenile Justice Board, which was empowered to decide the said question, as such, the appellate order was set aside and the matter was remanded for decision on the question of juvenility by the Juvenile Justice Board.

6. The Juvenile Justice Board by means of an order dated 16.11.2018, disbelieving the High School Certificate and placing reliance on the medical report, held that the revisionist was not a juvenile on the date of the incident. The Board determined the juvenility on the basis of procedure prescribed under the Rules framed by the State Government in 2004 .

7. The said order dated 16.11.2018 was challenged by the revisionist by filing Criminal Appeal No. 224 of 2018 before the Special Judge (POCSO Act)/Additional Sessions Judge, Court No. 7, Kanpur Nagar. The said appeal too was dismissed vide order dated 4.7.2019, thus the order of Juvenile Justice Board dated 16.11.2018 holding the revisionist to be major was upheld by the Appellate Court. The present revision has been filed challenging both the orders dated 16.11.2018 and order dated 4.7.2019.

8. Common ground between the parties is that the date of incident admittedly is 22.12.2013. It is well settled that the question of juvenility is to be determined on the date of the incident.

Submission of parties:

9. The submission of counsel for the revisionist is that while determining the juvenility, the Juvenile Justice Board has

erred in not relying upon the Birth Certificate, which was available on record indicating the date of birth of the revisionist as 21.4.1996 and has erred in taking recourse to medical examination as well as other evidence while coming to a conclusion with regard to status of the revisionist as juvenile. His submission is that in terms of the provisions of the Juvenile Justice (Care And Protection Of Children) Act, 2000 (in short 'the Act 2000') the procedure for determining juvenility is prescribed under Section 7A which lays down the procedure to be followed when the claim of juvenility is raised before the Court. He argues that a specific procedure has been prescribed in Juvenile Justice (Care and Protection of Children) Rules, 2007 (in short 'Rules 2007') for determining the juvenility. He further relies upon Section 68 of the Act 2000 which confers power on the State Government to make rules to carry out the purpose of the Act 2000 subject to the rider as prescribed under the proviso to Section 68 (1) of the Act 2000, which makes it clear that where the Central Government has framed model rules and the State Government although empowered to make rules has not framed the model rules as framed by the Central Government would prevail. He further argues that even in terms of the Rules 2007, it is specifically provided that the rules so framed by the State Government should be in conformity with the model rules framed by the Central Government. He emphasises that determination of age on basis of Rules of 2004 was bad in law and contrary to the mandate of Act and the settled law.

10. On the basis of the said submission, counsel for the revisionist argues that the Juvenile Justice Board as well as Appellate Court has erred in ignoring the mandate of the Act 2000 as well as Rules 2007 and have taken recourse to determine the age relying on medical examination and other evidence which is strictly prohibited. He further placed reliance on the judgment of the Full Bench of this Court in the Case of **Jai Prakash Tiwari Vs. State of U.P. & another, 2016, 97 ACC 592**. On the basis of the said submissions, he argues that the orders passed are contrary to the Act, 2000 and Rules, 2007 and the same deserves to be set aside, the revision should be allowed and the revisionist should be declared a juvenile based upon the High School Certificate, which is on record before this Court also.

11. Sri Sharique Ahmad, on the other hand, argues that in the light of the judgment in the case of **Parag Bhati (juvenile) Vs. State of Uttar Pradesh, 2007 SCC (Crl.) 819, 2013 SCC online All**, which places reliance on the earlier judgment of **Abuzar Hossain alias Gulam Hossain Vs. State of West, (2012) 10 SCC 489, 2013 1 SCC (Cri.) 83,** it is open before the Juvenile Justice Board to resort to procedure of conducting the medical examination if the Juvenile Justice Board has reasons to believe that the High School Certificate casts a doubt of it being obtained in a manner which is not prescribed under law or is fraudulent. He further argues that in terms of the material before the Juvenile Justice Board, as indicated in the impugned order, the Juvenile Justice Board was right in coming to the conclusion that matriculation certificate as produced by the juvenile was not worthy of reliance and no error can be found with regard to steps taken by the Juvenile Justice Board for determining the age of the juvenile which, on determination, has been found to be above 18 years of age.

12. Counsel for the Opposite Party further argues that the first submission of the revisionist that the determining process should be taken in accordance with the Rules 2007, does not merit acceptance as rules of Uttar Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2004 (in short 'Rules 2004) and Rule 2007 of the Central Government, in sum and substance, are same and no prejudice is likely to be caused to the revisionist on account of determination based upon the Rules 2004.

13. Counsel for the revisionist, in rejoinder, argues that initially also the proceeding has travelled to this Court and this Court had entertained Criminal Revision No. 3839 of 2015 and finally vide order dated 15.5.2018, the matter was remanded for determination of the juvenility.

14. Sri Manoj Kumar Dwivedi and Sri O.P. Mishra, learned AGA appearing on behalf of the State strongly defend the orders and argue that the orders have been passed in accordance with law.

Statutory Provisions

15. Realizing that primary responsibility for ensuring the needs of the children is to be filled General Assembly of the United Nations adopted a Convention on the Rights of a Child on 20th November, 1989 and it was accepted that all the nations would adhere to the standards set therein.

16. In terms of the mandate of the Constitution as laid down in Article 15 (3), Clauses (e)(f) of Article 39, Article 45 and Article 47. The Government of India ratified the Convention on 11th December, 1992. Initially for ensuring the needs of the children in conflict with law was governed by the Juvenile Justice Act, 1986, however, subsequently, the Government of India having ratified the United Nations Convention on Child Rights enacted the "Act' known as The Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the "JJ Act 2000').

17. Section 7A of the said JJ Act 2000 provides for the procedure to be followed when the claim of juvenility is raised before any Court and is as under:

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

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

2. If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall

forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect].

18. Section 68 of the JJ Act 2000 empoweres the State Government to make rules to carry out the purposes of the Act. Section 68 (1) of the JJ Act 2000 is being quoted herein below as the same is relevant for the purpose of adjudication:

68. Power to make rules.-- (1) The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act: 1[Provided that the Central Government may, frame model rules in respect of all or any of the matters with respect to which the State Government may make rules under this section, and where any such model rules have been framed in respect of any such matter, they shall apply to the State until the rules in respect of that matter is made by the State Government and while making any such rules, so far as is practicable, they conform to such model rules.]

19. In terms of the powers conferred by virtue of Section 68 of the JJ Act 2000, the State Government framed rules known as The Uttar Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2004 (hereinafter referred to as the "Rules of 2004'). The said rules specifically provided for the manner of determining the age of the juvenile. Rule 22 of the said Rules of 2004 laid down the procedure to be followed by a Court in holding the inquiries. Rule 22 (5), which is relevant for the present case is quoted hereunder.

22. Procedure to be followed by the Board in holding inquiries and the determination of age.-

(5) In every case concerning a juvenile or child, the Board shall either obtain-

(i) a birth certificate given by a corporation or a municipal authority; or

(ii) a date of birth certificate from the school first attended; or

(iii) matriculation or equivalent certificates, if available; and

(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, regarding his age, and, when passing orders in such case shall, after taking into' consideration such evidence as may be available or the medical opinion, as the case may be, record a finding in respect of his age.

20. Subsequent thereto, the Central Government also framed rules which are known as The Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the "Rules of 2007'). In the said Rule, Rule 12 specifically provided for the procedure to be followed by the Board while determining the age of the Juvenile. Rule 12 (3) relevant for the present case is as under:

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

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

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

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

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

21. Subsequently, the Act itself has been amended by the Juvenile Justice (Care and Protection of Children) Act, 2015 and The Juvenile Justice (Care and Protection of Children) Model Rules, 2016.

22. In the present case, as the date of incident admittedly is 22.12.2013, the Act of 2015 and the Model Rules of 2016 would not apply and the determination is to be done on the basis of law as existed on the date of the incident i.e. on 22.12.2013.

23. Thus, on the basis of the submissions as made and on the basis of the statutory provisions that existed on the date of the incident what has to be determined is

(a) whether the claim of juvenility is to be decided on the basis of 2007 Rules or 2004 Rules; and

(b) whether the orders passed and impugned herein are in conformity with the statutory mandate.

24. The first submission of Sri Sharique Ahmed, counsel for the opposite party that there is no distinction in between the 2004 Rules or 2007 Rules in as much as the procedure adopted for determination of age prescribed is same under both the rules is not worthy of acceptance for the sole reasons that Rule 12 (3) (b) of the Rules 2007 specifically mandates the reliance on documents specified under clauses (i), (ii) and (iii) of Rule 3 (a) and in that order and permits the resort to constitution of a Medical Board only in the absence of any of Clauses (i), (ii) and (iii) of Rule 3 (a) of Rule 12, whereas in the Rules of 2004, the resort to medical opinion by a medical board is available only in the event of absence of the documents mentioned in Clause (1) to (3) of Rule 22 of Rules 2004. The other distinction between the said two Rules is that Rule 22 (5) in the order of priority prescribes three documents, which can be relied upon by the Board while determining the claim of juvenility being birth certificate given by a municipal

authority, the date of birth certificate from the school first attended and matriculation and equivalent certificate, if available, whereas in the Rules of 2007, the order of documents, which can be relied upon by the Board while deciding the claim of juvenility are matriculation or equivalent certificate and *''in absence'* thereof , the date of birth certificate from the school and in *''in absence'*, the birth certificate given by a corporation or a municipal authority. Comparison of the two is indicated hereinbelow:

Rule 22 (5) of the Rules, 2004	**Rule 12 (3) of the Rules, 2007**
(5) In every case concerning a juvenile or child, the Board shall either obtain- ***(i) a birth certificate given by a corporation or a municipal authority; or*** ***(ii) a date of birth certificate from the school first attended; or*** ***(iii) matriculation or equivalent certificates, if available; and*** ***(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, regarding his age, and, when passing orders in such case shall, after taking into' consideration such evidence***	***(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-*** ***(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;*** ***(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*** ***(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;*** ***(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.*** ***and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.***

as may be available or the medical opinion, as the case may be, record a finding in respect of his age.	

25. Thus, the distinction as is clear from the 2004 Rules and 2007 Rules is that resort to the certificates enumerated in Clause (ii) and Clause (iii) of Rule 3 (a) of the 2007 Rules and in that order can be taken only ***''in absence'*** of availability of the document as specified in Rule 12 (3) (a)(i).

26. The Full Bench of this Court had the occasion to consider the applicability of 2004 Rules vis-a-vis applicability of 2007 Rules in view of the conflict and in terms of the mandate of Section 68 of the JJ Act, 2000 the Full Bench, after dealing with the scope of the said two rules and after noticing the inconsistencies in between the said two rules finally in **Jai Prakash Tiwari Vs. State of U.P. and another, 2016 (97) ACC 592** held as under:

"32. The procedure that has been provided for determining the question of juvenility under Central Rules as to how the question of juvenility is to be determined, the same will have a prevailing effect on U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004 as the State of Uttar Pradesh has not framed any rule in tune with the Central Rules referred to above and Central Rule would apply for the inquiry to be held until Rules in this regard are framed by the State of Uttar Pradesh, in view of this, answer to the question posed i.e. "whether the U.P. Juvenile Justice (Care & Protection of Children) Rules 2004 need be recast consequent upon addition of section 7-A of the Juvenile Justice (Care & Protection of Children) Act, 2000 (as amended by Act No. 33 of 2006)" is 'Yes' as the provisions of the U.P. Juvenile Justice (Care & Protection of Children) Rules 2004 on its own after introduction of Section 7-A and keeping in view the provisions of the Central Rules until and unless it is not revamped and not at all brought in consonance with the provisions as are contained under the Juvenile Justice (Care & Protection of Children) Rules 2007, the same cannot be subscribed and in view of this, same needs to be modified.

33. The answer to the second question i.e. "And in case it is found that they need not be recast whether the U.P. Juvenile Justice (Care & Protection of Children)Rules 2004 framed by State Government or The Juvenile Justice (Care & Protection of Children) Rules 2007 framed by the Central Government shall apply to the matter, in Uttar Pradesh" is that it needs to be modified and till it is not revamped, on the issue of juvenility being raised, the answer to the said question will have to be found on the parameters of the provisions as are contained under The Juvenile Justice (Care & Protection of Children) Rules 2007 and the same shall apply to the matter in the State of Uttar Pradesh also."

27. In view of the specific decision of the Full Bench as quoted above, the argument of Sri Sharique Ahmed cannot be

accepted and it is thus held that the only recourse available before the Board was to determine the question of juvenility on the basis of 2007 Rules. This answers the first question.

28. Coming to the second question as to whether the order of the Juvenile Justice Board dated 16.11.2018 is in conformity with the 2007 Rules or not .

29. The claim of juvenility by the revisionist was based upon the High School Certificate indicating the date of birth of the revisionist as 21.4.1996. Prior to date of birth recorded in the certificate being 21.4.1996 a certificate was issued to the revisionist indicating his date of birth as 21.4.1997 and as there were error in the said date of birth on an application filed by the revisionist, the date of birth was corrected by the Education Board to 21.4.1996 which Certificate was relied upon by the revisionist in support of his claim of juvenility. The Juvenile Justice Board observed that as the date of birth has been corrected from 21.4.1997 to 21.4.1996 the same was not trustworthy and the Board resorted to the procedure as laid down in Rule 22 (4) of the JJ Rules 2004 for determination of date of birth. Besides expressing suspicion on account of change of date of Birth, the Board has relied upon the statement of the mother of the juvenile to the effect that a birth certificate is available in the records of the Nagar Nigam whereas the report of police indicated that no such birth certificate existed in the records of Nagar Nigam. JJ Board further placed reliance upon the certificate issued by the NDMC to the effect that the address of the parents of the revisionist was forged. JJ Board further found that the statement of the parents of juvenile that the juvenile was born in Delhi was found to be untrue. After having cast doubt on the High School Certificate on the basis of the evidences, as discussed above, the Juvenile Justice Board further disbelieved the statement with regard to the primary education on the basis of the statement made by the mother and father of the juvenile. The JJ Board although considered the certificate on record issued by the Uttar Pradesh Education Board to the effect that the revisionist Meghraj Sharma, who appeared in the High School Examination in the year 2012 having Roll No. 1625284 and his date of birth was corrected from 21.4.1997 to 21.4.1996 did not rely upon the same, thus, having cast a doubt on the grounds as extracted above, the Board taking recourse to 2004 Rules proceeded to determine the age of the revisionist as 19 years, 8 months and 25 days as on the date of the incident on the basis of the medical examination alone and consequently the claim of juvenility stood rejected.

30. Having considered the reasoning of the Board as extracted above, I am of the firm view that the reasoning adopted in disbelieving the High School Certificate of the revisionist was wholly arbitrary in as much as the revisionist had got his date of birth in the certificate corrected from 21.4.1997 to 21.4.1996 by adopting the procedure established for change of date of birth and duly ordered by the Deputy Secretary of the Education Board permitting the correction of error in recording the date of birth in the High School Certificate. The JJ Board erred in disbelieving the certificate despite there being nothing on record to indicate that the certificate issued by the Board indicating the date of birth as 21.4.1996 was a forged or fabricated document and in any case change of date of birth from 21.4.1997 to 21.4.1996, that too, much prior to the date

of the incident could not have enured any benefit to the revisionist as the age of the juvenile was actually increased. Once there is nothing on record to the effect that certificate issued by the Board was either forged or fabricated document, it could not have been disbelieved by the JJ Board, moreso, on the basis of the reasoning given by the JJ Board that the date of birth in the certificate was got changed from 21.4.1997 to 21.4.1996. Once the High School Certificate was on record, the resort to report of the Medical Board was not available to the Board in view of the specific mandate contained in Rule 12 (3) of the 2007 Rules. The appellate authority committed the same error while holding the order of the Board and resorted to the report of the Medical Board ignoring the High School Certificate holding the same to be suspicious for the reasons as recorded by the JJ Board.

31. The counsel for the parties have relied upon the judgments in which the first being Full Bench judgment of this Court in the case of **Jai Prakash Tiwari Vs. State of U.P., 2016 (97) ACC 592**, which I have already discussed hereinabove, which clearly laid down that in case of conflict the determination is to be done in accordance with the 2007 Rules. Being a judgment by Full Bench of this Court, I am bound by the said judgment and thus, I have no hesitation in holding that resort to determination under 2004 Rules was not available to the Board and the determination ought to have been done under the 2007 Rules alone.

32. The next judgment relied upon by the counsel for the revisionist is the judgment of the apex court in **Ashwani Kumar Saxena Vs. State of M.P., 2013 SCC (Cri), 2012 9 SCC 570** wherein the Supreme Court after considering the scope of Section 7A of the 2000 Act and 2007 Rules specifically held as under:

"31. We also remind all Courts/Juvenile Justice Board and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate etc. mentioned in Rule 12 (3) (a) (i) to (iii). The courts in such situations act as a parens patriae because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

32. "Age determination inquiry" contemplated under section 7A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

33. Once the court, following the above mentioned procedures, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in subsection (5) or Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of the Rule 12. Further, Section 49 of the Juvenile Justice Act also draws a presumption of the age of the Juvenility on its determination.

34. Age determination inquiry contemplated under the JJ Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, Juvenile Justice Board or a Committee functioning under the Juvenile Justice Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the Juvenile Justice Board or the Committee need to go for medical report for age determination."

33. The pronouncement of the Supreme Court is clear that the proceedings prescribed in 2007 Rules have to be followed strictly and only in the absence of the document specified in rule 12 (3)(a) can recourse be taken to the other methods prescribed.

34. Counsel for the Opposite Party, on the other hand, has placed reliance upon the judgment of the Supreme Court in the case of **Parag Bhati (Juvenile) Through Legal Guardian Mother Rajni Bhati Vs. State of Uttar Pradesh and another, (2016) 12 Supreme Court Cases 744** wherein the Supreme Court considered the scope of Rule of 12 of 2007 Rules and specifically held as under:

"36. It is settled position of law that if the matriculation or equivalent certificates are available and there is no other material to prove the correctness, the date of birth mentioned in the matriculation certificate has to be treated as a conclusive proof of the date of birth of the accused. However, if there is any doubt or a contradictory stand is being taken by the accused which raises a doubt on the correctness of the date of birth then as laid down by this Court in Abuzar Hossain (supra), an enquiry for determination of the age of the accused is permissible which has been done in the present case."

35. In the above judgment, the apex court holding that only if there is any doubt with regard to the the certificates as enumerated within Rule 12 (3)(a), the resort can be taken for determination of the age in the manner as prescribed by the Apex Court in the judgment in the case of **Abuzar Hossain alias Gulam Hossain Vs. State of West, (2012) 10 SCC 489**. The Supreme Court summarised the position as under:

"36. Now, we summarise the position which is as under:

(i) A claim of juvenility may be raised at any stage even after final disposal of the case. It may be raised for

the first time before this Court as well after final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in appeal court.

(ii) For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

(iii) As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded underSection 313of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh and Pawan these documents were not found prima facie credible while in Jitendra Singh10 the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes ofSection 7Aand order an enquiry for determination of the age of the delinquent.

(iv) An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of age of the delinquent.

(v) The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

(vi) Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be

rejected by the court at threshold whenever raised."

36. In the same very judgment, one of the judges on the Bench T.S. Thakur, J. agreeing with the view of the other brother judges further clarified the position and recorded as under:

"39. Physical appearance of the accused is, therefore, a consideration that ought to permeate every determination under the Rule aforementioned no matter appearances are at times deceptive, and depend so much on the race or the region to which the person concerned belongs. Physical appearance can and ought to give an idea to the Court at the stage of the trial and even in appeal before the High Court, whether the claim made by the accused is so absurd or improbable that nothing short of documents referred to in this Rule 12 can satisfy the court about the need for an enquiry. The advantage of "physical appearance" of the accused may, however, be substantially lost, with passage of time, as longer the interval between the incident and the court's decision on the question of juvenility, the lesser the chances of the court making a correct assessment of the age of the accused. In cases where the claim is made in this Court for the first time, the advantage is further reduced as there is considerable time lapse between the incident and the hearing of the matter by this Court.

40. The second factor which must ever remain present in the mind of the Court is that the claim of juvenility may at times be made even in cases where the accused does not have any evidence, showing his date of birth, by reference to any public document like the register of births maintained by Municipal Authorities, Panchayats or hospitals nor any certificate from any school, as the accused was never admitted to any school. Even if admitted to a school no record regarding such admission may at times be available for production in the Court. Again there may be cases in which the accused may not be in a position to provide a birth certificate from the Corporation, the municipality or the Panchayat, for we know that registration of births and deaths may not be maintained and if maintained may not be regular and accurate, and at times truthful. Rule 12(3) of the Rules makes only three certificates relevant. These are enumerated in Sub- Rule 3(a)(i) to

(iii) of the Rule which reads as under:

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

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

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

41. Non-production of the above certificates or any one of them is not, however, fatal to the claim of juvenility, for Sub-Rule 3(b) to Rule 12 makes a provision for determination of the question on the basis of the medical examination of the accused in the ''absence' of the certificates. Rule 12(3)(b) runs as under:

"12(3) (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court, or

the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year."

42. The expression ''absence' appearing in the above provision is not defined under the Act or the Rules. The word shall, therefore, be given its literal dictionary meaning which is provided by Concise Oxford dictionary as under:

"Being away from a place or person; time of being away; non-existence or lack of; inattenation due to thought of other things."

43. Black's Law Dictionary also explains the meaning of ''absence' as under:

"1. The state of being away from one's usual place of residence. 2. A failure to appear, or to be available and reachable, when expected. 3. Louisiana Law. The State of being an absent person - Also termed (in sense 3) absentia."

44. It is axiomatic that the use of the expression and the context in which the same has been used strongly suggests that ''absence' of the documents mentioned in Rule 12(3) (a)(i) to (iii) may be either because the same do not exist or the same cannot be produced by the person relying upon them. Mere non-production may not, therefore, disentitle the accused of the benefit of the Act nor can it tantamount to deliberate non-production, giving rise to an adverse inference unless the Court is in the peculiar facts and circumstances of a case of the opinion that the non-production is deliberate or intended to either mislead the Court or suppress the truth."

37. Thus, in the same very judgment as extracted above, the phrase *''in the absence of'* as used in Rule 12 (3) (a) (i)(ii)(iii) has been further explained. Applying the ratio laid down by the Supreme Court to the facts of the case in hand it is clear that resort to the provisions of Rule 12 (3)(a)(iv) was not available to the board as *there was no absence of* the Matriculation Certificate.

38. The counsel for the Opposite Party has further also placed reliance on the judgment of the Supreme Court in the case of **Om Prakash Vs. State of Rajasthan, 2012 (77) ACC 654 (SC) .**

39. In the said case, the Court was of the view that in the event of there being insufficient evidence, on the basis of school records, to come to the conclusion of the age of the juvenile resort can be taken to the medical evidence. However, the said judgment will have no applicability to the present case as the High School Certificate was available on record .

40. In the said judgment, the Supreme Court after observing the earlier decisions of the Supreme Court in the case of **Ashwani Kumar Saxena (supra), Abuzar Hossain alias Gulam Hossain (supra)** and **Parag Bhati (supra)** proceeded to hold the matriculation certificate produced by the juvenile in the said case as being suspicious on the basis of the material on record including the affidavit filed by the Board i.e. CBSE to the effect that the date of birth was recorded purely on the basis of final list of student forwarded by the school. The Supreme Court further placed reliance upon the statement of Head Master of the school who deposed that the date of birth was

indicated on the basis of the affidavit of the parents which could not be procured in the case of the student/accused in the said case. Thus, based upon the said material, the Supreme Court held the resort to Section 12 (3) (b) was justified. The said judgment has no applicability to the facts of the present case as in the present case, there is no such exercise carried out by the JJ Board while disbelieving the certificate issued by the Education Board.

41. Next judgment relied upon by the counsel for the Opposite Party is the judgment of this Court dated **16.8.2018** passed in **Criminal Revision No. 64 of 2018, Brijesh Kumar Vs. State of UP.** In the said judgment, the Court was confronted with the question of resort to Clause (b) of Rule 12 (3) in view of there being absence of the original High School Certificate and the reliance being placed upon the certificate which contained manipulations and interpolations. This Court after considering the plethora of judgments on the question of determination of juvenility held as under:

"Thus if no other evidence is led, either as to fabrication or manipulation in the school record or to create a reasonable doubt as to the correctness of school record or if there is no other contradictory stand taken by the accused as to the age disclosed on the strength of the school record, or there does not exist any other circumstance as may raise a reasonable doubt as to the genuineness or correctness of the school certificate or the date of birth of the claimant disclosed therein, then obviously the age claim made on the strength of the school certificate must be accepted and in that event, the Court concerned may remain advised to not unnecessarily examine any other evidence."

42. The Court took into consideration the fact that certificate relied upon was neither signed by the Secretary nor was there any explanation with regard to the difference with the name of the father of the student. I am afraid, the said judgment has no applicability to the facts of the present case.

43. The last case relied upon by the counsel for the Opposite Party is the judgment of the Supreme Court in the case of **M.C. Gupta Vs. C.B.I., (2012) 8 Supreme Court Cases 669**. The said judgment dealt with issue of repeal of the Act and the Supreme Court held that any person can be convicted for an offence in terms of the law as it existed at the time of the commission of the offence in terms of the law in force at that time. The said judgment, I am afraid, has no applicability to the facts of the present case.

44. On the basis of interpretation of law by Apex Court and discussed above, the salient features that can be culled out for determination of age of a juvenile under the 2007 Rules are:

(i) If Matriculation Certificate is available, only the same is to be relied upon for determination of age.

(ii) Matriculation Certificate can be disbelieved only if it is forged or fabricated which has to be adjudicated after enquiry and sufficient evidence to be dealt with in accordance with procedure established to hold a document as forged and fabricated.

(iii) If Matriculation Certificate is not available or in its absence alone can resort be taken to determination on basis of date of birth certificate from school first attended (Rule 3 (a) (ii) of the Rules 2007.)

(iv) If date of birth certificate is not available or is disbelieved if found to be forged and fabricated after the adjudication and considering the evidence and following the procedure for holding the document as forged and fabricated.

(v) Resort can be taken to the birth certificate given by the corporation or a municipal authority.

(vi) If the said birth certificate given by the corporation or a municipal authority is not available or is held to be forged and fabricated and not worthy of reliance after conducting the enquiry on the basis of evidences adduced, resort can be taken to Clause 12 (3) (b) of the Rules 2007.

45. In view of the discussions and the case laws referred to above, I am of the firm view that Board has committed error in determining the Juviniles claim by taking recourse to Rules of 2004 and has erred in not placing reliance on the High School Certificate, which is on record. Even otherwise also, the reasoning given by the Board in rejecting the claim of juvenility is wholly arbitrary.

46. In view thereof, the revision deserves to be allowed. The impugned order dated 4.7.2019 passed by the Special Judge (POCSO Act/Additional Sessions Judge, Court No. 7, Kanpur Nagar in Criminal Appeal No. 224 of 2018 and the impugned order dated 16.11.2018 passed by the Juvenile Justice Board, Kanpur Nagar in Misc. Case No. 6500036 of 2014, Case Crime No. 213 of 2013, under Sections 302, 201, 364-A IPC, Police Station Swaroop Nagar, District Kanpur Nagar are set aside and the revisionist is declared juvenile on the date of the commission of the alleged offence in view of his age being 21.4.1996 as indicated in the High School Certificate.

(2021)07ILR A251
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 4551 of 2019

Sanju @ Gulfu (Minor)
...Revisionist (In Jail)
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Rakesh Kumar Verma, Sri Kartikey Singh

Counsel for the Opposite Parties:
A.G.A., Sri Rajesh Kumar Yadav, Sri Shanker Lal

(A) Criminal Law - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 12 - Bail to a person who is apparently a child alleged to be in conflict with law -Section 101 - Appeal - Indian Penal Code, 1860 - Section 498A, 304B, Dowry prohibition Act,1961 - Section ¾ - gravity of the offence is not relevant consideration for refusing grant of bail to the juvenile - Once the co-accused has been admitted to bail, who is adult, there seems no justification to additionally test the case of the revisionist with reference to the requirements of the proviso to sub Section (1) of Section 12 of the Act.- 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 - 14,15,16)

Daughter of the informant - set on fire by tying her with the cot on account of non-fulfilment of rupees one lac as dowry - died during treatment on 7.9.2018 - application by revisionist (juvenile) for bail before Juvenile Justice Board - board refused bail - criminal appeal before Additional Sessions Judge/Special Judge POCSO Act - affirmed order of board - hence present criminal revision .

HELD:- No distinguishing feature from the case of the said co-accused, who is adult offender circumstanced identically as the revisionist. No justification to hold the revisionist not entitled to the liberty of bail. Revisionist has by now done more than half of institutional incarceration. 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 . Impugned orders cannot be sustained and are liable to be set aside and reversed. (Para - 16)

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. Dharmendra (Juvenile) Vs St. of U.P. & ors., 2018 (7) ADJ 864

4. Shiv Kumar alias Sadhu Vs St. of U.P., 2010 (68) ACC 616(LB)

5. 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 26.10.2019 passed by Additional Sessions Judge/Special Judge POCSO Act, Kaushambi dismissing Criminal Appeal No.35 of 2019 (versus 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 30.7.2019 passed by Juvenile Justice Board, Kaushambi refusing the bail plea to the revisionist in Bail Application No.22 of 2019 under Section 498A, 304B IPC and Section 3/4 D.P. Act, Police Station Puramufti District Kaushambi.

2. Heard learned counsel for the revisionist as well as learned A.G.A. for the State and learned counsel for opposite party no.2 and perused the record.

3. The prosecution case, as per the version of the FIR, is that the daughter of the informant namely Ranjana was married to Santosh son of Bachcha and on 1.9.2018 she was set on fire by tying her with the cot on account of non-fulfilment of rupees one lac as dowry and thereafter during treatment she died on 7.9.2018.

4. Learned counsel for the revisionist submits that the revisionist has been falsely implicated in the present case. It is further submitted that general role has been assigned to the revisionist and his family members. No specific role has been assigned to the revisionist.

5. 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 cousin brother of the revisionist is giving his undertaking that after release of the revisionist on bail, he 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.

6. Learned counsel for the revisionist further submits that it is not in dispute that the revisionist is a juvenile as he has already been declared juvenile by Juvenile Justice Board, Kaushambi vide order dated 2.7.2019. The revisionist was a juvenile aged about 17 years on the date of occurrence. He is in jail since 14.11.2018 in connection with the present crime and has completed more than half of the sentence out of the maximum three years institutional incarceration permissible for a juvenile, under Section 18(1)(g) of the Act. It is submitted with much emphasis that co-accused Bachcha @ Bacha Nishad, who is adult and similarly circumstanced as the revisionist, has been admitted to bail by this Court vide order dated 17.4.2019 passed in Criminal Misc. Bail Application No. 15869 of 2019. It is argued that the revisionist being a minor, cannot be held in institutional incarceration any further once co-accused, 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.

7. Learned counsel for the revisionist further submits that thereafter the revisionist applied for bail before the Juvenile Justice Board, Kaushambi upon which a report from the District Probation Officer was called for. The bail application was rejected vide order dated 30.7.2019, being aggrieved, the revisionist preferred an appeal under Section 101 of the Act, which was also dismissed vide order dated 26.10.2019. 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.

8. 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.

9. Learned counsel for the revisionist has further argued that the revisionist has already undergone half of the imprisonment/institutional incarceration and 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."

10. 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."

11. Learned AGA and learned counsel for the opposite party no.2 have 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.

12. Learned counsel for the revisionist thereafter filed the rejoinder affidavit and has denied the averments made in the counter affidavit and has reiterated the grounds mentioned in the revision.

13. This Court has carefully considered the rival submissions of the parties and perused the impugned orders. The juvenile is clearly about 17 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."

14. This Court has, in particular, looked into the role of the various accused and finds that the aforesaid co-accused who has already been granted bail by this Court, and the revisionist have identical role. Once the aforesaid co-accused has been admitted to bail, who is adult, there seems no justification to additionally test the case of the revisionist with reference to the requirements of the proviso to sub Section (1) of Section 12 of the Act. In this connection, I had occasion to consider the question about the right of a juvenile to be released on bail where a similarly circumstanced adult offender had been extended that liberty. In the case of

Dharmendra (Juvenile) vs. State of U.P. and others, [2018 (7) ADJ 864], the High Court was pleased to observe as under:

"10. The matter can be looked at from another vantage. In case the revisionist were an adult and stood charged of the offence that he faces with a weak circumstantial evidence of last seen and confession to the police, in all probability, it would have entitled him to bail pending trial. If on the kind of evidence forthcoming an adult would be entitled to bail, denying bail to a child in conflict with law may be denying the juvenile/ child in conflict with law the equal protection of laws guaranteed under Article 14 of the Constitution.

11. The rule in Section 12(1) of the Act is in favour of bail always to a juvenile/ child in conflict with law except when the case falls into one or the other categories denial contemplated by the proviso. It is not the rule about bail in Section 12 of the Act that in case a child in conflict with law is brought before the Board or Court, his case is not to be seen on merits prima facie about his complicity at all for the purpose granting him bail; and all that has been done is to see if his case falls is one or the other exceptions, where he can be denied bail. The rule in Section 12 sanctioning bail universally to every child in conflict with law presupposes that there is a prima facie case against him in the assessment of the Board or the Court based on the evidence placed at that stage. It is where a case against a child in conflict with law is prima facie made out that the rule in Section 12(1) of the Act that sanctions bail as a rule, except the three categories contemplated by the proviso comes into play. It is certainly not the rule, and, in the opinion of the Court cannot be so, that a case on materials and evidence collected not being made out against a child at all, his case has to be tested on the three parameters where bail may be denied presuming that a prima facie case is constructively there. Thus, it would always have to be seen whether a case prima facie on merits against a child in conflict with law is there on the basis of material produced by the prosecution against him. If it is found that a prima facie case on the basis of material produced by the prosecution is there that would have led to a denial of a bail to an adult offender, in that case also the Rule in Section 12(1) of the Act mandates that bail is to be granted to a juvenile/ child in conflict with law except where his case falls into any of the three disentitling categories contemplated by the proviso.

12. In the opinion of this Court, therefore, the perception that merits of the case on the basis of prima facie evidence is absolutely irrelevant to a juvenile's bail plea under the Act would not be in conformity with the law. The catena of decisions that speak about merits of the case or the charge against a juvenile being irrelevant, proceed on facts and not an assumption that a case on merits is made out, and, not where the case is not at all made out prima facie. It is not that a child alleged to be in conflict with law against whom there is not iota of evidence to connect him to the crime would still have bail denied to him because his case may be placed in or the other disentitling categories under the proviso to Section 12(1) of the Act. If this kind of a construction were to be adopted it might expose the provisions of Section 12(1) of the Act to challenge on ground of violating the guarantee of equal protection of laws enshrined in Article 14 of the Constitution. It is an enduring principle that a construction that lends a statute to

challenge about its constitutionality should be eschewed and one that saves and upholds its vires is to be adopted. In this context the guidance of their Lordships of the Hon'ble Supreme Court in ***Japani Sahoo vs. Chandra Sekhar Mohanty, (2007) 7 SCC 394*** *may be referred to:-*

"51. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis'. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution."

15. 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.

16. In the present case there appears to be no distinguishing feature from the case of the said co-accused, who is adult offender circumstanced identically as the revisionist. There is no justification to hold the revisionist not entitled to the liberty of bail. It is also taken note of by this Court that the revisionist has by now done more than half 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. 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. This Court, thus, finds that the impugned orders cannot be sustained and are liable to be set aside and reversed.

17. 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 Hon'ble Court in the cases of **Kamal Vs. State of Haryana (supra), Takht Singh Vs. State of Madhya Pradesh (supra),**

Dharmendra (Juvenile) vs. State of U.P. and others (supra), Japani Sahoo vs. Chandra Sekhar Mohanty (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.

18. In the result, this revision **succeeds** and is **allowed**. The impugned judgment and order dated 26.10.2019 passed by Additional Sessions Judge/Special Judge POCSO Act, Kaushambi in Criminal Appeal No.35 of 2019 and the order dated 30.7.2019 passed by Juvenile Justice Board, Kaushambi in Bail Application No.22 of 2019, Case Crime No.337 of 2018, under Section 498A, 304B IPC and Section 3/4 D.P. Act, Police Station Puramufti District Kaushambi, are hereby **set aside** and **reversed**.The bail application of the revisionist stands **allowed**.

19. Let the revisionist, Sanju @ Gulfu (Minor) through his natural guardian Mahendra Kumar be released on bail in Case Crime No.337 of 2018 under Section 498A, 304B IPC and Section 3/4 D.P. Act, Police Station Puramufti District Kaushambi 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, Kaushambi 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 August, 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.

20. 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)07ILR A259
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2021

BEFORE

THE HON'BLE SIDDHARTH, J.

Crl. Misc. Anticipatory Bail Application No. 4002 of 2021

Prateek Jain ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Sri Avnish Kumar Srivastava, Sri Priyanka Sharma

Counsel for the Opposite Parties:
A.G.A., Sri Vidya Prakash Singh

(A) Criminal Law - Code of criminal procedure, 1973 - Section 438 - anticipatory bail - Sections 438(1), (i), (ii), (iii) and (iv) Cr.P.C - *"inter alia"* - grant liberty to the Court to exercise its discretion in a particular case according to the facts and circumstances of the case, regarding grant or rejection of anticipatory bail - Indian Penal Code, 1860 - Section 420, 467, 468, 471, 506, 406 - doctrine of selection of remedies - when an application for grant of anticipatory bail is made to this Court, it expressely bars entertainment of the same by the Court of Session. (Para - 17,20)

(B) Criminal Law - Constitution of india - Article 21 - protection of life and personal liberty - right to life is more precious and sacrosanct than the right to personal liberty which is sought to be protected by way of grant of anticipatory bail to an accused by the Court - apprehension of death on account of reasons like the present pandemic of novel corona virus can certainly be held to be a ground for grant of anticipatory bail to an accused - law of anticipatory bail is founded only on the apprehension of arrest - apprehension may be of pre-recording or post-recording stage of the FIR.(Para - 23)

(C) Criminal Law - Constitution of india- Article 14 - equality before law and equal protection of law - against the requirement of Article 14 to leave an accused unprotected from arrest and suffer the consequences of being infected with novel corona virus.(Para - 31)

Allegations against the applicant - he along with other co-accused persons is director of a builder company - applicant applied for a flat being constructed by the company - paid Rs. 3,25,000/- by means of a cheque as the booking amount - possession of flat not given - second wave of novel corona virus has given rise to apprehension of death of an accused.(Para - 5,24)

HELD:- The apprehension of an accused being infected with novel corona virus before and after his arrest and the possibilty of his spreading the same while coming into contact with the police, Court and jail personnels or vice-versa can be considered to be a valid ground for grant of anticipatory bail to an accused.(Para -31)

Anticipatory bail application allowed. (E-6)

List of Cases cited:

1. Gurubaksh Singh Sibbia, etc., Vs St. of Punj, 1980 AIR 1632

2. Sushila Aggarwal Vs St. (NCT of Delhi), 2020 SCC Online SC 98

3. Kerala Union of Working Journalists Vs U.O.I & ors., Writ Petition (CRL) No. 307 of 2020

4. Suo Motu Writ Petition (C) No. 1/2020 In Re: Contagion of Covid 19 Virus in Prisons

5. Sushila Aggarwal Vs St. (NCT of Delhi)- 2020 SCC Online SC 98

(Delivered by Hon'ble Siddharth, J.

1. As per Resolution dated 07.04.2021 of the Committee of this Court for the purpose of taking preventive and remedial measures and for combating the impending threat of Covid-19, this case is being heard by way of virtual mode.

2. Heard Sri Avnish Kumar Srivastava, learned counsel for the applicant and learned A.G.A for State through video conferencing.

3. The instant anticipatory bail application has been filed with a prayer to grant an anticipatory bail to the applicant, **Prateek Jain**, in Case Crime No. 1906 of 2020 under Section 420, 467, 468, 471, 506, 406 IPC, Police Station- Sihani Gate, District- Ghaziabad.

4. Prior notice of this bail application was served in the office of Government Advocate and as per Chapter XVIII, Rule 18 of the Allahabad High Court Rules and as per direction dated 20.11.2020 of this Court in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 8072 of 2020, Govind Mishra @ Chhotu Versus State of U.P., hence, this anticipatory bail application is being heard. Grant of further time to the learned A.G.A as per Section 438 (3) Cr.P.C. (U.P. Amendment) is not required.

5. There are allegations against the applicant that he along with other co-accused persons is director of a builder company. The applicant applied for a flat being constructed by the company and paid Rs. 3,25,000/- by means of a cheque as the booking amount. Thereafter he took loan and paid total amount of Rs. 27,27,875/-. He has not been given possession of flat.

6. Learned counsel for the applicant submits that he is not the director of the builder company in dispute. He is only related to the other directors and hence he has been falsely implicated in this case. On account of demonitization and the slump caused in the business of real estate the present dispute arose. The informant has remedy under the Real Estate (Regulation and Development) Act, 2016.

7. Learned A.G.A. has opposed the prayer for anticipatory bail of the applicant. He has submitted that in view of the seriousness of the allegations made against the applicant, she is not entitled to grant of anticipatory bail. The apprehension of the applicant is not founded on any material on record. Only on the basis of imaginary fear, anticipatory bail cannot be granted.

8. Since the application has been heard through video conferencing and the connectivety was not very good, the Court could not gather the complete submissions raised at the Bar. However, keeping in view the mandate of Section 438(5) Cr.P.C., which requires disposal of anticipatory bail application within 30 days and also considering the spread of second wave of novel corona virus, the hearing of this bail application does not deserves to be adjourned in the larger interest of justice. Due to lack of proper technical support the cause of justice cannot be allowed to suffer.

9. After considering the rival contentions, this Court before proceeding further, considers it appropriate to go through the Section 438 Cr.P.C, U.P. Amendment of 2019, which is as follows:-

"438. Direction for grant bail to person apprehending arrest.--(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely--

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, arid and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely-

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer,

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

Explanation.--The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of

anticipatory bail under sub-section (1), within thirty days of the date of such application;

(6) Provisions of this section shall not be applicable,--

(a) to the offences arising out of,--

(i) theUnlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

10. A perusal of the aforesaid provisions re-enacted in the Cr.P.C in the State of Uttar Pradesh in the year 2019 regarding the grant of anticipatory bail, this Court finds that the section proceeds on the assumption that whenever an anticipatory bail application is filed before the Sessions Court or the High Court, it would be heard promptly and interim order shall be passed as per Section 438(2) Cr.P.C. Where the Court grants an interim order it shall cause a notice of application served on the public prosecutor as per Section 438(3) Cr.P.C granting him not less than 7 days time, to seek instruction. After affording opportunity of hearing to the public prosecutor, the application shall be heard by the Court. After hearing the public prosecutor and the applicant, the Court may either confirm, modify or cancel the interim order as per Section 438(4) Cr.P.C. Section 438(5) Cr.P.C further provides that the High Court or the Court of Session shall finally dispose of such an application within 30 days of filing of the same.

11. In this Court, the anticipatory bail applications are filed after due service of notice in the office of Government Advocate, as per Chapter XVIII, Rule - 18 of Allahabad High Court Rules. The aforesaid rule provides that no bail application shall be placed before the Court unless two days have elapsed prior to the presentation of the application before the Court.

12. There is no provision in the Rules of Court regarding filing and entertainment of anticipatory bail application.

13. However all the anticipatory bail applications are being filed before this court in accordance with the provision of Chapter XVIII, Rule 18 of the Rules of Court after serving prior notice of the same on the Government Advocate. Therefore, the requirement of granting time to the Government Advocate to obtain instructions within seven days, where the Court grants an interim order in an anticipatory bail application, is not in the interest of speedy justice.

14. The anticipatory bail applications are being listed before the court after more than two days invariably. Most of the anticipatory bail applications are being put up before the Court after more than a week, or even after more than a month. There is sufficient time for Government Advocate to obtain instructions in anticipatory bail applications. The unnecessary complication of passing interim order and then final order in the anticipatory bail application can be avoided in case the office of Government Advocate is vigilant and it

obtains instructions within two days of the receipt of notice of the anticipatory bail applications.

15. Directions in this regard have already been issued by this Court in Criminal Misc. Anticipatory Bail Application under Section 438 Cr.P.C No. 8072 of 2020 on 20.11.2020 to the Government Advocate and the Advocate General of the State.

16. Hitherto, the anticipatory bail applications were being considered on the basis of the considerations given in Section 438(1) Cr.P.C., which are as follows-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437 Cr.P.C., as if the bail were granted under that section.

17. However, the legislature was conscious of the fact that no straight jacket formula can be prescribed for grant of anticipatory bail to an accused therefore under Section 438(1) Cr.P.C., it provided that the Court may, after taking into consideration, ***"inter alia"***, the conditions given in Sections 438(1), (i), (ii), (iii) and (iv) Cr.P.C for grant or rejection of anticipatory bail application.

18. In the aforesaid section the words ***"inter alia"*** are very important. They grant liberty to the Court to exercise its descretion in a particular case according to the facts and circumstances of the case, regarding grant or rejection of anticipatory bail.

19. The Apex Court in the case of ***Gurubaksh Singh Sibbia, etc., vs. State of Punjab, 1980 AIR 1632*** was also conscious of the fact that the future is so unpredictable that no fixed criteria can be laid down for the grant or rejection of anticipatory bail of an accused by the High Court or the Court of Session. It was held by the Apex Court that the High Court and the Court of Session are competent to deal with the case as per their knowledge and experience. It further held that the legislature conferred vide descretion on the High Court and the Court of Session to grant anticipatory bail because it felt that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and the Courts were given free hand in this regard. Departing from the terms of Sections 437 and 439 Cr.P.C., Section 438(1) Cr.P.C., provides descretion to this Court in the grant or rejection of anticipatory bail application.

20. Section 438(2) Cr.P.C provides for the conditions to be imposed while granting anticipatory bail in cases, the Court deems fit. However, the conditions are not exhaustive and leave it open for the Court to impose other conditions apart from the conditions given in the section

aforesaid. Section 438(5) Cr.P.C., clearly provides that the application for grant of anticipatory bail shall be decided within 30 days of the filing of application. Section 438(7) provides that if an application for grant of anticipatory bail has been filed by any person before the High Court, no such application shall be entertained by the Sessions Court. Therefore, as per the doctrine of selection of remedies, when an application for grant of anticipatory bail is made to this Court, it expressely bars entertainment of the same by the Court of Session. The aforesaid section does not leaves any room for any controversy regarding filing of anticipatory bail application either before the High Court or before the Court of Session as per 438 (7) Cr.P.C, U.P. Amendment. A literal construction of the aforesaid section 438(7) Cr.P.C shows that there is no requirement of giving any special or compelling reason to approach this Court for grant of anticipatory bail without approaching the Court of Session. Once a person has choosen to approach this Court praying for grant of anticipatory bail, by operation of law, his opportunity to approach the Sessions Court gets extinguished. Therefore, he incurs disadvantage by choosing to abdicate his remedy before the Court of Session. Where the statute clearly provides the option for choosing a remedy and the applicant chooses one such remedy he cannot be compelled to disclose reasons why he has choosen such a remedy, when the statute does not requires the same to be stated.

21. The Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98***, has also held that whether to grant an anticipatory bail or reject the same is a matter of descretion of the Court and it is for the Court to decide, on the basis of the facts and circumstances of the case, what course is to be adopted. No formula has been laid down by the five Judges Bench of the Hon'ble Supreme Court regarding grant or denial of anticipatory bail.

22. The legislature, in its wisdom, left it open for the Court to apply the law of anticipatory bail as per the facts of the case and the circumtances involved therein.

23. The law is a dynamic concept and it is required to be interpreted as per the requirements of time. With the change in the requirements of time, the interpretation and application of law is required to be adopted with change. The law of anticipatory bail is founded only on the apprehension of arrest. The apprehension may be of pre-recording or post-recording stage of the FIR. However, the pre-requisite condition of apprehension of arrest is survival of the accused. Only when the accused would be protected from apprehension of death the apprehension of his arrest would arise. Article 21 of the consititution of India provides for protection of life and personal liberty of every citizen of the country. The protection of life is more important than the protection of personal liberty of a citizen. Unless the right to life is protected the right to personal liberty would be of no consequence. It is clear that the right to life is more precious and sacrosanct than the right to personal liberty which is sought to be protected by way of grant of anticipatory bail to an accused by the Court. If the right to life is not protected and permitted to be violated or imperiled, the right to personal liberty, even if protected by the Court, would be of no avail. If an accused dies on account of the reasons beyond his control when he could have been protected from

death by the Court, the grant or refusal of anticipatory bail to him would be an exercise in futility. Hence, the apprehension of death on account of reasons like the present pandemic of novel corona virus can certainly be held to be a ground for grant of anticipatory bail to an accused.

24. The second wave of novel corona virus has given rise to apprehension of death of an accused. If he is arrested and subjected to the subsequent procedures of detention in lock-up, production before the Magistrate, grant or rejection of bail or incarceration in jail, etc., the apprehension to his life will certainly arise. During the compliance of procedures provided under Cr.P.C. or any special act, an accused will definitely come in contact with number of persons. He will be arrested by police, confined in lock-up, produced before the Magistrate and if his bail application is not granted promptly, he will be sent to jail for an indefinite period till his bail is granted by the Higher Court. The accused may be suffering from the deadly infections of corona virus, or police personnels, who have arrested him, kept him in lock-up, produced him before the Magistrate and then took him to jail may also be infected persons. Even in jail large number of inmates have been found to be infected. There is no proper testing, treatment and care of the persons confined in jails.

25. The Apex Court in the case of ***Kerala Union of Working Journalists vs. Union of India and Others*** in a recent order dated 28.04.2021 passed in ***Writ Petition (CRL) No. 307 of 2020*** had held that the fundamental right to life unconditionally embraces even an undertrial.

26. In view of arrestee in that case being a journalist, the matter was raised before the Hon'ble Supreme Court when he was found to be suffering from Corona virus infection and other ailments. Hon'ble Supreme Court directed the arrestee journalist to be transferred to the hospital at Delhi from the hospital at Mathura for proper medical treatment. Number of such arrestees are there who are suffering from the deadly infection of novel corona virus but they cannot approached the Court on account of limitations of resources.

27. The Apex Court in the case of ***Suo Motu Writ Petition (C) No. 1/2020 In Re: Contagion of Covid 19 Virus in Prisons*** has considered the measures for de-congestion of the jails on account of threat of spread of infection of novel corona virus and by the order dated 07.05.2021 has held as follows:-

"5. An unprecedented surge in Covid-19 during the last few weeks has resulted in a steep spike in the number of people who are affected by Covid-19. In the present situation there is a serious concern about the spread of Covid-19 inovercrowded prisons where there is lack of proper sanitation, hygiene and medical facilities.

6. Mr. Colin Gonsalves, learned Senior Counsel appearing for the Applicant submitted that the High Powered Committees which have been constituted pursuant to the orders passed by this Court on 25.03.2020 should be directed to release all those prisoners who have been released last year on regular bail.

Such of those inmates who have been granted parole last year should be granted 90 days parole by this Court. He

requested that all orders of the High-Powered Committees shall be put on the website of the Governments. Mr. Gonsalves argued that the Standard Operating Procedure (SOP) formulated by the National Legal Services Authority for release of prisoners should be taken into account by the High-Powered Committees.

7. The learned Attorney General submitted that prisons need to be decongested by release of some prisoners in view of the grim situation. He submitted that the High-Powered Committees may be permitted to adopt the procedure that was followed earlier and release the prisoners on the basis of the guidelines formulated by them last year. The learned Attorney General requested for relaxation of handcuffing of the prisoners as during the present outbreak of Covid-19 there is a great danger of spread of the virus to the police personnel who have to hold the hands of the accused while being escorted. The learned Solicitor General of India and Ms. Aishwarya Bhati, learned Additional Solicitor General also supported the learned Attorney General. A further request was made on behalf of the Union of India that the Commissioner of Police, Delhi be made a member of the High-Powered Committee to be constitutedby the Delhi Government.

8. We may notice that India has more than four lakh prison inmates. It is observed that some of hte prisons in India are overburdened and are housing inmates beyond optimal capacity. In this regard, we may notice that the requirement of de congestion is a matter concerning health and right to life of both the prison inmates and the police personnel working. Reduction of impact of Covid-19 requires this Court to effectively calibrate concerns of criminal justice system, health hazards and rights of the accused. From limiting arrests to taking care of Covid-19 Patients, there is a requirement for effective management of pandemic from within the prison walls so as to defeat this deadly virus.

9. As a first measure, this Court, being the sentinel on the quivive of the fundamental rights, needs to strictly control and limit the authorities from arresting accused in contravention of guidelines laid down by this Court in Arnesh Kumar v. State of Bihar (supra) during pandemic. It may be relevant to quote the same:

11. Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

11.2. All police officers be provided with a check list containing specified sub-clause under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of institution of the case with a copy of the

Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41-A Cr.P.C be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the

Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

12. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A IPC or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine.

10. Second, the rapid proliferation of the virus amongst the inmates of congested prisons is a matter of serious concern. The High-Powered Committees constituted by the State Governments/Union Territories shall consider release of prisoners by adopting the guidelines (such as inter alia, SOP laid down by NALSA) followed by them last year, at the earliest. Such of those States which have not constituted High Powered Committees last year are directed to do so immediately. Commissioner of Police Delhi shall also be a member of the High-Powered Committee, Delhi.

11. Third, due to the immediate concern of the raging pandemic, this court has to address the issue of de-congestion. We find merit in the submission of Mrs. Colin Gonsalves, learned Senior Counsel appearing on behalf of the applicant, that the High Powered Committee, in addition to considering fresh release, should forthwith release all the inmates who had been released earlier pursuant to our order 23.03.2020, by imposing appropriate conditions. Such an exercise is mandated in order to save valuable time.

12. Fourth, further we direct that, those inmates who were granted parole, pursuant to our earlier orders, should be again granted a parole for a perid of 90 days in order to tide over the pandemic.

13. Fifth, the fight against the pandemic is greatly benefitted by transparent administration. In this regard, our attention was drawn to example of Delhi, wherein the prison occupancy is updated in websites. Such measures are required to be considered by other States and should be adopted as good practice. Moreover, all the decisions of High-Powered Committees need to be published on respective State Legal Service Authorities/State Governments/High Courts websites in order to enable effective dissemination of information.

14. Overcrowding of prisons is a phenomenon, plaguing several countries including India. Some prisoners might not be willing to be released in view of their social background and the fear of becoming victims of the deadly virus. In

such extraordinary cases, the authorities are directed to be considerate to the concerns of the inmates. The authorities are directed to ensure that proper medical facilities are provided to all prisoners who are imprisoned. The spread of Covid-19 virus should be controlled in the prisons by regular testing being done of the prisoners but also the jail staff and immediate treatment should be made available to the inmates and the staff. It is necessary to maintain levels of daily hygiene and sanitation required to be improved. Suitable precausions shall be taken to prevent the transmission of the deadly virus amongst the inmates of prisons. Appropriate steps shall be taken for transportation of the released inmates of the prisons, if necessary, in view of the curfews and lockdown in some States.

28. The above observations and directions of the Apex Court show the concern about the over crowding of jails and in case this Court, ignoring the same, passes order which will result in over crowding of jails again it would be quite paradoxical. Counsel for the State has not given any assurance of protection of the accused persons, who are in jail and may be sent to jail, regarding their protection from contacting the infection of novel corona virus.

29. The right to life guaranteed under Article 21 of the Constitution of India is paramount and by mere implication in a case of alleged commission of non-bailable offence, right to life of an accused person can not be put to peril. The allegations may be serious against an accused but the presumption of innocence in his favour cannot be dispelled only on the basis of the allegation. An accused who has not been subjeced to trial and not even police investigation has been completed against him in many cases, cannot be compelled to surrender and obtain regular bail in the current circumstances. Even in cases where the police report has been submitted under Section 173(2) Cr.P.C., and summons/ warrants have been issued against him, such an accused is also required to be protected till the threat of novel corona virus to his life is minimized or eradicated and normal functioning of the Courts are restored. Keeping in view the inadequate medical facilities for treating the large number of persons getting infected day by day, common accused cannot be left unprotected from the threat to his life on account of his arrest by police or surrender before the Court as per the normal procedure applicable to accused persons in normal times.

30. Extraordinary times require extraordinary remedy and desperate times require remedial remedy. Law should be interpreted likewise. The established parameters for grant of anticipatory bail like the nature and gravity of accusation, the criminal antecedent of the applicant, the possibility of fleeing from justice and whether accusation has been made for injuring and humiliating the applicant by getting him arrested have now lost significance on account of present situation of the country and the State on account of spread of second wave of novel corona virus.

31. There is also threat of spread of third wave of novel corona virus looming large over the entire country and it is uncertain when the aforesaid wave will abate and normal functioning of the Courts would be restored. Therefore, the apprehension of an accused being infected with novel corona virus before and after his

arrest and the possibilty of his spreading the same while coming into contact with the police, Court and jail personnels or vice-versa can be considered to be a valid ground for grant of anticipatory bail to an accused. The conventional and well settled grounds for grant of anticipatory bail to an accused implicated for alleged commission of non-bailable offence can be considered after the normal conditions in the society and the courts are restored then the anticipatory bail application of the accused persons shall be considered on ordinary parameters like in ordinary times. The experts are of the view that the third wave is likely to come in the month of September, 2021 and it is uncertain when the normal functioning of the Court would be restored. In such uncertain times it would be against the requirement of Article 14 of the constitution of India, which provides equality before law and equal protection of law, to leave an accused unprotected from arrest and suffer the consequences of being infected with novel corona virus. The Apex Court while hearing the case regarding the preparation of the Government to deal with spread of novel corona virus has cautioned the Government to prepare itself for the third wave of the same which may come.

32. The informant/ complainant may take objection to the relief being granted to the applicant and may be dissatisfied from the observations made in this judgment in favour of accused. However, they should not lose sight of the fact that only when the accused would be alive he would be subjected to the normal procedure of law of arrest, bail and trial. The law presumes him to be innocent till the offence alleged against him is proved beyond doubt before the Competent Court. In civil cases the object of grant of injunction is the preservation of subject matter of dispute between the parties. During the pendency of suit the subject matter of suit is protected from any loss, change of nature, decay, etc. Similarly, now the situation has arisen which calls for protection of an accused from infection of novel corona virus and death till the police investigation and, if required, trial is concluded against him. This Court is only granting limited protection to the applicant in view of the mandate of Articles 14 and 21 of the constitution of India. The only remedy available to the person who is implicated for commission of non-bailable offence, against his arrest, is to resort to the remedy of anticipatory bail and it can be granted to an accused on the consideration that the situation at present is not conducive to his subjection to normal procedure of arrest and bail provided under the Criminal Procedure Code.

33. The Election Commission, the Higher Courts and the Government failed to fathom the disastrous consequences of permitting the elections in few States and the Panchayat elections in the State of Uttar Pradesh. The infection of novel corona virus, which had not reached the village population in its first wave of novel corona virus spread in the last year, has now spread to the villages. The State Government is having tough time in controling the spread of novel corona virus in urban areas and it would be very difficult to conduct the test, detect and treat the village population found suffering from novel corona virus. The State lacks preparation and resources for the same at present. On account of the recent panchayat elections in the State large number of FIR's have been lodged in the villages. Even

otherwise the crime rate in the village is quite high in the State. Keeping in view the overall situation of the villages after the Panchayat elections large number of accused persons may be infected and their infection may not have been detected.

34. In view of the above facts and circumstances and after finding that the apprehension to life in the current scenario is a ground for grant of anticipatory bail to an accused, this Court hereby directs that the applicant, in case of his arrest, shall be enlarged on anticipatory bail for the limited period, till 03 of January, 2022 on the following conditions:-

1. The applicant shall, at the time of execution of the bond, furnish his address and mobile number and shall not change the residence till the conclusion of investigation/ trial without informing the Investigating Officer of the police/ the Court concerned of change of address and the reasons for the same before changing the same.

2. The applicant shall not leave the country during the currency of trial/investigation by police without prior permission from the concerned trial Court.

3. The applicant shall not obstruct or hamper the police investigation and not play mischeif with the evidence collected or yet to be collected by the Investigating Officer of the police;

4. The applicant shall surrender his passport, if any, to the concerned Court/Investigating Officer forthwith. His passport will remain in custody of the concerned Court/ Investigating Officer till the investigation is completed. In case he has no passport, he will file his affidavit before the Court/ Investigating Officer concerned in this regard.

5. That the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade his from disclosing such facts to the Court or to any police officer;

6. The applicant shall maintain law and order.

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

8. In case, the applicant misuses the liberty of bail, the Court concerned may take appropriate action in accordance with law and judgment of Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98*** and the Government Advocate/informant/complainant can file bail cancellation application.

9. The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court, default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of her bail and proceed against him in accordance with law.

10. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

11. 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.

12. The applicant is warned not to get himself implicated in any crime and should keep distance from the informant and not to misuse the liberty granted hereby. Any misuse of liberty granted by this Court would be viewed seriously against the applicant in further proceedings.

35. This anticipatory bail application is being allowed on account of special conditions and on special ground. The normal grounds, settled for the grant of anticipatory bail, have not been considered by this Court and it would be open for the applicant to approach this Court again, if so adviced, in changed circumstances.

36. The anticipatory bail application is ***allowed.***

(2021)07ILR A271
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2021

BEFORE

THE HON'BLE RAM KRISHNA GAUTAM, J.

Crl. Misc. Anticipatory Bail Application No. 5039 of 2021

Abdul Wahab & Ors. ...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Sri V.M. Zaidi (Senior Advocate), Sri Dur Vijay Singh

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 438 - Indian Penal Code, 1860 - Sections 420, 467, 468, 471, 406 - anticipatory bail - considering an application for grant of anticipatory bail - Court has to consider the nature of offence, the role of the person, the likelihood of his influencing the course of investigation or tempering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country etc.) should also be considered - Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and is subject to the discretion of the Court. (Para - 4)

Dispute with regard to management committee of District Cricket Association - civil suit filed by District Cricket Association against the applicants - relief of injunction claimed by plaintiff - charge-sheet over which cognizance taken - apprehension of arrest of applicants - application, for grant of anticipatory bail - embezzlement of money and manufacturing of forged and fictitious documents, account book etc. under garb of misrepresentation of above committee was said in first information report. (Para - 2,5)

HELD:- Hence, deceit, manufacturing of forged and valuable securities, receiving of money under the guise of misstatement, criminal breach of trust with regard to above trusted money etc. and deceit with public at large, including cricketers of District Aligarh are heinous offences, requiring no indulgence by this Court in granting anticipatory bail under section 438 of Cr.P.C.(Para - 6)

Anticipatory bail application dismissed. (E-6)

List of Cases cited:

1. Myakala Dharmarajam Vs The St. of Telangana, (2020) 2 SCC 743

2. Sushila Aggarwal Vs St. (NCT of Delhi) (2020) 5 SCC 1
3. Satlingappa Mhetre Vs St. of Maharashtra & ors., (2011)1 SCC 694

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

1. This application under Section 438 of Code of Criminal Procedure has been filed by Abdul Wahab, Abdul Latif, Mutahir Zaidi and Fashahat Ali, with a prayer for grant of anticipatory bail to the applicants, by way of a direction to the Senior Superintendent of Police, Aligarh/ Station House Officer/ Investigating Officer/ Arresting Officer concerned, to release the applicants on bail, in the event of their arrest, on such terms and conditions, as is being imposed, in pursuance of first information report, dated 29.12.2015, registered as Case Crime No. 811 of 2015, under sections 420, 467, 468, 471, 406 IPC, Police Station Civil Line, District Aligarh.

2. Learned counsel for the applicants argued that accused-applicants are innocent. They have been falsely implicated in above case crime number, lodged by informant, who happened to be Vice President of above District Cricket Association to whom money was said to be given for organizing a tournament and this tournament was not organized. There was neither any deceit nor any fraud or fabrication of any document by applicants. The dispute is with regard to management committee of above District Cricket Association, Aligarh for which previous complaint was filed and it was dismissed under section 203 of Cr.P.C. A civil suit was also filed by District Cricket Association, Aligarh against the applicants and one other as Original Suit No. 554 of 2016 in the Court of Civil Judge (Junior Division), Kol, Aligarh. The plaintiff filed above suit with specific mention of registration number of District Cricket Association, Aligarh and the applicants were said to interfere in affairs of District Cricket Association, Aligarh for which relief of injunction was claimed by plaintiff. Hence, the present prosecution is in furtherance of above civil suit and there is a charge-sheet over which cognizance has been taken and there is every apprehension of arrest of applicants in above case. Applicants are innocent and they are having fear of arrest in above case crime number. Hence, this application, for grant of anticipatory bail, has been moved with above prayer.

3. Learned AGA has vehemently opposed with this contention that first information report was got lodged by informant with accusation of fraud, deceit, receiving of money under misstatement of fact by applicants and fabrication of forged documentation with regard to District Cricket Association, Aligarh and this was investigated, wherein charge-sheet has been filed. Against this cognizance taking order, an application under section 482 Cr.P.C. No. 18049 of 2020 (Abdul Latif and 2 others versus State of U.P. and another) was filed and this was dismissed with specific finding that there seems to be prima facie existence of offences cognizable, requiring no interference by this Court. Accordingly, above proceeding under section 482 Cr.P.C. was got dismissed. Hence, offences against applicants are very heinous with regard to deceit and fraud with general public and receiving of money under deceit. There is also accusation of manufacturing fraudulent document and account book by applicants who used to represent themselves as a member and office bearer of District Cricket Association, Aligarh, which was neither registered nor they were office bearer of same. Hence, looking into above gravity and heinousness of offence,

the Sessions Judge, Aligarh has rejected anticipatory bail application, moved before him and then after this application before this Court has been filed. Accordingly, this ought to be dismissed.

4. Having heard and gone through material placed on record, it is apparent that Hon'ble Apex Court while discussing law of anticipatory bail, laid down in Sidharam ***Satlingappa Mhetre versus State of Maharashtra and others***, reported in (2011)1 SCC 694 as well as constitution Bench of Apex Court decision in ***Sushila Aggarwal versus State (NCT of Delhi)*** reported in (2020) 5 SCC 1 and decision of Apex Court in ***Myakala Dharmarajam versus The State of Telangana,*** reported in 2020 (2) SCC 743, propounded that at the time of considering an application for grant of anticipatory bail, nature and gravity of the accusation and the exact role of the accused; the antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence; from the possibility of the applicant fleeing from justice; likelihood of applicant repeating similar or other offences; where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her; impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people as well as consideration of Court; the entire available material against the accused and comprehensive exact role of accused in alleged offence is to be appreciated. The application seeking anticipatory bail should contain bare essential fact relating to offence and why the applicant reasonably apprehends arrest as well as his side of story is the essential for the Court to consider application and to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. While considering an application for grant of anticipatory bail, the Court has to consider the nature of offence, the role of the person, the likelihood of his influencing the course of investigation or tempering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country etc.) should also be considered. The Courts ought to be generally guided by consideration such as the nature and gravity of the offences, role attributed to the applicant and the fact of the case, while considering whether to grant anticipatory bail or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and is subject to the discretion of the Court.

5. In the present case, the accusation is that applicants Abdul Wahab and three others in mispresenting themselves to be office bearers of a committee known as District Cricket Association, Aligarh came to informant and assured for organizing a tournament, wherein the cricket team of Aligarh was to participate and upon this assurance, Rs. 15,000/- was drawn through cheque no. 38047 of ICICI Bank by informant, was received. Subsequently also money was taken, but no such tournament was held. Not only this, informant was nominated as Vice President of above Cricket Association, whereas subsequently informant came to know that neither this association was registered one nor was a registered Cricket Association, Aligarh. There was deceit with players and cricketers of District Aligarh, wherein they were said to be selected as member of district cricket team. The embezzlement of money and

manufacturing of forged and fictitious documents, account book etc. under garb of misrepresentation of above committee was said in first information report. This first information report was investigated and ultimately charge-sheet for offences punishable under section 419, 420, 467, 467, 471, 406 IPC was filed before the Court of Judicial Magistrate, wherein cognizance was taken. The applicants moved before the Court of Sessions Judge, Aligarh with a prayer for grant of anticipatory bail and this was heard and denied by the Court of Sessions Judge, Aligarh in Anticipatory Bail Application No. 758 of 2021 vide order dated 2.2.2021. Again there was an application under section 482 Cr.P.C. No. 18049 of 2020 moved with a prayer for setting aside criminal proceeding and it was denied by this Court vide order dated 28.1.2021 and it was held that there was substance for alleged commission of cognizable offence in the material placed on record.

6. The second round of anticipatory bail has been moved by way of this application before this Court, whereas cognizance has been taken on 28.2.2020. Wherein the present applicants have been charge- sheeted for the offences punishable under section 420, 467, 468, 471, 406 IPC of Police Station Civil Line, District Aligarh. Charge-sheet is at page No. 38 of paper book. The offences alleged to be committed by applicants, including misrepresentation about registration of District Cricket Association, Aligarh and applicants being office bearer of above association which was neither registered with Registrar Chit Fund Societies, Agra nor any office bearer-ship was there. Rather, Secretary of District Cricket Association has already filed a civil suit No. 554 of 2016 against applicants and one other with the same accusation that defendants including the present applicants were misrepresenting themselves to be a member of District Cricket Association, Aligarh and their activities of deceiving money in the name of District Cricket Association, Aligarh, manufacturing and fabricating documents and register were also result of forgery. This civil suit was filed by Aligarh District Association through its Secretary, Pradeep Singh who was said to be registered society under Registrar of Societies Chit Fund, Agra with specific registration No. 0747/1996-97. The same accusation is here in this criminal case. Hence, deceit, manufacturing of forged and valuable securities, receiving of money under the guise of misstatement, criminal breach of trust with regard to above trusted money etc. and deceit with public at large, including cricketers of District Aligarh are heinous offences, requiring no indulgence by this Court in granting anticipatory bail under section 438 of Cr.P.C.

7. Considering all these essential ingredients and parts of the consideration laid down by Hon'ble Apex Court, but without commenting on merits, later on to be seen by trial court on the basis of evidence, this application merits dismissal. **Dismissed**, as such. .

(2021)07ILR A274
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.07.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Bail No. 6572 of 2020
with
Bail No. 6614 of 2020

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

Counsel for the Applicant:
Dhirendra Pratap Singh, Ajay Kumar Singh, Vijay Pratap Singh

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 439 - bail - Indian Penal Code, 1860 - Sections 302/328/376D - Gang rape - The Protection of Children from Sexual Offences (POCSO) Act, 2012 - Sections 5/6 , Section29 - presumtion as to certain offences - Section30 - Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 - Section 3(2)(5) - merely because the Forensic Science Laboratory report is inconclusive, it is not necessary that the irresistible conclusion is only one that the accused is not guilty (*Rajendra Pralhadrao Wasnik v. State of Maharashtra)* .(Para - 26)

(B) Criminal Law - The Indian Evidence Act, 1872 - Section 32 (1) - Cases in which statements of relevant fact by person who is dead or cannot be found, etc., is relevant - When it relates to cause of death - narration of incident to the father and other witnesses is dying declaration - need no corroboration, if the statement is convincible with other evidence - narration by victim is sufficient to be a statement disclosing the cause of her death - no reason to disbelieve the said statement, if read alongwith the report of Forensic Science Laboratory .(Para - 16)

Incident of brutal and aggravated sexual assault on a minor girl - committed rape - administered forcibly poison - behaved inhumanly by filling up her vagina with soil - belongs to a poor and down trodden family, suffering trauma - victim girl died - police of the locality behaved apathetically with insensitive inaction on it's part - accused persons named by deceased-victim and reported to the police by her father - Special Court, POCSO Act come into action - allowed application under Section 156(3) of Cr.P.C. - F.I.R. registered.(Para - 10)

HELD:- In view of the observation of Hon'ble the Supreme Court in ***Rajendra Pralhadrao Wasnik v. State of Maharashtra*** it can be said that whatever stated in dying declaration by the deceased with regard to the cause of her death and the commission of gang rape upon her, told to her mother, father and uncle, deserves to be believed and relied on with credibility. Manner in which the offence is committed, the nature and conduct of the accused-applicants, all are sufficient to raise apprehension of abusing their liberty in case of release on bail in adversely affecting witnesses and the family of the victim's so as to effect the trial. (Para - 26,27,31)

Bail applications rejected. (E-6)

List of Cases cited:

1. Shama Vs St.of Har., (2017) 11 SCC 535

2. Sudhakar Vs St.of M.P., (2012) 7 SCC 569

3. Bharwada Bhoginbhai Hirjibhai Vs St.of Guj., (1983) 3 SCC 217

4. Rajendra Pralhadrao Wasnik Vs St.of Mah., (2019) 12 SCC 460

5. Sudha Singh Vs The St. of U.P. & anr., AIR 2021 SC 2149

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

1. These two bail applications for releasing the accused persons on bail are moved before this Court under Section 439 of the Cr.P.C..

2. The accused-applicants, Pankaj Kori in Criminal Misc. Application No.6614 (B) of 2020 and Dhermendra

Yadav in Criminal Misc. Application No.6572 (B) of 2020 are involved in Case Crime No.08/2020, under Sections 302/328/376D of I.P.C., Sections 5/6 of POCSO Act and Section 3(2)(5) of S.C./S.T. Act, registered at Police Station Fursatganj, District Amethi.

3. The accused-applicants, Pankaj Kori and Dharmendra Yadav moved their bail applications before the Special Judge, POCSO Act, Raebareli, respectively bail applications no.1109 of 2020 and 1100 of 2020 which were heard and rejected by a consolidated order dated 19.08.2020.

4. For the bail-applicant, Pankaj Kori, learned counsel Sri Dileep Kumar Pandey, Advocate and for the accused-applicant, Dharmendra Yadav, learned counsel Sri Dhirendra Pratap Singh, Advocate appeared through video conferencing for virtual hearing.

5. Learned A.G.A. on behalf of State Sri Rajiv Verma, Advocate also appeared before the Court in virtual hearing through video conferencing.

6. Since the matter pertains to Section 376-D of Indian Penal Code, 1860 and Section 5/6 of The Protection of Children from Sexual Offences (POCSO) Act, 2012 alongwith Section 3(2)(5) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 coupled with Section 302 and 328 of Indian Penal Code, 1860, therefore, pursuant to the order of the Court dated 23.09.2020, notice of bail applications was issued by the office to be served through Chief Judicial Magistrate, Sultanpur. Office has reported that the notice is served personally on the opposite party no.2, the father of the victim / informant. State has filed it's counter affidavit.

7. Briefly the case is that the Ram Kishor Pasi, resident of village Poore, Hanumat Mazare, Mohaiya Kesaria, Police Station Fursatganj, District Amethi complained before the Special Court, POCSO Act under Section 156(3) Cr.P.C. that his minor daughter aged about 16 years informed him on mobile phone on 29/30.04.2019 at about 12:30 A.M. that the accused, native villager of his village namely Pankaj Kori and Dharmendra Yadav respectively 25 years and 30 years of age committed rape on her and thereafter administered forcibly poison by reason of which, she is feeling extreme thirst of water and lying helpless below a mongo tree in the grove of Akhilesh. The complainant rushed up alongwith his wife and brother, Ram Bahadur on the spot and his daughter reiterated about incident as she had informed telephonically to him. She further told that the accused persons have filled up her vagina with soil. At that time, the informant's daughter, the victim was alive. He brought her at his home and after informing the police on their assurance, began to manage to take her to hospital. The entire family stayed waiting the police for a long but she could not be taken to the hospital until she was alive and suffering severe pain, ultimately she died. The police reached the complainant's home at about 06:00 A.M. after her death.

8. A complaint in writing against the accused persons was got written by the informant-father, the police carried away the dead body of the victim in police station, where accused persons were also found present, talking and whispering with S.I. Santosh Kumar Singh. Pursuant thereto, the S.I. started threatening to the informant and his family members that they would be committed to jail by him and their report will not be registered nor the post mortem will be

done unless his demand of Rs.15,000/- is not fulfilled. The informant under compulsion, any how managed the amount of Rs.15,000/- and paid to him. The S.I. got complainant's thumb impression on 3 to 4 blank papers, sent the body for post mortem but did not register the first information report. He began to avoid the informant and also did not handover the post mortem report to him, therefore, the informant-father of the deceased-victim had no option but to approach the District Magistrate, moved there an application, complaining the threat of life and limb on the part of accused and action not being taken by the police station. But when no action was taken, he dispatched the first information report of the incident on 02.07.2019 through registered post, addressed to the Police Superintendent, District Amethi but that too went in vain.

9. Compelled under the aforesaid circumstances, an application under Section 156(3) Cr.P.C. was moved before the competent court on 05.07.2019 which ultimately ordered by the Special Court (POCSO Act) on 26.10.2019 and the first information report was got registered.

10. The information reveals an incident of brutal and aggravated sexual assault on a minor girl, who belongs to a poor and down trodden family, suffering trauma, the victim girl died but the police of the locality behaved apathetically with insensitive inaction on it's part. The accused persons were named by the deceased-victim and reported to the police by her father. Minor in age, the girl was sexually assaulted and behaved inhumanly by filling up her vagina with soil. She was victimized in very gruesome manner that too cannot invoke the sensitivity of the local police. If the Special Court, POCSO Act does not come into action by allowing the application under Section 156(3) of Cr.P.C., the F.I.R. also could not be registered.

11. Contentions on behalf of accused

11.1 Learned counsel Sri Dilip Kumar Pandey, Advocate on behalf of accused-applicant-Pankaj Kori argued that before going into the first information report, it would be pertinent for the Court to look into at page 18 of the paper book, annexure no.2, which is moved to the Station House Officer, Police Station Fursatganj, District Amethi by the informant of the case, Ram Kishor to the effect that on 30.04.2019 at 02:30 A.M., his daughter aged about 17 years fallen in severe stomach ache and she died in the house as she got diarrhea, requesting not to proceed for legal action, if any.

11.2 Learned counsel further argued that the said letter reveals the real cause of the death of the victim and the first information report, pursuant to the order of the Court under Section 156(3) Cr.P.C. is subsequent development with ulterior motive and premeditated plan to falsely implicate the accused. He further drew attention towards the G.D. entry annexed by him as annexure no.3, reproducing the contents of annexure no.2, the alleged information by the informant-Ram Kishor. He further pressed on inquest report made annexure no.4 to the application, wherein the witnesses of the inquest and the S.I. have collectively opined that cause of death is not ascertained, therefore, post mortem of the dead body is necessary. He further drew attention towards annexure no.5, which is an information of death of the victim on 30.04.2019 at about 03:30 A.M. by reason of loose motion and vomitting. This letter was handed over to medical officer for post mortem.

11.3 Learned counsel for the applicant argued that the prosecution did

not try to identify the accused-applicant who allegedly committed offence of rape upon the victim. He further argued that the statement of informant was recorded alongwith statement of informant's brother and wife, though, they stated that the victim while she was alive, informed telephonically to the informant about the commission of rape by accused persons namely Pankaj Kori and Dharmendra Yadav and thereafter administered her poison is not admissible in evidence.

11.4 Learned counsel for the applicant further argued that there is no corroboration of the alleged statement of victim by other evidences. There is no independent witness, therefore, it does not deserve to be relied on and believed.

11.5 Learned counsel further argued that the charge sheet is submitted excluding the co-accused Santosh Kumar, S.I. posted at Police Station Fursatganj, District Amethi as the evidence could established the allegation made against him by the informant as to his being in collusion with the present accused, as such on the basis of same evidence, the accused cannot be prosecuted.

11.6 Learned counsel further argued that the most vital fact of the case is that the victim was subjected to gang rape but neither the inquest report nor the post mortem report has affirmed the sign of gang rape, therefore, allegations in the first information report and in the statement of the prosecution witnesses have no lacks for want of medical evidences.

11.7 Learned counsel lastly argued that accused-applicants are lingering in jail since 02.07.2020 for no fault of them, therefore, they should be released.

11.8 On behalf of accused, Dharmendra Yadav, learned counsel Sri Dhirendra Pratap Singh, Advocate submitted in agreement with the argument submitted by learned counsel Sri Dilip Kumar Pandey, Advocate subject to an addition that none of the accused persons were identified as the offender as well as their connection from the offence of gang rape over the victim, is not established by any evidence of the medical and forensic examination. The police tried to trace the location of accused from the mobile phone, getting C.D.R. reports from the tele-communication department but the location of the accused could not be traced from the spot of incident, where the offence has been committed.

11.9 On the basis of aforesaid facts and circumstances, learned counsels submitted that the entire prosecution story is nothing but false implication, therefore, the accused-applicants need be released on bail.

12. Contentions on behalf the Prosecution

12.1 Learned A.G.A., on the other hand, argued that accused-applicants are not innocent. The victim of the incident had her date of birth 08.07.2003, accordingly, as on the date of incident, she was nearly 15 years 9 months and 21 days old i.e. child under the definition clause of The Protection of Children from Sexual Offences (POCSO) Act, 2012. He drew the attention towards the statement of the father-complainant, recorded by the Investigating Officer under Section 161 Cr.P.C., where he has stated that the high school certificate for the purpose of showing date of birth and age of victim was hand over to the Investigating Officer. She was subjected to aggravative penetrative offence under Section 5/6 of The Protection of Children from Sexual Offences (POCSO) Act, 2012 as well as the rape was

committed by two persons simultaneously i.e. accused Pankaj Kori and Dharmendra Yadav, therefore, offence of Section 376-D I.P.C. read with Section 5/6 of POCSO Act is committed by them.

12.2 Learned A.G.A. argued that the victim narrated the whole incident on telephone to her father and to the mother and uncle when they reached alongwith father at the spot where she was lying helpless after the commission of rape below a mango tree in grove of one Akhilesh, a native villager. All of them have stated the same without any contradiction to the Investigating Officer that the accused persons, Pankaj Kori and Dharmendra Yadav committed rape on victim child, thereafter filled soil in her vagina and administered her poison. She was badly feeling thirsty by reason of poison.

12.3 Learned A.G.A. further argued that this is established by law from time to time in the judgment delivered by our own High Court and Hon'ble the Supreme Court that if the medical evidence is in deviation with the oral statement of witness particularly the statement of the victim who is at the pedestal of injured witness, the same could not be disbelieved even the medical report is liable to be discarded.

12.4 Learned A.G.A. further submitted that the entire situation reveals the high handedness and collusion, there is no whisper of examining the private parts while making autopsy over the dead body of deceased. Therefore, the report of post mortem seems to be prepared in collusion with person interested to get benefited from them.

13. After hearing to the rival contentions and arguments of the parties, the facts and evidence available on record should be considered for the decision on the issue of releasing the accused on bail.

14. Learned counsels for the applicants tried to divert attention of the Court to another approach of examining the incident suiting to them. He pressed on the annexure no.2, the information of death said to have been given by the father of the victim to the police station. On bare perusal of the said information, it does not emanate the Court to believe that the same was given by the father of the victim as information of death by reason of Diarrhoea to the police station. Neither date nor time of moving such application is entered thereon. Moreover, under Section 154 of the Cr.P.C., where the Station House Officer of the police station is duty bound to get reduced into writing, if any information of unnatural death is given to him and a copy of the said writing is to be furnished to the informant under the seal of the officer. The said annexure no.2 is not in the form of any such document, it seems to have been procured by the accused-applicants as a 'writing' purported to exhibit it as the same is of the father of the victim, so as to suit their version of defense.

15. In this patriarchal and male dominated society, even the fundamental and human rights of women are often denied and invalidated. In villages, towns and semi-urban areas, there is no effect of women's awakening going on for centuries but traditionally women are unsecured, deprived of equal rights, deprived of right to redress in justice. Undue advantage of this environment are taken by tyrants of the society, who do not have fear and hesitation in making girl child, adolescent girls and minors, a victim of their lust. Instead of providing justice to the victim or the families of the victim, the responsible people of the society, the law enforcement authorities start following the reverse

course of action. Non-writing of first information report by the police, not conducting relevant medical examination by the doctors etc. are example of this, which is nothing but negative activness of such people and authorities to prevent the fact or evidences from coming to light usually in collusion with the accused. In the recent past, in September 2020, the nation has shockingly witnessed the Hathras gang rape case, where the victim faced an extreme bestiality of the accused and ultimately died.

16. The narration of incident to the father and other witnesses is dying declaration, which need no corroboration, if the statement is convincible with other evidence. The Forensic Science Laboratory has confirmed human blood found on salwar, which the deceased wore at the time of incident and human semen was also found. The chemical examination report confirms the statement of victim made to her family members when she was alive. The family members have stated the same. The narration by victim is sufficient to be a statement disclosing the cause of her death. There is no reason to disbelieve the said statement, if read alongwith the report of Forensic Science Laboratory at this stage.

17. This would be pertinent to state here that the accused-applicant's involvement in the crime became known to all only after the victim narrated the entire incident to her father, firstly on telephone and thereafter when the father and other witnesses reached to her at the spot of incident and brought her to home, she told the entire incident, how happened and who was the culprit, to her father (the informant), mother as well as to uncle. The father rushed up to police station instantly as he stated in his statement but the police did not come at once but opted to reach at the home of the victim at 06:00 A.M. Till then, the victim could not survive and died.

18. I perused on record, annexure no.6 on the paper book, the post mortem report wherein no external injury is reported as anti mortem injuries. Since cause of death could not be ascertained, the doctor preserved viscera for forensic examination. The viscera alongwith clothes wore by the deceased at the time of death were chemically examined in the Forensic Science Laboratory. The viscera report is made annexure no.11, which discloses that a considerable amount of Aluminum Phosphate poison is found. Likewise, the salwar, underwear, top, thread alongwith locket and nosepin as item no.1 to 5 were sent for the chemical examination. The salwar, underwear and top was found stained with human blood and on the salwar, the human semen was also found. All these are clear and unambiguous evidence prima facie establishing the sexual assault on the victim.

19. The argument of learned counsel for the accused persons with regard to the statement of deceased-victim as to the commission of rape and her murder by poisoning is unbelievable as it is not recorded by the Magistrate on prescribed format is baseless as Hon'ble the Supreme Court in the case of ***Shama Vs. State of Haryana***1, it is held:-

"Law does not prescribe any format for recording dying declaration; and secondly, it also does not prescribe any specific authority to record it unless any special law or rule is enacted to that effect. On the other hand, perfect working and neatly structured dying declaration at times brings about an adverse impression and

creates suspicion in mind of court, since dying declaration need not be drawn with mathematical precision. All that law requires is that declarant should be in a fit state of mind and be able to recollect the situation resulting in the available state of affairs in relation to the incident and the court should be satisfied that reliance ought to be placed thereon rather than distrust."

20. In the case of ***Sudhakar Vs. State of Madhya Pradesh***2, it is laid down that :-

"20. The "dying declaration" is the last statement made by a person at a stage when he is in serious apprehension of his death and expects no chances of his survival. At such time, it is expected that a person will speak the truth and only the truth. Normally in such situations the courts attach the intrinsic value of truthfulness to such statement. Once such statement has been made voluntarily, it is reliable and is not an attempt by the deceased to cover up the truth or falsely implicate a person, then the courts can safely rely on such dying declaration and it can form the basis of conviction. More so, where the version given by the deceased as dying declaration is supported and corroborated by other prosecution evidence, there is no reason for the courts to doubt the truthfulness of such dying declaration."

21. In order to deal with the argument of learned counsel for the accused-applicants that the prosecution could not proceed against them only on the basis of statement of deceased-victim, which was made to her family members only, it would be relevant to quote Section 32 (1) of the Indian Evidence Act, 1872, which is as follows:-

"Section 32 : Cases in which statements of relevant fact by person who is dead or cannot be found, etc., is relevant-*Statement, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:*

(1) When it relates to cause of death

When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under the expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

22. The deceased victim narrated the incident of gang rape committed by the accused persons to her father, mother and uncle before her death. After her death that narration have assumed the status of dying declaration explaining cause of her death. Any corroborative evidence is not necessarily required to place reliance on it, provided it in itself appears to be readily true in the circumstances of the case free of doubts. Moreover, requirement of

certificate provided by a doctor in respect of such state of deceased, is not essential in every case.

23. The reliance may be placed of in the judgment of Hon'ble the Supreme Court in case of ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat***3, where it is held that corroboration to the testimony of the victim of sexual offence is not required except corroboration by medical evidence, if available, no other corroborating evidence required if the victim's testimony is otherwise believable. Here the victim's statement as dying declaration is stated by her parents and uncle, which is supported by forensic science examination report.

24. During the investigation, the investigating officer has written the statement of mother, uncle and the first informant-father of the deceased victim and the father, in which the incident of brutal sexual violence happened to her and the perpetrators who caused the incident. There is no mutual contradiction, deviation or material contradiction in the statements of all of them.

25. Learned counsel for the accused-applicants vehemently argued that merely because of Forensic Science Laboratory report, the present accused-applicants could not be detailed as connected with the offence, as the report is inconclusive with regard to the semen found on the salwar, wore by the deceased at the time of incident.

26. In a recent judgment of ***Rajendra Pralhadrao Wasnik v. State of Maharashtra***4, Hon'ble the Supreme Court held that merely because the Forensic Science Laboratory report is inconclusive, it is not necessary that the irresistible conclusion is only one that the accused is not guilty.

27. In view of the above observation of Hon'ble the Supreme Court, it can be said that whatever stated in dying declaration by the deceased with regard to the cause of her death and the commission of gang rape upon her, told to her mother, father and uncle, deserves to be believed and relied on with credibility.

28. It would be pertinent to refer Section 29 and 30 of The Protection of Children from Sexual Offences (POCSO) Act, 2012, which is quoted as under:-

"29. Where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.-In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

29. The provision of Section 29 provides for a presumption as to certain offences. It provides that where a person is prosecuted for violating any of the provisions under Section 3, 5, 7 and 9 of the Act and where the victim is a child, below the age of 16 years, the Special Court shall presume that such person has committed the offence unless the counter is proved. The offence against the accused-applicant bears a reverse burden of proof, therefore, their argument as to the lack of evidences against them for proving the offence committed by them is not tenable.

30. At the stage of hearing on the bail application of accused this court without going deep into the scrutiny of evidences collected by the investigating officer, is to assess them on "probability factor" only. The version of the victim about the incident of gang rape as stated by the witnesses finds corroboration from the forensic science lab's examination report of clothes (salwar) wore on the body of deceased, was found stained with human blood and human semen. Like wise the victim's version of administering her poison by the accused as stated by the witnesses also finds support as the viscera extracted from the dead body of deceased for forensic examination was found containing poison like Aluminum phosphate, sufficient to cause death. Informant-father of the deceased is not pleaded to be inimical with the accused since before the incident of rape. He is not blamed by the accused to be interested any how to falsely implicate to get them behind the bar. They are most natural witnesses. As such, the witnesses are prima facie reliable and credible, their statements as to dying declaration of the victim as stated by the witnesses sufficient to explain cause of her death by reason of administering poison to her by accused after committing brutal gang rape. The prosecution case, thus prima facie found established against the accused persons.

31. The manner in which the offence is committed, the nature and conduct of the accused-applicants, all are sufficient to raise apprehension of abusing their liberty in case of release on bail in adversely affecting witnesses and the family of the victim's so as to effect the trial.

32. Moreover, it would not be out of place to observe that from the very inception, just after the incident, the people of the locality, the police, all seem to had acted in protecting the accused-applicants from prosecution. The First Information Report was not got registered despite the fact that father of the victim approached the police instantly in the night of the incident, he was told to wait so that the victim may be sent to the women hospital for medical examination. The victim died but the police reached only thereafter at 06:00 A.M. in the morning. Despite the fact stated by the victim to her parents that she was brutally with aggravation subjected to gang rape by both the accused and their criminal animus was so aggravated and heinous that they filled soil in her vagina and administered her poison, the Aluminum Phosphate to ensure her death. Therefore, the personal liberty of the accused is not to override, the right to life of the victim's family and for fair trial, the complainant would need a completely fear-free environment as a witness. He has the right to have a fair trial of the matter.

33. Hon'ble the Supreme Court further in the case of ***Sudha Singh Vs. The State of Uttar Pradesh & Anr.***5 held as follows:-

"12. There is no doubt that liberty is important, even that of a person charged

with crime but it is important for the courts to recognise the potential threat to the life and liberty of victims/witnesses, if such accused is released on bail."

34. This would also not be irrelevant to mention that while the police officers were making inquest and doctors were doing autopsy on the body of the deceased in post mortem house, despite the fact, the blood stained salwar of the victim was sent to Forensic Science Laboratory for chemical examination, no private part of the deceased was examined so as to verify the allegations of gang rape with her. Neither the inquest report nor the post mortem report have made any such report.

35. All these facts, if they are true, sufficient to gather inference of high handedness of the accused-applicants affecting the things in their favour. Therefore, their release on bail at this stage cannot be considered.

36. The application of the bail moved on behalf of accused-applicants on the basis of above discussions is ***rejected***.

37. The trial court is required to examine as soon as possible, the prosecution witnesses and proceed further with the disposal of the case, therefore, a direction is hereby issued to the Court concerned to proceed expeditiously within one year, from the date, the certified copy of the order is placed before it.

38. It is further clarified that the learned trial court while deciding the case on merit, shall not swayed upon with the observation made by this Court in the order because occasion to make such observations arisen while dealing with the argument made at the stage of bail by learned counsels for the bail-applicants.

39. The officers entrusted with the prosecution i.e. A.D.G. (Police) / Incharge of D.G. (Prosecution), State of U.P., Lucknow, Joint Director (Prosecution), Amethi and D.G.C. (Criminal), Amethi are directed to ensure the production of prosecution witness before the trial court expeditiously and get them examined so that the trial court may be able to decide the case expeditiously within a prescribed period of one year. They are further directed to ensure the protection of witnesses of prosecution.

40. The Senior Registrar of the Court to ensure the service and communication of order to (i) A.D.G. (Police) / Incharge of D.G. (Prosecution), State of U.P., Lucknow, (ii) Joint Director (Prosecution), Amethi and (iii) D.G.C. (Criminal), Amethi through email in addition to the usual course of communication and service of orders as prescribed under rules.

(2021)07ILR A284
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2020

BEFORE

THE HON'BLE SIDDHARTH, J.

Crl. Misc. Anticipatory Bail Application No. 8285 of 2020

Adil ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Sadaful Islam Jafri, Sri Iqubal Hussain, Sri Nazrul Islam Jafri (Senior Adv.)

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 438 - Indian Penal Code, 1860 - Sections 307 & 504 - anticipatory bail - If the facts of the given case make the applicant entitled for grant of anticipatory bail, even after submission of charge sheet against him and cognizance of the same by the Court, the second anticipatory bail would be maintainable before the High Court even though the applicant was earlier granted anticipatory bail till the submission of charge sheet by the High Court. (Para - 11)

FIR lodged against the applicant with regard to incident of the same date - allegation - co-accused fired upon the informant on the instigation of applicant - did not hit the informant - Neither named in the FIR - nor in the statement of the witnesses recorded by the Investigating Officer any weapon has been assigned to him - no criminal history .(Para - 12,13)

HELD:- Power to grant anticipatory bail vested in High Court does not comes to an end after submission of charge sheet.(para - 11)

Anticipatory bail application allowed. (E-6)

List of Cases cited:

1. Anirudh Prasad @ Sadhu Yadav Vs The St. of Bihar, Patna High court

2. Bharat Chaudhary & anr. Vs St. of Bihar & anr. (2005) 8 SCC 77

3. Imratlal Vishwakarma & ors. Vs St. of M.P., 1996(0) MPLJ 662

4. Ravindra Saxena Vs St. of Raj., (2010) 1 SCC 684

5. Jagmohan Bahl & anr. Vs St. (NCT of Delhi) & anr. (2014) 16 SCC 501

6. Salauddin Abdul Samad Shaikh Vs St. of Maharashtra, (1996) VI SCC 667

7. Vinod Kumar Vs St. of U.P. & anr., 2019 (12) ADJ 495

8. Sushila Aggarwal Vs St. (NCT of Delhi), 2020 SCC Online SC 98

(Delivered by Hon'ble Siddharth, J.

1. Heard Sri N.I. Jafri, learned Senior Counsel assisted by Sri S.I. Jafri, learned counsels for the applicant and learned A.G.A for the State.

2. The instant Anticipatory Bail Application has been filed with a prayer to grant an anticipatory bail to the applicant, namely, **Adil**, Case Crime No. 89 of 2019, under Sections- 307 and 504 IPC, Police Station- Civil Lines, District- Aligarh.

3. Prior notice of this bail application was served in the office of Government Advocate and as per Chapter XVIII, Rule 18 of the Allahabad High Court Rules and as per direction dated 20.11.2020 of this Court in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 8072 of 2020, Govind Mishra @ Chhotu Versus State of U.P., hence, this anticipatory bail application is being heard. Grant of further time to the learned A.G.A as per Section 438 (3) Cr.P.C. (U.P. Amendment) is not required.

4. This anticipatory bail application has been filed praying for enlargement of the applicant on anticipatory bail again when earlier he was granted anticipatory bail by this court vide Criminal Misc. Anticipatory Bail Application No. 29238 of 2019 till the submission of police report

under Section 173(2) Cr.P.C. Learned Senior Counsel for the applicant has submitted that the Investigating Officer has submitted charge sheet against the applicant and the co-accused under Section 307/504 IPC before CJM, Aligarh and after cognizance of the same the applicant alongwith co-accused have been summoned by the court vide order dated 02.11.2019. Hence the applicant may be enlarged on anticipatory bail till the conclusion of trial.

5. Learned A.G.A has opposed the prayer made on behalf of the applicant and has submitted that once anticipatory bail was granted to the applicant for a limited period and he availed the same, there is no occasion for granting him further anticipatory bail till the conclusion of trial. Since the charge sheet has been submitted and cognizance has been taken thereof by the C.J.M., hence the applicant may apply for regular bail under Section 439 Cr.P.C or he may challenge the charge sheet and summoning order passed by the C.J.M., concerned.

6. Learned Senior Counsel for the applicant has relied upon the judgment of the Patna High Court in the case of ***Anirudh Prasad @ Sadhu Yadav vs. The State of Bihar dated 22, May, 2006*** wherein the Patna High Court had earlier granted anticipatory bail to the applicant till the submission of police report. Later when the charge sheet was filed against him he moved second anticipatory bail application for granting him anticipatory bail till the conclusion of trial. The prayer was turned down by Patna High Court but the Apex Court did not agreed to the same and directed the Patna High Court to consider the bail application of the applicant afresh. The Patna High Court found that the power to grant anticipatory bail does not comes to an end by mere submission of charge sheet against the applicant. After considering the merits of the case anticipatory bail was granted to the applicant by the Patna High Court till the conclusion of trial.

7. Next reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of ***Bharat Chaudhary & Another vs. State of Bihar & Another (2005) 8 SCC 77*** dated 08.10.2003 wherein the Apex Court held that there is no restriction on the power of the courts empowered to grant anticipatory bail under Section 438 Cr.P.C to prevent undue harassment of accused persons by pre-trial arrest and detention. It can be granted even when cognizance on charge sheet has been taken.

8. Learned Senior Counsel for the applicant has further relied upon the judgment of Madhya Pradesh High Court in the case of ***Imratlal Vishwakarma and Others vs. State of Madhya Pradesh dated 09.12.1996, 1996(0) MPLJ 662*** and the judgment of the Supreme Court in the case of ***Ravindra Saxena vs. State of Rajasthan (2010) 1 SCC 684 dated 15.12.2009*** where the second anticipatory bail application of the applicant was dismissed by the High Court but the Apex Court disapproved the same and granted liberty to the applicant to make third anticipatory bail application before the High Court. The anticipatory bail application of the applicant in that case was rejected only because challan was presented against him before the court.

9. Final reliance has been placed on the judgment of the Apex Court of ***Jagmohan Bahl and Another vs. State (NCT of Delhi) and Another (2014) 16 SCC 501*** which does not addresses the

controversy involved in the present bail application.

10. Learned A.G.A has relied upon the case of ***Salauddin Abdul Samad Shaikh vs. State of Maharashtra (1996) VI SCC 667*** wherein the Apex Court held that when the anticipatory bail is granted by the court of Session or the High Court, it is at the stage of incomplete investigation. The nature of offence against the offender is not before the court, therefore, anticipatory bail order should be of limited duration only and after the aforesaid duration expires the matter should be left for the regular court to deal with it and the court granting anticipatory bail should not substitute itself for the original court. He has also relied upon the judgment of this court in ***Vinod Kumar vs. State of U.P. & Another 2019 (12) ADJ 495*** and has submitted that this court has mandated that interim bail would continue only till submission of charge sheet before the court.

11. After considering the rival contentions this court finds that the Apex Court in the case of ***Bharat Chaudhary and Another vs. State of U.P. and Another (Supra)*** has considered the judgment of ***Salauddin Abdul Samad Shaikh (supra)*** and has held that it does not imposes any restriction or absolute bar on the court granting anticipatory bail even in cases where either cognizance has been taken or a charge sheet has been filed. The Apex Court has found that it only lays down a guideline that while considering prima facie case against an accused, the factum of cognizance having been taken and filing of charge sheet would be of some assistance for coming to the conclusion whether the accused is entitled for anticipatory bail or not. Now this judgment stands overruled by the judgment of Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98***. Regarding the judgment of this court in ***Vinod Kumar (Supra)*** the observations were that till such time this issue is decided by the larger Bench the anticipatory bails shall continue till summoning of accused on the basis of police report submitted under Section 173(2) Cr.P.C. The issue stands decided 5 Judge Bench of the Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98***. The Apex Court has settled the controversy finally by holding the anticipatory bail need not be of limited duration invariably. In appropriate case it can continue upto conclusion of trial. Therefore after considering the authorities cited on behalf of the learned Senior Counsel for the applicant this court is of the view that power to grant anticipatory bail vested in High Court does not comes to an end after submission of charge sheet. <u>If the facts of the given case make the applicant entitled for grant of anticipatory bail, even after submission of charge sheet against him and cognizance of the same by the Court, the second anticipatory bail would be maintainable before the High Court even though the applicant was earlier granted anticipatory bail till the submission of charge sheet by the High Court.</u>

12. Now coming to the factual matrix of the case this court finds that FIR dated 28.02.2019 was lodged against the applicant with regard to incident of the same date alleging that co-accused, Nabel, fired upon the informant on the instigation of applicant, but it did not hit the informant. The applicant filed Anticipatory Bail Application No. 29238 of 2019 which

was allowed by this court vide order dated 23.07.2019 granting anticipatory bail to the applicant till the submission of police report under Section 173(2) Cr.P.C. Now charge sheet has been submitted and cognizance has been taken by C.J.M., Aligarh thereon vide order dated 02.11.2019. The applicant has also been summoned by C.J.M.

13. Applicant belongs to a reputed family and is pursuing B.A., L.L.B. Course in Aligarh Muslim University. His father is an Assistant Professor in the same University. Neither in the FIR nor in the statement of the witnesses recorded by the Investigating Officer any weapon has been assigned to him. He has been implicated only to spoil his life career. The applicant has no criminal history nor he has ever been implicated in any other case. The Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98*** has held that the bail can be granted to an accused till the conclusion of trial and therefore applicants' prayer can be considered for grant of anticipatory bail till the conclusion of trial.

14. Hence without expressing any opinion on the merits of the case and considering the nature of accusations and of applicant antecedents the applicant is directed to be enlarged on anticipatory bail as per the Constitution Bench judgment of the Apex Court in the case of ***Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98*** and order dated 22.05.2020 passed by this Court in Criminal Misc. Anticipatory Bail Application No. 2609 of 2020. The future contingencies regarding anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court.

15. Let the applicant involved in the aforesaid crime be released on anticipatory bail on furnishing a personal bond with two sureties each in the like amount to the satisfaction of the trial court concerned with the following conditions:-

1. The applicant shall not leave India during the currency of trial without prior permission from the concerned trial Court.

2. The applicant shall surrender his passport, if any, to the concerned trial Court forthwith. His passport will remain in custody of the concerned trial Court

3. That the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

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

5. In case, the applicant misuses the liberty of bail, the trial Court concerned may take appropriate action in accordance with law and judgment of Apex Court in the case of Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98.

6. The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of

liberty of his bail and proceed against him in accordance with law.

7. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

8. The concerned Court /Authority/Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)07ILR A289
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.06.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 8720 of 2021

Amit ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Praveen Kumar Tripathi, Sri Shri Krishna Tripathi

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Indian Penal Code, 1860 - Section 392 - offence of robbery , Section 411 - Dishonestly receiving stolen property - 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.(Para - 9)

Informant lodged F.I.R. with regard to an incident - against two unknown persons for the offence of robbery - allegation - snatching of gold chain .(Para - 3)

HELD:- The applicant is a repeated offender and has a long criminal history of 17 cases . Applicant has misused the liberty of bail granted to him on earlier occasions by repeatedly indulging himself in such offences. Considering long criminal history of the applicant and his conduct, this Court is of the view that there is no good ground to release the applicant on bail at this stage. (Para - 7,10)

Bail application rejected. (E-6)

(Delivered by Hon'ble Sanjay Kumar Singh, J.

1. Heard learned counsel for the applicant, Mr. Rabindra Kumar Singh, learned Additional Government Advocate assisted by Mr. Prashant Kumar Singh, learned Brief holder appearing on behalf of the State of U.P. through video conferencing and perused the record of the case.

2. The instant bail application has been filed on behalf of the applicant with a prayer to release him on bail in Case Crime No. 466 of 2020, under Section 392, 411 I.P.C., Police Station-Panki, District-Kanpur Nagar during the pendency of trial.

3. As per the prosecution case, facts of the case in brief are that on 04.10.2020 informant Smt. Pushpa Devi lodged F.I.R. at 16:40 O'clock as Case Crime No. 466 of 2020 at P.S. Panki, District-Kanpur City with regard to an incident that took place on 04.10.2020 at 12:30 p.m. against two unknown persons for the offence of robbery under 392 I.P.C. alleging inter alia that on 04.10.2020 she along with her daughter Sunita Jain and daughter-in-law

Priti Gupta had left her house for Rambagh by auto-rickshaw No. U.P. 78 CT 3306. Thereafter they reached near power house market, where her daughter got an auto-rickshaw stopped and went to purchase fruits. Meanwhile the auto-rickshaw driver went to take pan masala. At that time she along with her daughter-in-law were sitting in the auto rickshaw. At the same time two bike-borne men approached their auto-rickshaw on Apache motorcycle from Kalyanpur side. The person sitting behind the rider on the motorcycle had covered his face and before she could understand something,they fled towards Panki temple snatching her gold chain.

4. It is also the case of prosecution that on 21.10.2020 police apprehended two persons, namely Amit (applicant) and co-accused Kundan using necessary force near Central School and recovered four chains of yellow metal and rupees two thousand from their possession. It is also stated that at the time police tried to apprehend them, they fired at the police personal by country made pistol. They were asked to surrender themselves but they again started loading their pistol, then the police personnel in their self defence also fired upon the accused persons under compelling circumstances, which hit the accused on their legs. On frisking them, two chains of yellow metal, an amount of rupees one thousand, one country made pistol of 315 bore, one live cartridge of 315 bore and one empty cartridge which was lying at the spot were recovered from the possession of applicant Amit and two chain of yellow metal,one thousand rupees, one country made pistol of 315 bore, one live cartridge of 315 bore and and one empty cartridge which was lying at the spot were recovered from the possession of co-accused Kundan. Thereafter separate F.I.R. was lodged as Case Crime No. 0063 of 2020, under Section 307 I.P.C. against the applicant and co-accused Kundan at P.S. Armapur, District Kanpur City connecting the applicant with present Case Crime No.466 of 2020 as well as in case crime no.257 of 2020 and 258/2020 under Section 392 I.P.C. registered at police station Najirabad, district Kanpur City.

5. It is argued by learned counsel for the applicant that police after apprehending falsely implicated the applicant in six cases (crime no.63of 2020 under Section 307 I.P.C., crime no.64 of 2020 under Section 3/25.Arms Act, crime no.481 0f 2020 under Section 392,411 I.P.C., crime no.737 of 2020 under Section 392,411 I.P.C., crime no.257 of 2020 under Section 392, 411 I.P.C. and crime no.258 of 2020 under Section 392,411 I.P.C.), out of which applicant has been granted bail in three cases being case crime numbers 63 of 2020, 481of 2020 and 737 of 2020 by orders dated 04.12.2020, 15.12.2020 and 11.12.2020 of the concerned court below. It is next submitted that false recovery has been shown from the possession of applicant. There is no independent witness of the alleged recovery. In paragraph no. 12 of the bail application it is mentioned that the applicant has a criminal history of 11 cases which have been planted against the applicant. Lastly it is submitted that applicant is in jail since 21.10.2020 and on granting bail in this case, the applicant will appear before the trial court on each dates and will not misuse the liberty of bail.

6. Per contra, learned A.G.A. vehemently opposed the prayer for bail of the applicant by contending that applicant is habitual offender and has a long criminal history of 17 cases apart from present case. It is also submitted that in case applicant is granted bail, he will again

indulge in similar offence. Details of the criminal history of the applicant as pointed out by the learned A.G.A. are given herein below :

"1. Case Crime No. 257 of 2020, under Section 392/411 I.P.C., P.S. Nazirabad, District-Kanpur City.

2. Case Crime No. 01 of 2020, under Section 394 I.P.C., P.S. Kakwan, District-Kanpur City.

3. Case Crime No. 279 of 2012, Section 356 I.P.C., P.S. Kidwai Nagar, District-Kanpur City.

4. Case Crime No. 214 of 2012, under Section 392 I.P.C., P.S. Kidwai Nagar, District-Kanpur City.

5. Case Crime No. 189 of 2012, under Section 392 I.P.C., P.S. Shivrajpur, District-Kanpur City.

6. Case Crime No. 159 of 2012, under Section 356 I.P.C., P.S. Shivrajpur, District-Kanpur City.

7. Case Crime No. 207 of 2012, under Section 392/411 I.P.C., P.S. Kakadeo, District-Kanpur City.

8. Case Crime No. 191 of 2012, under Section 3/25 Arms Act, P.S. Shivrajpur, District-Kanpur City.

9. Case Crime No. 337 of 2012, under Section 3(1) Gangster Act, P.S. Kakadeo, District-Kanpur City.

10. Case Crime No. 548 of 2012, under Section 392/411 I.P.C., P.S. Kalyanpur, District-Kanpur City.

11. Case Crime No. 1153 of 2009, under Section 18/20 of N.D.P.S. Act, P.S. Kalyanpur, District-Kanpur City.

12. Case Crime No. 218 of 2019, under Section 4/25 Arms Act, P.S. Kalyanpur, District-Kanpur City.

13. Case Crime No. 258 of 2020, under Section 392 I.P.C., P.S. Nazirabad, District-Kanpur City.

14. Case Crime No. 481 of 2020, under Section 392, P.S. Kidwai Nagar, District-Kanpur City.

15. Case Crime No. 737 of 2020, under Section 392 I.P.C., P.S. Barra, District-Kanpur City.

16. Case Crime No. 63 of 2020, under Section 307 I.P.C., P.S. Armapur, District-Kanpur City.

17. Case Crime No. 64 of 2020, under Section 3/25 Arms Act, P.S. Armapur, District-Kanpur City."

7. After having heard the argument of learned counsel for the applicant and learned A.G.A., I find that the applicant is a repeated offender and has a long criminal history of 17 cases as mentioned above. Offence under Section 392 I.P.C. is punishable with rigorous imprisonment for a term which may extend to ten years. Record indicates that applicant has misused the liberty of bail granted to him on earlier occasions by repeatedly indulging himself in such offences. In the circumstances this Court is not satisfied that applicant is not likely to commit any offence while on bail.

8. A spurt in incidents of chain-snatching is a matter of grave concern and has created fear psychosis rendering many women reluctant to step out of their home. Even as the chain-snatchers continue to prowl the city with repeated incidents of them targeting women, a sense of fear has been instilled in women who have now stopped wearing gold ornaments or at the most wear a very thin one that is not even visible. Such incidents need to be taken seriously and the offenders must be instilled with a sense of fear so that women feel safe and free as such incidents not only cause terror but also restrict their mobility.

9. 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.

10. On account of the reasons mentioned above and considering long criminal history of the applicant and his conduct, this Court is of the view that there is no good ground to release the applicant on bail at this stage.

11. Accordingly, without expressing any opinion on the merit of the case, bail application of the applicant is rejected at this stage.

12. Copy of this order be sent to the concerned court below as well as to the informant of this case within two weeks.

(2021)07ILR A292
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.06.2021

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Crl. Misc. Bail Application No. 14291 of 2021

Zahid ...Applicant (In Jail)
Versus
Union of India ...Opposite Party

Counsel for the Applicant:
Sri Salman Ahmad, Sri Naseem Ahmad

Counsel for the Opposite Party:
Sri Ashish Pandey

(A) Criminal Law - Code of criminal procedure, 1973 - Section 439 - Narcotic Drugs & Psychotropic Substances Act,1985 - Sections 8/29/22 , Section 37 - Bail on the ground of parity of order - Offences to be cognizable and non-bailable , Section 50 - search before a Gazetted Officer or Magistrate - recording of finding in terms of section 37 of N.D.P.S. Act is a *sine qua non* for granting bail - 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.(Para -10,11)

Recovered and seized 61000 bottles of 100 ml each of Phensedyl syrup containing Codeine Phosphate - serial No. 28 of the list of Narcotics Drugs & Psychotropic Substances - much more than the commercial quantity - provisions of section 37 of Narcotics Drugs & Psychotropic Substances Act are attracted in this case .(Para - 9)

HELD:- Neither any reason has been recorded nor provisions of section 37 of N.D.P.S. Act has been considered in the said order while granting bail to the co-accused. The benefit of parity of order dated 15.06.2021 of co-accused cannot be given to present applicant. Each and every case depends on its own facts and a close similarity between one case and another is not enough, because even a single significant detail may alter entire aspect of the case.**(**Para - 10,12,13)

Bail application on the ground of parity rejected. (E-6)

List of Cases cited:

1. Sonu Vs Sonu Yadav & anr., AIR 2021 SC 201

2. U.O.I. Vs Prateek Shukla, AIR, 2021 SC 1509

3. Narcotics Control Bureau Vs Laxman Prasad Soni, etc., Criminal Appeal No. 438-440 of 2021

4. U.O.I. Vs Rattan Mallik @ Habul, 2009 (1) SCC (Crl) 831

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

1. Keeping in view the Pandemic (COVID-19), the case is taken up through video conferencing.

2. Heard learned counsel for the applicant and Mr. Ashish Pandey, learned Special Public Prosecutor (Narcotics) appearing on behalf of Union of India through video conferencing and perused the material placed on record.

3. By means of this application, the applicant, who is involved in Case Crime No. 04 of 2021, under sections 8/29/22 of Narcotic Drugs & Psychotropic Substances Act, police station N.C.B., district Lucknow, is seeking enlargement on bail during the pendency of trial.

4. In nutshell, the facts of this case are that on 17.01.2021 at about 13.00 O'clock Intelligence Officer of Narcotics Control Bureau received a confidential information from reliable sources that Avnish Singh @ Chhotu and Chandan Kumar Tiwari, residents of Jaunpur, hid the illegal stock of Phensedyl syrup in the go-down, which they will send to Bengal by two trucks. This information was conveyed by the Intelligence Officer to the Superintendent, N.C.B. Lucknow. Thereafter, a team consisting officers of N.C.B., Lucknow and S.T.F. Varanasi was formed to carry out the operation, which succeeded in apprehending the accused persons and two trucks bearing No. UP 53 BT 7304 and RJ 40 GA 0142. On interrogation, the apprehended accused persons disclosed their names as Zahid, Ameen Khan, Chandan Kumar, Jitendra Prajapati, Brijesh Singh and Jai Singh. The accused were served with the notice under section 50 of the Narcotics Drugs and Psychotropic Substances Act and were enlightened about their legal rights in terms of section 50 of N.D.P.S. Act to be searched before a Gazetted Officer or Magistrate. They were searched before Circle Officer, but no incriminating articles were recovered from their personal search. However, on the pointing out of accused Chandan Kumar from the dumper of truck bearing No. UP 73 BT 7304, ten cartons of Phensedyl syrup were recovered. Thereafter, on search of go-down, 610 packets of Abbott Company, in which Phensedyl syrup were kept, recovered. In one packet, 100 plastic bottles, on which Chlorpheniramine Maleate & Codeine Phosphate cough Linctus, Phensedyl @ New 100 ml, were printed, also recovered. The weight of bottle was 135 gms. On analysis the contents of the bottle, it was found that Codeine Phosphate was mixed, which comes within the ambit of Narcotics Drugs and Psychotropic Substances Act. The aforesaid recovered items were made by Abbott Health Care Pvt. Ltd., District Solan, Himachal Pradesh. The quantity of recovered items was 61000 bottles of 100 ml each. From truck No. UP 53 B.T. 7304, sack of rice and from truck No. RJ 40 GA 0142, plywood were also recovered. Recovery memo was prepared at the spot following required legal formalities. On the basis of aforesaid recovery memo, a case was registered against the accused persons at Case No. 4 of 21, under section 8/29/22 N.D.P.S. Act, police station N.C.B., district Lucknow.

5. Main substratum of argument of learned counsel for the applicant is that the applicant is driver of truck bearing No. RJ 40 GA 0142. The co-accused Ameen Khan, who is the cleaner of the said truck, has already been granted bail by co-ordinate Bench of this Court vide order 15.06.2021 in Criminal Misc. Bail Application No. 14601 of 2021, therefore the applicant is

also entitled to be released on bail on the ground of parity. It is next submitted by the learned counsel for the applicant that there is no recovery from the possession of the applicant and he has been falsely implicated in this case.

6. Per contra, Mr. Ashish Pandey, learned Special Public Prosecutor appearing on behalf of opposite party-Union of India through Narcotics Control Bureau, Lucknow, vehemently opposed the aforesaid submission of learned counsel for applicant by contending that:

(i) All the six accused persons, who were involved in this case, were apprehended at the spot.

(ii) The applicant was having conscious possession of aforesaid recovery.

(iii) There is no enmity between officers of Narcotics Control Bureau and the S.T.F. with the applicant, therefore, allegation of false implication is without any basis and against the evidence on record.

(iv) The huge quantity of 61000 bottles of 100 ml each of Phensedyl syrup cannot be planted.

(v) The mandatory requirements as provided under the Narcotics Drugs & Psychotropic Substances Act have been followed by the officer concerned.

(vi) Illicit trafficking is a organized crime and are done adopting different *modus operandi* by a group of persons.

(vii) All the accused persons of this case were involved together in the illicit trafficking with their different role.

(viii) The place of seizure of the recovery is situated at Faizabad road near Public Inter College, Shahganj, district Jaunpur, which is not on the route of West Bengal.

(ix) The act of the applicant as well as co-accused comes under the purview of "illicit traffic" as defined in section 2 (viii b) (iii) & (iv) of the N.D.P.S. Act.

(x) In view of section 54 of the N.D.P.S. Act, presumption shall also be drawn against the applicant unless the contrary is proved.

(xi) At this stage, it cannot be said that applicant is not guilty of alleged offence.

(xii) So far as bail order dated 15.06.2021 of co-accused Ameen Khan is concerned, it is submitted by Mr. Pandey that contention on behalf of Narcotics Control Bureau/Union of India has neither been considered nor noted in the order dated 15.06.2021.

(xiii) Much emphasis has been given that order dated 15.06.2021 has been passed without considering the provisions of section 37 of Narcotics Drugs & Psychotropic Substances Act, therefore benefit of parity of such bail order cannot be extended to the applicant.

(xiv) Lastly, Mr. Ashish Pandey, learned Special Public Prosecutor submitted that the case is under investigation and he may be allowed some short time to file counter affidavit on behalf of Narcotics Control Bureau to bring on record the relevant material for proper adjudication.

7. After having heard the learned counsel for the parties, I find that the issue that arises for consideration before this Court is *"as to whether the applicant is entitled to be released on bail only on the ground of parity of bail order dated 15.06.2021 of co-accused Ameen Khan".*

8. The order dated 15.06.2021 passed in Criminal Misc. Bail Application No.

14601 of 2021 is being reproduced herein-below:

"Heard learned counsel for the applicant and Sri Ashish Pandey learned counsel for Union of India through N.C.B.

It has been contended by the learned counsel for the applicant that nothing has been recovered either from the possession of the applicant or from the truck no. RJ 40 GA 0142 but to the contrary the applicant is the cleaner of the aforesaid truck and he is going to Kolkata by the truck in which the plywood had been uploaded and the driver has a valid document relating with the goods and the truck but the applicant has been falsely implicated in the present case by the police, the said fact has been mentioned in para 13 to the affidavit filed in support of bail application. The applicant has no criminal history with respect to the N.D.P.S. Act. It has also been submitted that the applicant is languishing in jail since 18.01.2021. The applicant has no other reported criminal antecedent, the said fact has been mentioned in para 27 to the affidavit filed in support of bail application.

Learned A.G.A. opposed the prayer for bail.

Considering the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, reasonable apprehension of tampering of the witnesses and prima facie satisfaction of the Court in support of the charge and the applicant is entitled to be released on bail in this case.

Without expressing any opinion on the merits of the case let the applicant Ameen Khan involved in Case Crime No. 4/2021 under Section 8/29/22 N.D.P.S. Act, Police Station N.C.B, District Lucknow be released on bail on his furnishing a personal bond with two sureties each in the like amount to the satisfaction of magistrate/court concerned, with the following conditions:-

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

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

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

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

In case of breach of any of the above conditions, the court below shall be at liberty to cancel the bail.

The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

The computer generated copy of such order shall be self attested by the counsel of the party concerned.

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."

9. There is no dispute that recovered and seized 61000 bottles of 100 ml each of Phensedyl syrup containing Codeine Phosphate, which finds place at serial No. 28 of the list of Narcotics Drugs & Psychotropic Substances appended to N.D.P.S. Act, are 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.

10. After perusing the aforesaid bail order dated 15.06.2021 of co-accused Ameen Khan, I find that neither any reason has been recorded nor provisions of section 37 of N.D.P.S. Act has been considered in the said order while granting bail to the co-accused Ameen Khan. It is well settled that recording of finding in terms of section 37 of N.D.P.S. Act is a *sine qua non* for granting bail.

11. In view of Section 37 of the N.D.P.S. Act, 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. Section 37 of the N.D.P.S. Act 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."

On account to these two reasons as well as considering the principle laid down by the Apex Court in following resent judgments, the bail order dated 15.06.2021 is not binding upon this Court:

i. ***Sonu vs Sonu Yadav and another****, reported in AIR 2021 SC 201; (paragraphs 11 and 12).*

ii. ***Union of India vs Prateek Shukla****, reported in AIR, 2021 SC 1509; (paragraphs 11 and 13).*

iii. ***Narcotics Control Bureau vs Laxman Prasad Soni,*** *etc, (Criminal Appeal No. 438-440 of 2021 decided on 19th April, 2021.*

iv. ***Union of India Vs. Rattan Mallik @ Habul,*** *reported in 2009 (1) SCC (Crl) 831 (paragraphs 13 and 14).*

12. As such, in the light of dictum of aforesaid judgments of the Apex Court as well as the reasons mentioned in preceding paragraph No.10, the benefit of parity of order dated 15.06.2021 of co-accused Ameen Khan cannot be given to present applicant. Accordingly, the submission of learned counsel for the applicant for granting bail on the ground of parity of order dated 15.06.2021 is rejected.

13. In the opinion of this Court, each and every case depends on its own facts and a close similarity between one case and another is not enough, because even a single significant detail may alter entire aspect of the case.

14. In view of above, it would be appropriate to grant time to opposite party to file counter affidavit in the matter.

15. Let a counter affidavit be filed within four weeks. Two week's time is allowed to the learned counsel for the applicant to file rejoinder affidavit thereafter.

16. List this case on 05.08.2021 before the appropriate Bench for hearing of this case on merits.

(2021)07ILR A297
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.07.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Crl. Misc. Bail Application No. 46998 of 2020

Junaid ...Applicant (In Jail)
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Mohammad Mustafa

Counsel for the Opposite Parties:
G.A., Sri Maya Pati Pandey

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 439 (IA) - Indian Penal Code, 1860 - Sections 363, 366 , 376(3), 376, 376 AB, 376 DA, 376DB - Service of notice upon the victims in bail - Special powers of High Court or Court of Session regarding bail - The Protection of Children From Sexual Offences Act, 2012 - Sections 16/17 , Section 33 (7) , 40,45 - The Protection of Children From Sexual Offences Rules, 20202 - Rule 4(13), 4(14) ,7, (15) - The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1995 - Section 3(1)(da), 3(1)(dha) and 3(2)(va) - The Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 27, 30 - Legal Services Authorities Act, 1987 - Section 6, 7, 8, 12 & 13.

(B) Criminal Law - Time for maturation of a bail application before it is placed in court has to be definite - Task of the Court - to achieve the overarching and underlying legislative intent by integrating the various statutes into an unified legal framework - rights of child come to fruition after the authorities(local police/SJPU,CWC,DLSA & HCLSC ,District Magistrate) perform their functions respectively.(Para - 14,58,59)

(C) Criminal Law - Timeline and procedure for maturation of bail application - court has to correlate and balance the mandate of statutory rights of the victim, with the imperative of constitutional liberties of the accused - bail maturation process has to be conducive to implementation of the POCSO Act, 2012 read with POCSO Rules, 2020 - Where time period for performance of statutory duties not provided - authorities are obligated to perform the duties in a reasonable time frame - held -

justification of advance notice of two days in bail applications for offences under the POCSO Act, 2012 as advanced in the response affidavit filed by the High Court not accepted.(Para - 66,67,71,83)

First information report lodged against the applicant - bail application of the applicant rejected by Additional District and Sessions Judge/Special Judge - not accused of rape or abduction - did not blackmail the victim - acts were committed by the main accused Sajjad - did not accompany the victim and Sajjad in the bus - statement of the victim squarely contradicts the FIR insofar as the involvement of the applicant is concerned. (Para - 93,94,95)

HELD:- The applicant is entitled to be enlarged on bail.

Bail application allowed. (E-6)

List of Cases cited:

1. Reena Jha Vs U.O.I., 2020 SCC Online Del 1389

2. Miss G (Minor) Thru. Her Mother Vs St. of NCT Delhi, 2020 SCC Online Del 629

3. Arjun Kishanrao Malge Vs St. of Mah., 2020 SCC Online Del 551

4. Tanul Rastogi Vs St. of U.P., Bail No. 4018 of 2020 (Allahabad High Court at Lucknow Bench)

5. Ajeet Chaudhary Vs St. of U.P., (2021) 1 ADJ 559

6. Eera through Dr. Manjula Krippendorf Vs St. (NCT of Delhi) & anr., (2017) 15 SCC 133

7. Alakh Alok Srivastava Vs U.O.I. & ors., (2018) 17 SCC 291

8. St. of Haryana Vs Raghuvir Dayal, (1995) 1 SCC 132

9. Dilip Kumar Sharma Vs St. of M.P., (1976) 1 SCC 560

10. Nazir Ahmad Vs The King-Emperor, AIR 1936 PC 253(2)

11. D.R. Venkatachalam v. Transport Commissioner & ors., (1977) 2 SCC 273

12. St. Vs Sanjeev N&a, 2012 (8) SCC 450

13. Public Interest Foundation Vs U.O.I., 2019 (3) SCC 224

14. St. of A.P. Vs Mangali Yadagiri, (2016) CriLJ 1415

15. S. N. Srikantia & Co. Vs U.O.I., AIR 1967 Bom 347

16. Noy Vellesina Engineering SPA Vs Jindal Drugs Ltd., (2021) 1 SCC 382

17. Tanul Rastogi Vs St. of U.P., Bail No. 4018 of 2020, (Allahabad High Court at Lucknow Bench)

18. Regional Provident Fund Commissioner Vs K. T. Rolling Mills Pvt. Ltd., (1995) 1 SCC 181

(Delivered by Hon'ble Ajay Bhanot, J.

1. The judgement is being structured in the following conceptual framework to facilitate the discussion:

I	Introduction
II	Submissions of learned counsels
III	Defining the controversy and its origins
IV	Rights of an accused in a bail application
V	Child rights jurisprudence : authorities and principles
VI	Relevant provisions from POCSO Act read with POCSO Rules:
	A. Right of victim to receive notice

I. Introduction:

2. While arguing the bail application Sri Mohd. Mustafa, learned counsel for the applicant submitted at length that the question of service of notice upon the victim raises legal issues of public importance. Considering the general importance of the matter, the members of the Bar were invited to assist the Court.

3. At the request of the Court, Sri Nazrul Islam Jafri, learned Senior Counsel assisted by Sri Mohammad Zubair, learned counsel, Sri Dharmendra Singhal, learned Senior Counsel assisted by Sri Shivendra Raj Singhal, learned counsel, Sri Vinay Saran, learned Senior Counsel assisted by Sri Saumitra Dwivedi, learned counsel, Sri Arun Kumar Singh Deshwal, learned counsel and Sri R.P.S. Chauhan, learned counsel also made their submissions. The Court expresses gratitude to the learned members of the Bar for their able assistance and appreciates their selfless service to the cause of law.

4. Shri Ashish Mishra, learned counsel for the High Court has been heard. Affidavit on behalf of the High Court is taken in the record.

5. The State represented by Shri Manish Goyal, learned Additional Advocate General assisted by Shri Avinash Kumar Tripathi, learned AGA, has to its credit not adopted an adversarial approach but that of a stakeholder in this controversy. Though, the acid test lies ahead in the efficacious implementation of the directions of the Court.

II. Submissions of learned counsels:

6. The following submissions were made by the learned Senior Counsels and learned Counsels at the Bar:

(i) The practice of issuance of notices to the victim by the courts in bail applications is contrary to provisions of the Protection of Children From Sexual Offences Act, 20121 read with the Protection of Children From Sexual Offences Rules, 20202.

(ii) Practice of issuance of the notice of bail application to the victim by the court varies from court to court. This leads to inconsistencies in procedures, introduces uncertainty in the time frame for maturation of bail applications, and delays the hearing of bail applications.

(iii) Authorities need adequate time to perform their statutory duties under the POCSO Act, 2012 read with POCSO Rules, 2020 before a bail application becomes ripe for being placed before the Court. The time period of two days for maturation of a bail under the Rules of Court, 1952 of Allahabad High Court is insufficient in cases under the said enactment.

(iv) Various authorities need to sync up their functioning and work under a defined time frame to uphold the rights of victim and to protect the rights of the accused.

(v) Steps have to be taken by all stakeholders to protect the identity of the victim.

(vi) The judgements of the Delhi High Court in **Reena Jha Vs. Union of India3** and **Miss G (Minor) Thru. Her Mother Vs. State of NCT Delhi**4 and the judgement of Bombay High Court in **Arjun Kishanrao Malge Vs. State of Maharashtra**5 are distinguishable in some respects and are not directly applicable in the State of U.P. The relevant provisions of law were not referred to the Court in **Tanul Rastogi Vs. State of U.P.**6 and the order is not a binding precedent.

III. Defining the controversy and its origins

7. Amendments made in the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1995 and the Protection of Children From Sexual Offences Act, 2012 read with the Protection of Children From Sexual Offences Rules, 2020 conferred rights on victims. The changed legislative perspective towards victims, altered the judicial approach in processing bail applications. The practice of issuance of notice by courts to victims in bail applications for offences under the said enactments came into being. The correctness of this practice was in issue in **Ajeet Chaudhary vs. State of U.P.**7

8. The instant controversy is similar in some respects to **Ajeet Chaudhary (supra)**. But the distinctive features of the POCSO Act, 2012 read with POCSO Rules, 2020 require separate consideration.

9. Attention of this Court has been called to the following issues in the submissions made by the learned members of the Bar:

(a) Whether notice of a bail application for offences under the POCSO Act, 2012 read with POCSO Rules, 2020 is liable to be issued by the Court to the child and the consequences thereof? Or whether notice of such bail application is liable to be served upon the child/ authorized person by the authorities nominated for the purpose and in the manner prescribed in the POCSO Act, 2012 read with POCSO Rules, 2020?

(b) What is a reasonable time line to enable various authorities to discharge their statutory functions under the POCSO Act, 2012 read with POCSO Rules, 2020 before the bail application becomes ripe for being placed before the Court?

(c) A decision on the aforesaid issues to resolve the bail conundrum has to ensure that the practices of the bail processual regime are consistent with the POCSO Act, 2012 read with POCSO Rules, 2020, protect the rights of the both victim and the accused, and define the time frame for placing the bail application after its maturation before the Court.

IV. Rights of an accused:

10. The constitution makers made fundamental rights of the citizens sacrosanct by writing them into the text of the Constitution of India. The constitutional courts made fundamental liberties of the citizens inviolable by evolving tenets of constitutional law.

11. The defence of liberty does not always manifest in a people's movement, a philosopher's prose, a poet's verse, or a statesman's actions. The challenge to liberty is often less dramatic, and its defence more mundane.

12. Learned counsels at the bar have raised substantive issues of individual liberty of the accused and statutory rights of the victim arising from the procedure of bail maturation for offences under the POCSO Act, 2012 read with POCSO Rules, 2020.

13. Any detention is a restraint on liberty. A detention passes the first test of legality when it is compliant with the statutory provisions. However, a detention of a citizen satisfies the mandate of liberty after its validity is tested by the Court. Delay in the reckoning before the Court, degrades the liberty of the citizen.

14. Time for maturation of a bail application before it is placed in court has to be definite. Upholding this as a right of a bail applicant in **Ajeet Chaudhary (supra)**, it was further held:

"39. A bail processual framework violates fundamental rights and personal liberties of an accused guaranteed under Articles 14 and 21 of the Constitution of India in the following situations:

A. Provisions with an unreasonably large time for maturation of a bail application;

B. Procedures where the time period for hearing of a bail application is undefined;

C. Practices causing indefinite deferment of hearing of a bail application.

D. Failure of police authorities to provide timely instructions to the Government Advocate before the hearing of bail application.

41. Attributes of the processual framework of bails which are in accord with Articles 14 and 21 of the Constitution of India are these. Bail applications have to be processed expeditiously and placed before the court for hearing in a reasonable and definite time frame. The procedure for processing the bail application needs to be consistent, and the time period for hearing of the bail application has to be certain.

42. The proposition that a bail application cannot be under procedural incubation for an unreasonable time, is the sequitor of the preceding tenets of constitutional law."

V. Child Rights Legislations

15. The Constitution of India, international instruments, the statutes and judicial precedent applicable to the current controversy converge on these first principles of child rights jurisprudence. Recognition of the vulnerability of children to abuse and exploitation, and the incapacity of children to defend themselves against such offences. Affirmation of the responsibility of the courts and the state to create a sensitive environment to deal with the victims of such offences, and to protect the dignity and rights of the child. The POCSO Act, 2012 further enjoins authorities and courts to respectively provide support services to the child with promptitude and ensure expeditious disposal of cases.

16. Judgements of the Supreme Court in **Eera through Dr. Manjula**

Krippendorf Vs. State (NCT of Delhi) and another8, **Alakh Alok Srivastava Vs. Union of India and others**9 and of Bombay High Court in **Arjun Kishanrao Malge (supra)** can be referred to with profit in this context.

VI. Relevant provisions of Protection of Children from Sexual Offences Act, 2012 read with Protection of Children from Sexual Offences Act, 2020:

VI-A. Rights of victim to receive notice of bail application and the mode of service:

17. The POCSO Act, 2012 (as amended from time to time) was enacted with the object "to protect children from offences from sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for speedy trial of such offences and for matters connected therewith or incidental thereto". The Statement of Objects and Reasons of the POCSO Act, 2012 is appended as Appendix 1i ***(see endnote).***

18. The Rules framed under Section 45 of the POCSO Act, 2012, for carrying out the purposes of the Act are called "the Protection of Children from Sexual Offences Rules, 2020.

19. Relevant parts of the statutory scheme shall now be discussed.

20. Rule 4(13), 4(14) and (15) of the POCSO Rules, 2020, cast responsibility upon the local police/SJPU to provide information about the status of investigations, developments and schedule of court proceedings and bail applications, and other entitlements and services to the child (**In this judgement "child" shall include child and child's parents/guardian / any other person in whom the child has confidence/support person).** Form A10 ii to be filled by the police officials contains the list of entitlments of the child and has to be served upon the latter. Form B11iii is the preliminary assessment report to be submitted by the police to the Child Welfare Committee12. The provisions are being extracted hereinunder for ease of reference:

"4. Procedure regarding care and protection of child.-

(13) It shall be the responsibility of the SJPU, 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 other court proceedings.***(emphasis supplied)*

"4(14). SJPU or the local police shall also inform the child and child's parents or guardian or other person in whom the child has trust and confidence about their entitlements and services available to them under the Act or any other law for the time being applicable as per Form-A. It shall also complete the Preliminary Assessment Report in Form B within 24 hours of the registration of the First Information Report and submit it to the CWC."

(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;*** *(emphasis supplied)*

(ix) the rendering of a verdict after trial; and

(x) the sentence imposed on an offender.

21. The legislative intent in regard to the said obligations of the local police/SJPU is disclosed from the phraseology employed by the legislature.

22. A reference may now be made to some judicial precedents containing long settled principles of statutory interpretation.

23. The word "shall" mostly denotes that the provision is mandatory ***(see State of Haryana Vs. Raghuvir Dayal13).***

24. The settled principle of strict construction of criminal statutes was reiterated by the Supreme Court in ***Dilip Kumar Sharma Vs State of M.P.***14:

"23. It is well settled that such a penal provision must be strictly construed ; that is to say, in the absence of clear compelling language the provision should not be given a wider interpretation and no case should be held to fall within which does not come within the reasonable interpretation of the statute."

25. By reinforcing the word "shall" with the words "be the responsibility of" in Rule 4 (13) and "shall" in Rule 4(14) of the POCSO Rules,2020 the legislature has created an imperative charter of duties for the local police/SJPU. Rule 4(13), Rule 4(14) and Rule 4(15) of the POCSO Rules, 2020 are a part of a composite scheme and are mandatory in nature.

26. The said statutory functions are discharged only when the local police/ SJPU serve notice of the bail application upon the child, intimate the date of hearing and apprise the latter of entitled information and services. The POCSO Rules, 2020 thus nominate the local police/SJPU as the sole agency to serve notice and also prescribe the way to do it. Adherence to the statutory agency and mode of service fructify the rights of the child under the enactment.

27. The judicial proposition which controls the performance of lawful acts, was stated in the celebrated passage in **Nazir Ahmad Vs. The King-Emperor**15:

"...where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."

28. This dictum in **Nazir Ahmad (supra)** has been followed consistently and is an integral part of the body of judicial precedent. [**See: D.R. Venkatachalam v. Transport Commissioner and others16,**

para 17; State Vs. Sanjeev Nanda17 para 17 and Public Interest Foundation Vs. Union of India18 paras 99, 100 and 101]

29. Notice to the victim by the court is not contemplated under the POCSO Act, 2012 read with POCSO Rules, 2020. Without knowledge of and access to entitled information and services, the court notice is of no avail to the child. Rights of the child would be undermined if court notice is deemed sufficient in such facts and circumstances.

30. The statutory mode of service is also conducive to protect the identity of the child, and is consistent with the requirement of Section 33 (7) of the POCSO Act, 2012.

31. The role of CWC (discussed later) further obviates the need for High Court to issue notices to the victim.

32. There is merit in the submission that the practice of notice by the court varies from court to court and introduces uncertainty in the period of maturation of the bail application and delays the hearing. The process of bail maturation has to be uniform with a definite time line.

VI-B. Applicability of Section 439 (IA) Cr.P.C. to bail applications for offences under the POCSO Act, 2012.

33. Section 439 (IA) Cr.P.C. is reproduced below:

"439 (IA). Special powers of High Court or Court of Session regarding bail.-

"1A. 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 section376or section376ABor section376DAor section376DBof the Indian Penal Code (45 of 1860)."

34. The legislature consciously did not incorporate offences under POCSO Act, 2012 in Section 439(IA) Cr.P.C. Hence the requirement of mandatory presence of persons nominated in Section 439(IA) Cr.P.C., at the hearing of bail application, is confined only to the offences stipulated in the provision namely Section 376(3), Section 376, Section 376 AB, Section 376 DA, Section 376DB of the I.P.C. The said persons (nominated in Section 439(IA) Cr.P.C.) may not be obligated to attend but are certainly entitled to be present at the hearing of the bail application in POCSO Act, 2012 offences.

35. The conclusions are supported by authorities in point. The rule of strict interpretation of criminal statutes has been referenced earlier. **See: Dilip Kumar Sharma (supra).** In **State of A.P. Vs. Mangali Yadagiri**19, the Telangana High Court interpreted the scheme of the enactment in light of Section 42-A of the POCSO Act, 2012 and also held that the POCSO Act, 2012 is a self contained code:

"18. A perusal of both the enactments would show that POSCO Act is a self contained legislature which was introduced with a view to protect the children from the offences of sexual assault, harassment, pornography and other allied offences. It was introduced with number of safeguards to the children at every stage of the proceedings by incorporating a child friendly procedure.

The legislature introduced the non-obstante clause in Section 42-A of the POSCO Act with effect from 20.06.2012 giving an overriding effect to the provisions of the POSCO Act, though the legislature was aware about the existence of non-obstante clause in Section 20 of the SC/ST Act."

36. The restrictive consequences of a self contained code described in enduring words by Tulzapurkar J. in **S. N. Srikantia and Co. Vs. Union of India**20, shall apply here:

"12....in my view, if theArbitration Act, being both an amending and consolidating Act was intended to be a self-contained Code and therefore exhaustive fo the law on the subject or on some particular point (and there could be no dispute that the Act is a self-contained code and exhaustive) a corollary would follow that it declares the whole of the law upon a particular subject or point and would carry with it a negative import that it shall not be permissible to do what is not mentioned in it and further that what is permissible thereunder will be done only in the manner indicated and no other." **(emphasis supplied)**

37. The proposition stated in **S. N. Srikantia (supra)** was followed in **Noy Vellesina Engineering SPA Vs. Jindal Drugs Ltd.**21

VI-C. Case Laws : Discussion

38. The Delhi High Court promulgated practice directions to implement the mandate of Section 439(IA) Cr.P.C. The aforesaid practice directions were made applicable to bail applications for offences under the POCSO Act, 2012 in the judgment rendered by the Delhi High Court in **Reena Jha (supra)**. The judgment is brief and is fully extracted below:

"1.Mr. Sidharth Aggarwal, learned counsel appearing for petitioners points-out that Practice Directions dated 24.09.2019 as referred to in order dated 25.11.2019 are based upon amendments to Section 439 Code of Criminal Procedure 1973 (Cr.P.C.) and apply to aggravated forms of sexual offences under Section 376(3), 376-AB, 376-DA and 376-DB of Penal Code, 1860 (IPC). The Practice Directions however do not apply to cases under the Protection of Children from Sexual Offences Act ("POCSO Act'). He further draws attention to Section 40 of POCSO Act read with Rule 4(11) & 4(12)(viii) of the Protection of Children from Sexual Offences Rules, 2012 ("POCSO Rules).

2.It is the submission of counsel for the petitioners that Practice Directions dated 24.09.2019 or directions to the same effect should also be extended/made applicable to offences under POCSO Act.

3.Counsel points-out however that an issue in relation to POCSO offences may arise in cases where the crime has been perpetrated by a close family member; in which case, issuing notice or giving information to such family member in line with the Practice Directions, would not serve any purpose. Mr. Aggarwal suggests that in such cases notice be issued to the concerned Child Welfare Committee and a copy of such notice/information be also sent to Delhi State Legal Services Authority ("DSLSA').

4.We see merit in the submission made by Mr. Aggarwal. Accordingly, we direct that the provisions of Practice Directions dated 24.09.2019 shall *mutatis mutandis* also apply to offences under POCSO Act.

5.We further direct that the present order shall be read in conjunction with order dated 25.11.2019; and both orders shall be circulated to all District Judges in Delhi, who will be responsible to bring the same to the notice of the concerned criminal courts dealing with POCSO matters under their respective jurisdictions and to ensure that the same are implemented.

6.We also direct the National Commission for Protection of Children Rights ("NCPCR') and State Commission for Protection of Children Rights ("SCPCR') to ensure that they comply with the mandate of Rule 6 of POCSO Rules in relation to monitoring and implementation of the provisions of the POCSO Act, strictly and faithfully.

7.In view of the above, Mr. Aggarwal submits that no further orders are required to be passed in the present Public Interest Litigation.

8.Accordingly, the present petition is disposed of, with the court recording its appreciation for the valuable assistance rendered by Mr. Aggarwal, other learned counsel for the parties and the officials who appeared in the matter, including Mr. Kanwaljeet Arora, Member Secretary DSLSA and Ms. Tanushree Luthra, Member Secretary NCPCR."

39. Comprehensive directions to ensure effective compliance of the judgment in **Reena Jha (supra)** were issued by the Delhi High Court in **Miss G (Minor) Thru Her Mother (supra).**

40. The Bombay High Court in **Arjun Kishanrao Malge (supra)** following the judgments of Delhi High Court in **Reena Jha(supra)** and **Miss G (supra)** emphasized the responsibility of the courts in matters of offences against children.

41. No such practice directions have been framed by the Allahabad High Court. Further as held earlier Section 439 (IA) Cr.PC. is not applicable to bail applications for offences under the POCSO Act, 2012. In light of these distinguishing facts and the preceding discussion **Reena Jha (supra), Miss G (supra)** and **Arjun Kishanrao Malge(supra)**, cannot be invoked to support the practice of issuance of notices by courts to the victims.

42. However, the said judgments are not entirely bereft of precedential value for Allahabad High Court. The application has to be nuanced. It has to be stated that the said judgments of Delhi High Court and Bombay High Court enrich legal debate, and elevate the concerns of child rights to the conscience of the court. The judgments have sensitized the process of law and ameliorated the plight of child victims by acknowledging the responsibilities of the courts and making the CWC, Legal Services Authorities and police officials accountable to courts in bail applications. These recognizable principles of law can be clearly distilled from **Reena Jha (supra), Miss G (supra), Arjun Kishanrao Malge (supra).**

43. The order by the learned Single Judge of this Court in **Tanul Rastogi Vs. State of U.P.**22 needs consideration:

"I have considered the arguments advanced by the learned counsel for the applicant as well as by the learned A.G.A.

Section 40 of the POCSO Act provides right to the child to take assistance of legal practitioner. Section 40 of the POCSO Act reads as under:

"40. Right of child to take assistance of legal practitioner.- Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973 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."

Thus, Section 40 of the POCSO Act while giving right of legal assistance to the family or guardian of the child, also provides that if they are unable to afford a counsel, the Legal Services Authority shall provide a lawyer to them.

Under Section 45 of the POCSO Act, Protection of Children from Sexual Offences Rules, 2012 were framed, which came into force on 14th November, 2012. Rule 4 of the Rules provides care and protection to the victim. Sub-rule (12) of Rule 4 of the Rules provides that the information be provided by the State Juvenile Police Unit (SJPU), local police, or support person, to the child and his parents or guardian or other person, in whom the child has trust and confidence. Rule 4(12)(viii) provides that the information be also provided to the child/his parents or guardian or other person in relation to the bail, release or detention status of an offender or suspected offender. Rule 4(12) is being reproduced as under:

"4. Care and Protection.-

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(12) The information to be provided by the SJPU, local police, or support person, to the child and his parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following-

---

(viii) the bail, release or detention status of an offender or suspected offender."

Thus, the aforesaid provision clearly provides that the information of bail be given to the complainant/informant/victim or other person in whom the child has trust and confidence. In such circumstances, the arguments advanced by the learned counsel for the applicant has no legs to stand.

Issue notice to the informant-Km. Diksha Rastogi d/o Giri Raj Rastogi r/o 222/44, Raja Bazar, Chowk, Lucknow, returnable at an early date. Steps be taken within 10 days.(emphasis supplied)

List this case on 06.08.2020.

Station House Officer of the police station concerned shall ensure service of notice on the aforesaid person."

44. Notices were issued to the victim in **Tanul Rastogi (supra)** revealing her identity in the teeth of Section 33(7) of the POCSO Act, 2012. Clearly the learned Single Judge was not referred to all the relevant provisions of the statute. In such view of the matter the order in **Tanul Rastogi (supra)** is not a binding precedent.

VI-D. Enforcement of rights of the child under POCSO Act, 2012 read with POCSO Rules, 2020.

45. POCSO Act, 2012 read with POCSO Rules 2020 vest rights in a child

and also provide for means of realizing them.

46. The persons who shall act as guardians of the child are described in Rule 4(7)23iv.

47. CWC has a prominent role in protecting the best interests of the child. CWC constantly monitors the well being of the child. In appropriate circumstances it appoints a support person for the child. Reference may be made in this regard to Rule 4(5), 4(6), 4(8), 4(9), 4(10), 4(11), 4(12) of the POCSO Rules, 202024v.

48. Sections 19(5) and 19(6) of the POCSO Act, 201225vi read with Rule 4(4) of the POCSO Rules, 2020 cast the duty upon the local police /SJPU to report the offence to the CWC without unnecessary delay but within 24 hours, and in certain cases to produce the child before the CWC with a request for a detailed assessment by the latter. While Section 39 enables CWC to requisition services of experts26vii.

49. Section 40 of the POCSO Act, 2012 confers upon the child the right of assistance of a legal practitioner and is extracted below:

"Section 40. Right of child to take assistance of legal practitioner.-- 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."

50. Rule 7 of the POCSO Rules, 2020 provides the procedure and authorities responsible for providing free legal aid to the child:

"Rule 7. Legal aid and assistance. - (1) The CWC shall make a recommendation to District Legal Services Authority (hereafter referred to as "DLSA") for legal aid and assistance.

(2) The legal aid and assistance shall be provided to the child in accordance with the provisions of the Legal Services Authorities Act, 1987 (39 of 1987)."

51. The Juvenile Justice (Care and Protection of Children) Act, 201527 is the next critical link in the chain of enactments which govern the controversy.

52. Section 27 and Section 30 of the J.J. Act, 2015 detail the creation and functions of the CWC28viii.

53. Relevant provisions of the Legal Services Authorities Act, 198729 creating the State Legal Services Authority30, District Legal Services Authorities31 and High Court Legal Services Committee32 and in regard to their functions, mandate to coordinate with other agencies to provide legal aid and criteria for grant of legal aid are stipulated in Section 6, Section 7, Section 8, Section 12 and Section 13. Provisions are appended to the endnote as **appendix**33ix.

54. C.W.C. has to take steps to effectuate the right to free legal aid vested in the victim in coordination with other agencies like District Legal Services Authority and High Court Legal Services Committee.

55. The right to a legal counsel without right of hearing is illusory. The right to be heard by the court is concomitant to the right to a legal counsel. The scope of this right was described more eloquently by the Bombay High Court in **Arjun Krishnarao (supra):**

"20.We are thus of the clear opinion that the POCSO Act read with Rules 4(13) and 4(15) of the POCSO Rules recognize a statutory entitlement to the assistance of and representation by legal counsel for the family or the guardian of the child and entitlement to be present and to participate in proceedings in accordance with the said provision. As a necessary corollary, there is also an entitlement of such persons to be made aware of the filing of applications and the hearings scheduled on such applications at the various stages of the proceedings."

56. The rights become effective only when these conditions are satisfied prior to placement of the bail application before the court: (i) The child is imparted information about entitlements and services. (ii) The child is able to access relevant services like free legal aid and provided a support person in eligible cases.

57. Diverse statutes and multiple agencies do not manifest disparate legislative aims.

58. What then is the task of the Court? The task of the Court is to achieve the overarching and underlying legislative intent by integrating the various statutes into an unified legal framework. This requires corralling up the assortment of statutory bodies under a single legal umbrella, establishing synergy in aims, and ensuring concert in action of said authorities.

59. In summation, the rights of child come to fruition after the authorities perform the following functions respectively:

A. Functions of local police/SJPU:

I. To inform the CWC about the offence within 24 hours of its registration.

II. To serve the notice of bail application upon the child and intimate the date of hearing of the bail application to it.

III. Apprise the child of its rights to information and services under the POCSO Act, 2012 and POCSO Rules, 2020 and as detailed in Form A.

IV. Inform the CWC about the need of the child for free legal aid.

V. Produce the child before CWC when required under law. Prepare and submit reports as provided under the POCSO Act, 2012 read with POCSO Rules, 2020 including one Form A and in Form B to the CWC.

VI. To provide instructions to the Government Advocate in the High Court and DGC (Criminal) in the trial courts before hearing of the bail application. These will also include the report of service of bail application upon the victim, copies of Form B and information given to CWC, and report of information given to the child regarding entitlements under the POCSO Act, 2012 read with POCSO Rules, 2020 as detailed in Form A.

B. Functions of CWC:-

I. Receive information and documents from the police and take appropriate action thereupon as provided in the POCSO Act, 2012 read with POCSO Rules, 2020.

II. To apprise the child of its entitlements under the POCSO Act, 2012 read with POCSO Rules, 2020. Identify the person who would be best suited to protect the interests of the child and receive notices of the legal proceedings on its behalf from amongst the following persons: child's parents/guardian/any other person in whom the child has trust and confidence or appoint a support person for the child whenever required.

III. To prepare reports and coordinate with the police and various government agencies for providing information and services entitled to the child.

IV. To coordinate with the DLSA and HCLSC to provide free legal aid in appropriate cases to the child at the District Court and High Court respectively.

V. Disclose to the High Court as well as the trial court the status of entitled information and services including free legal aid provided to the child and submit relevant reports when the bail application is placed before the Court.

C. Functions of DLSA and HCLSC-

I. The DLSA and the HCLSC have to provide services of a legal counsel to the victim free of cost, upon the recommendation of the CWC, in bail proceedings before the District Court and High Court respectively. The agencies have to coordinate their functioning in this regard.

II. To inform the District Court and High Court respectively about the status of the legal aid provided to the victim and the requisition of the CWC in this regard, when the bail application is placed before the court.

D. Functions of District Magistrate:

I. To review the functioning of the CWC on a quarterly basis.

VI-E. Protecting the identity of the child victim & Parties to a bail application:

60. The police and other concerned authorities in the State of Uttar Pradesh, shall ensure strict compliance of the provisions of Section 33(7) of the POCSO Act, 2012 to protect the identity of the victim. Section 33(7) of the POCSO Act, 2012 is reproduced below:

"33(7). The Special Court shall ensure that the identity of the child is not disclosed at anytime during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.-For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed."

61. In terms of Section 33 (7) of the POCSO Act, 2012 the name of the victim/parents/legal guardians of the victim

or her address or any other information which tends to reveal the identity of the child shall be anonymized. All other steps shall be taken by the police, CWC and all other concerned authorities to ensure that the identity of the victim is not compromised.

62. CWC and HCLSC shall be joined as necessary parties to all bail applications for offences under the POCSO Act, 2012. The CWC and HCLSC shall ensure that they are represented by their respective counsels when the bail application is placed before the court. The DLSA will be a party in bail application in district courts. Child or her parents or legal guardians shall be impleaded as party without disclosing their names, and other identifying details like address and so forth.

63. The Director General of Police, the Principal Secretary, Child Welfare Department, Government of Uttar Pradesh and the L.R., Ministry of Law, Government of U.P. nominate officers who shall create appropriate procedures in this regard within four weeks.

64. The directions to all concerned police stations/ police officials and Police Heads of the Districts, CWC, DLSA and HCLSC shall immediately thereafter be issued for strict compliance.

VII. Timeline and procedure for maturation of bail application.

65. The discussion shall now move to the next most critical aspect of the controversy. The process and time line of the maturation of bail application for being placed before the court.

66. While determining the aforesaid issues, the court has to correlate and balance the mandate of statutory rights of the victim, with the imperative of constitutional liberties of the accused.

67. The bail maturation process has to be conducive to implementation of the POCSO Act, 2012 read with POCSO Rules, 2020 and protection of rights of the child under the said enactments. Besides the process should also secure the rights of the bail applicant.

68. The execution of statutory duties by various authorities (discussed earlier) under the POCSO Act, 2012 read POCSO Rules, 2020, are prerequisite acts of bail maturation process. Absent adequate time and opportunity for authorities to discharge the said functions, the implementation of the POCSO Act, 2012 read with POCSO Rules, 2020, shall be interdicted and rights of the child will be curtailed.

69. The time frame to perform these statutory duties has not been stated in the statute. Consequently, the time period for maturation of a bail application remains undefined.

70. The search of the legislature is for certainty. The quest of the courts is for consistency. The silences of the legislature have to be interpreted by the courts.

71. Where time period for performance of statutory duties is not provided, authorities are obligated to perform the duties in a reasonable time frame. Faced with a similar absence of specific time period in a statute to perform the duties, the Supreme Court in **Regional**

Provident Fund Commissioner Vs. K. T. Rolling Mills Pvt. Ltd.34 held:

"There can be no dispute in law that when a power is conferred by statute without mentioning the period within which it could be invoked, the same has to be done within reasonable period, as all powers must be exercised reasonably, and exercise of the same within reasonable period would be a facet of reasonableness."

72. This Court had directed the State Government to produce a viable time frame to accomplish the duties cast upon the various authorities by law. The State has filed its response affidavit. This is supported by the submissions of Sri Manish Goyal, learned Additional Advocate General on behalf of the State.

73. The response affidavit by the State Government being relevant for creation of reasonable time frame is extracted hereinunder:

"2. That the aforesaid bail application was taken up by the Hon'ble Court on 01.02.2021 and after hearing counsel for the parties, the Hon'ble Court while granting bail to the application has directed the State to file affidavit with regard to:

(i) Time period for determination to be made as to who amongst the child's parents, guardians, or persons in who the child has trust or support person is most suitable to receive the notice of bail applications and engage on behalf of the child under the POCSO Act read with the POCSO Rules. The aforesaid person is also required to be nominated by the Child Welfare Committee for implementing various provisions of the POCSO Act read with POCSO Rules.

(ii) The likely time period to be taken by the Child Welfare Committee for arranging of legal services for the child before the (a) district court (b) and the High Court.

3. That in respect of the queries made by the Hon'ble Court in it is stated that vide letter No. C-354 /Nide.Ma.Ka. /Go.Pra./2020-21, dated 05.02.2021 issued by the Directorate of Women Welfare addressed to the Chairperson of all Child Welfare Committees of State of Uttar Pradesh to nominate suitable support person of the victim-child involved in POCSO matters for doing suitable pairvi on their behalf within three days from the date of lodging of F.I.R. and also to ensure that the child is provided legal assistance at district level within three days by the District Legal Cell Authority and at the State level by the State Legal Cell Authority within 5 days."

74. Learned counsels at the Bar agree that the time line in the affidavit is reasonable. Shree Manish Goyal, learned Additional Government Advocate assisted by Shri Ashwani Kumar Tripathi, learned AGA for the State submits that the time line stated in the affidavit reflects the government policy and shall be strictly adhered to.

75. Accordingly, the following timeline to execute the different statutory functions by the respective authorities shall be implemented:

Sr. No.		**Time period**
1.	Information of crime to be given	24 hours after report of crime

	by local police/SJPU to CWC (Ref: Section 19(6) of the POCSO Act 2012).	
2.	Time period for CWC for creation of an assessment report and to identify person from amongst the parents/guardian/person in whom the child has trust or to nominate support person (if required) who is best suited to protect the best interests of child and receive	Within 3 days from date of lodgement of the F.I.R.

	bail notice on its behalf.	
3.	Time period for service of notice of bail application by the local police/SJPU upon CWC.	Within 3 days from the date of service of notice of bail application upon the office of the Government Advocate at the High Court.
4.	Time period for service of notice of bail application by the local police/SJPU upon the child and to apprise it about information and services entitled under the POCSO Act, 2012 read with POCSO Rules, 2020.	Within 4 days from date of service of notice of bail application upon office of Government Advocate at High Court.
5.	Time period for CWC and	Within 5 days from date of receipt of notice of bail application by CWC

	District Legal Services Authority for providing legal aid before the hearing of the bail application in the District Court. CWC shall also provide details of information and services entitled to the child under the POCSO Act, 2012 read with POCSO Rules, 2020.	
6.	Time period for CWC and High Court Legal Services Committee, DLSA for providing legal aid before hearing of the bail application in the High Court and District Court respectively.	Within 5 days from date of receipt of notice of bail application by CWC
7.	Time period for child/child's parents/guardian/any other person in whom the child has trust and confidence/support person to engage counsel of choice for the hearing of the bail application before the High Court and the District Court.	Within 5 days from date of service of notice of bail application by local police/SJPU upon the child.
8.	Time period for police authorities to provide instructions to the	Within 8 days after date of service of notice of bail application upon the office of the Government Advocate at the High Court. Under all circumstances the same should be provided to the

	Government Advocate, along with report of service of bail application upon victim and CWC, report apprising the child of entitled information and services under the POCSO Act, 2012 read with POCSO Rules, 2020 and other reports described earlier.	Government Advocate before the bail application is placed before the Court.
9.	Time period for CWC to submit report before the High Court regarding the status of information and services including legal aid provided to the child.	Report to be produced when bail application is first placed before the Court.
10.	Time period for HCLSC and DLSA to inform the High Court and trial court respectively about the grant of legal aid to the victim and requisition in this regard by CWC.	When the bail application is placed before the court.
11.	Time for the Registry to place the bail application before the Court	On the 10th day after service of notice of bail application upon the office of the Government Advocate at the High Court.

76. The timeline of duties stated above has to be strictly adhered to by the respective authorities.

77. In case application is not filed in time for it to be placed before the High

Court, in the above stipulated time, a further notice of two days shall be given to the Government Advocate as well as counsel for the victim.

78. The same procedure with necessary adaptions shall be implemented by the trial courts in all district judgeships in the State of U.P.

79. At this stage, it will be apposite to make reference to the Rules of Court, 1952 providing for the period of maturation of bail application. The relevant part of Rule 18 of the Rules of Court, 1952 (as amended on 19.09.2018), is reproduced hereinbelow:

"[(3) Save in exceptional circumstances-

(a) No bail application shall be placed before the Court unless notice thereof has been given to the Government Advocate and a period of two days has elapsed from the date of such notice.

(b) If the application for bail has not been moved within seven days after the expiry of the aforesaid period of two days the applicant or his counsel shall give two days previous notice to the Government Advocate as to the exact date on which such application is intended to be moved.

(c) Where the prayer for bail is contained in a petition of appeal or application for revision, notice thereof may be given to the Government Advocate the same day prior to the hearing of such petition or application and the fact of such previous notice having been given, shall be endorsed on such petition or application. Alongwith such notice a certified copy or one attested to be true by the counsel, of the Judgment appealed from or sought to be revised shall also be given to the Government Advocate.]
(emphasis supplied)"

80. The Rules of Court, 1952 contemplate an advance notice of two days to the Government Advocate prior to placement of the bail application before the Court. The notice period is to enable the Government Advocate to receive appropriate instructions from the police authorities in the case.

81. Clearly as in the case of SC-ST Act, 1989, the said notice period of two days previous notice to the Government Advocate is insufficient for maturation of a bail application under POCSO Act, 2012 read with POCSO Rules, 2020. This time period has to be enlarged to meet the requirements of POCSO Act, 2012 read with POCSO Rules, 2020. The same was done in similar circumstances in a case pertaining to SC/ST Act, 1989 **(See: Ajeet Chaudhary)**.

82. The response affidavit on behalf of Allahabad High Court asserts that the Allahabad High Court(Amendment) Rules, 2018 reduced the advance notice period in bail applications to two days. Obviously the Allahabad High Court Rules amended in the year 2018 could not take cognizance of and factor in the legislative mandate of the POCSO Rules, 2020. Secondly, the affidavit of the Allahabad High Court does not dispute the fact that two days advance notice period is inadequate for the authorities to accomplish the aforesaid statutory duties. Thirdly the practice of issuance of notices to the victim under the POCSO Act, 2012 has been supported on the foot of the ruling of this Court in **Tanul Rastogi (supra)**, which as the preceding discussion holds is not a binding precedent.

83. In wake of these reasons, the justification of advance notice of two days in bail applications for offences under the

POCSO Act, 2012 as advanced in the response affidavit filed by the High Court is not accepted.

84. The POCSO Act, 2012 read with POCSO Rules, 2020 is a special legislation. It is open to the High Court on the administrative side to consider the feasibility of creating specific rules for bail maturation/time period for advance notice upon the Government Advocate and other necessary parties for the said enactments, and regarding joinder of parties to the bail applications.

VIII. Monitoring and implementation of the directions in the judgment:

85. In Criminal Misc. Bail application No. 22305 of 2021 (Sanjay @ Mausam Vs. State of U.P.) and Criminal Misc. Bail Application No. 19839 of 2021 (Sahil Vs. State of U.P.), this Court noted the consequences of failure of police authorities to furnish timely instructions to the Government Advocate in bail applications and also registered its concern at the non compliance of the directions in **Ajeet Chaudhary (supra)** by the Director General of Police.

86. It is time to administer a caution. Failure to comply with the directions of this Court will thwart the endeavours to sensitize the legal process and impede the implementation of the legislative mandate. The misconduct will have to be duly investigated and the delinquent officials have to be proceeded against departmentally in accordance with law.

87. The police authorities have to create a credible system of oversight and accountability to deter individual officers from defying orders of the court, acting contrary to law and committing constitutional violations.

88. Regular monitoring of the implementation of the directions in this judgement is essential.

89. For this purpose the following directions are being issued:

I. The Director General of Police, UP Police/competent officer in the PHQ shall create a framework and standard operating procedures for the State of U.P. to ensure compliance of the directions and strict adherence to the timeline of duties stated earlier. The framework shall include nomination of officials responsible for executing specific tasks with a corresponding time line.

II. The Senior Superintendent of Police/ Deputy Commissioner of Police/Superintendent of Police (in districts where there is no post of Senior Superintendent of Police) of the concerned district shall be the nodal officer, who shall supervise the staff charged with the duty of actually serving the bail notice upon the victim and the CWC, imparting information about entitlements under the POCSO Act, 2012 read with POCSO Rules, 2020 to the victim, and submitting the assessment (Form B) to the CWC and to furnish timely instructions to the Government Advocate/District Government Counsel in bail applications. In case, there is default on part of such official, the S.S.P./ D.C.P/ S.P. of the concerned district shall take immediate action in accordance with law against such erring official.

III. The Director General of Police shall create a State Level Committee headed by Officer not below than the rank of Additional Director General of Police. The aforesaid committee shall prepare biannual reports which review the working and implementation of the above said directions throughout the State of U.P., & examine the action taken against the officials who violate the directions.

IV. The District Magistrate of the concerned district to ensure that the reports as directed in this order are produced by the CWC before the Court when the bail application is placed in Court. Appropriate action shall be taken against those who default.

V. Biannual reports shall be prepared by the Principal Secretary/competent authority in the Ministry of Child Welfare, Government of U.P. regarding compliance of the directions by the CWCs in State of U.P. and the action taken against erring officials.

VI. Reports under Direction Nos. III and V shall be placed before the High Court Legal Services Committee; High Court Committee for monitoring the expeditious disposal of rape and Protection of Children From Sexual Offences Act cases; High Court Committee for monitoring implementation of the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000, twice in an year.

VII. The Director General of Police, U.P., the Principal Secretary, Child Welfare Committee, Government of U.P., L.R., Government of U.P. to respectively file compliance affidavits before the Registrar General, Allahabad High Court, Allahabad on or before 12.09.2021.

VIII. The Registry shall ensure that the child or its parents are not joined as parties to the bail application by name. It should also be ensured that any other information like address or neighbourhood which will reveal the identity of the child shall not be stated in the bail application. The aforesaid details shall be anonymised.

IX. The Registrar General shall ensure compliance of all the directions, related to the Registry of this Court.

Copy of this order:-

90. The Government Advocate, High Court Allahabad shall forthwith ensure service of copy of this order on:

1. High Court Legal Services Committee, High Court Allahabad.
2. State Legal Services Authority, Lucknow.
3. L.R./Principal Secretary, Law, Government of U.P. Lucknow.
4. Principal Secretary, Child Welfare, Government of U.P., Lucknow.
5. Director General of Police, U.P Police, Lucknow.

91. Registrar General of this Court to forthwith place this order before the following Hon'ble Committees:

1. High Court Committee for monitoring the expeditious disposal of rape and Protection of Children From Sexual Offences Act cases.
2. High Court Committee for monitoring implementation of the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000.
3. High Court Legal Services Committee.

IX. Order on bail application:

92. Heard Shri Mohammad Mustafa, learned counsel for the applicant and learned AGA for the State.

93. A first information report was lodged against the applicant as Case Crime No. 158 of 2020, at Police Station- Itwa, District- Siddharth Nagar on 26.08.2020 under Sections- 363, 366 IPC, and Section 3(1)(da), 3(1)(dha) and 3(2)(va) of SC/ST Act (subsequently also under Sections 16/17 POCSO Act).

94. The bail application of the applicant was rejected by learned Additional District and Sessions Judge/Special Judge (POCSO Act), Siddharth Nagar, on 14.10.2020.

95. Sri Mohammad Mustafa, learned counsel for the applicant contends that the applicant is not accused of rape or abduction. The applicant did not blackmail the victim. These acts were committed by the main accused Sajjad. The applicant also did not accompany the victim and Sajjad in the bus. The statement of the victim squarely contradicts the FIR insofar as the involvement of the application is concerned. Lastly it is submitted by learned counsel for applicant that the applicant shall not abscond, and will fully cooperate in the criminal law proceedings. The applicant shall not tamper with the evidence nor influence the witnesses in any manner.

96. Learned A.G.A and Shri Maya Pati Pandey, learned counsel for the complainant could not satisfactorily dispute the aforesaid submissions from the record.

97. I see merit in the submissions of Shri Mohd. Mustafa, learned counsel for the applicant and accordingly hold that the applicant is entitled to be enlarged on bail.

98. In light of the preceding discussion and without making any observations on the merits of the case, the bail application is **allowed**.

99. Let the applicant **Junaid** be enlarged on bail in Case Crime No. 158 of 2020, under Sections- 363, 366, 368 IPC, and Sections 16/17 POCSO Act and Section 3(2)(V) of SC/ST Act, Police Station- Itwa, District- Siddharth Nagar, on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions.

i. The applicant will not tamper with the evidence during the trial.

ii. The applicant will not influence the prosecution witness.

iii. The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

iv. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court to any police officer or tamper with the evidence.

100. In case of breach of any of the above conditions, the prosecution shall be at liberty to move bail cancellation application before this Court.

101. The party shall file computer generated copy of this order downloaded from the official website of High Court,

Allahabad. 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.

i **Appendix i**

POCSO Act, 2012
Statement of Objects and Reasons

"Article 15 of the Constitution, inter-aila, confers upon the State powers to make special provision for children. Further, Article 39, inter-alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

2. The United Nations Convention on Rights of Children, ratified by India on 11th December,1992, requires the State Parties to undertake all appropriate National, By-lateral and Multi lateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the study on child abuse: India 2007' conducted by the Ministry of Women and Child Department. Moreover, sexual offences against children are not adequately addressed by the extent laws. A large number of such offences are neither specifically provided for nor are they adequately penalized. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

4. It is, therefore, proposed to enact a self contained comprehensive legislation inter-alia to provide for protection of children from the sexual offences and pornography with due regard for safeguarding the interest and well being of the child at every stage of the Judicial process, incorporating child friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.

5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation.

6. The notes on clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives."

ii **Appendix II**

POCSO Rules, 2020
Form -A

Entitlement of children who have suffered sexual abuse to receive information and services

1. To receive a copy of the FIR.

2. To receive adequate security and protection by Police.

3. To receive immediate and free medical examination by civil hospital/PHC etc.

4. To receive Counselling and consultation for mental and psychological well being

5. For Recording of statement of child by woman police officer at child's home or any other place convenient to child

6. To be moved to a Child Care Institution where offence was at home or in a shared household, to the custody of a person whom child reposes faith.

7. For Immediate aid and assistance on the recommendation of CWC.

8. For being kept away from accused at all times, during trial and otherwise.

9. To have an interpreter or translator, where needed.

10. To have special educator for the child or other specialized person where child is disabled.

11. For Free Legal Aid.

12. For Support Person to be appointed by Child Welfare Committee.

13. To continue with education.

14. To privacy and confidentiality.

15. For list of Important Contact No.'s including that of the District Magistrate and the Superintendent of Police.

Duty Officer
(Name & Designation to be mentioned)
Date:…….
I have received a copy of 'Form-A'
(Signature of Victim/Parent/Guardian)
(**Note** : The form may be converted in local and simple Child friendly language)

iii **Appendix III**

POCSO Rules, 2020
Form-B

Preliminary Assessment Report

Parameters Comment
1. Age of the victim
2. Relationship of child to the offender
3. Type of abuse and gravity of the offence
4. Available details and severity of mental and physical harm/injury suffered by the child
5. Whether the child is disabled (physical, mental or intellectual)
6. Details regarding economic status of victim's parents, total number of child's family members, occupation of child's parents and monthly family income.
7. Whether the victim has undergone or is undergoing any medical treatment due to incident of the present case or needs medical treatment on account of offence.
8. Whether there has been loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial or other reason?
9. Whether the abuse was a single isolated incident or whether the abuse took place over a period of time?
10. Whether the parents of victim are undergoing any treatment or have any health issues?
11. Aadhar No. of the child, if available.

Date:……...
Station House Officer

iv **Appendix iv**

POCSO Rules, 2020

Rule 4. Procedure regarding care and protection of child. -

(7) The child and child's parent or guardian or any other person in whom the child has trust and confidence and with

whom the child has been living, who is affected by such determination, shall be informed that such determination is being considered.

v **Appendix v**
POCSO Rules, 2020

Rule 4. Procedure regarding care and protection of child. -

(5) Upon receipt of a report under sub-rule (3), the concerned CWC must proceed, in accordance with its powers under sub-section (1) of section 31 of the Juvenile Justice Act, 2015 (2 of 2016), to make a determination within three days, either on its own or with the assistance of a social worker, as to whether the child needs to be taken out of the custody of child's family or shared household and placed in a children's home or a shelter home.

(6) In making determination under sub-rule (4), the CWC shall take into account any preference or opinion expressed by the child on the matter, together with the best interests of the child, having regard to the following considerations, namely: -

(i) the capacity of the parents, or of either parent, or of any other person in whom the child has trust and confidence, to provide for the immediate care and protection needs of the child, including medical needs and counselling;

(ii) the need for the child to remain in the care of parent's, family and extended family and to maintain a connection with them;

(iii) the child's age and level of maturity, gender, and social and economic background;

(iv) disability of the child, if any;

(v) any chronic illness from which a child may suffer;

(vi) any history of family violence involving the child or a family member of the child; and,

(vii) any other relevant factors that may have a bearing on the best interests of the child: Provided that prior to making such determination, an inquiry shall be conducted in such a way that the child is not unnecessarily exposed to injury or inconvenience.

(8) The CWC, on receiving a report under sub-section (6) of section 19 of the Act or on the basis of its assessment made under sub-rule (5), and with the consent of the child and child's parent or guardian or other person in whom the child has trust and confidence, may provide a support person to render assistance to the child in all possible manner throughout the process of investigation and trial, and shall immediately inform the SJPU or Local Police about providing a support person to the child.

(9) The support person shall at all times maintain the confidentiality of all information pertaining to the child to which he or she has access and shall keep the child and child's parent or guardian or other person in whom the child has trust and confidence, informed regarding the proceedings of the case, including available assistance, judicial procedures, and potential outcomes. The Support person shall also inform the child of the role the Support person may play in the judicial process and ensure that any concerns that the child may have, regarding child's safety in relation to the accused and the manner in which the Support person would like to provide child's testimony, are conveyed to the relevant authorities.

(10) Where a support person has been provided to the child, the SJPU or the local police shall, within 24 hours of

making such assignment, inform the Special Court in writing.

(11) The services of the support person may be terminated by the CWC upon request by the child and child's parent or guardian or person in whom the child has trust and confidence, and the child requesting the termination shall not be required to assign any reason for such request. The Special Court shall be given in writing such information.

(12) The CWC shall also Seek monthly reports from support person till the completion of trial, with respect to condition and care of child, including the family situation focusing on the physical, emotional and mental well being, and progress towards healing from trauma; engage with medical care facilities, in coordination with the support person, to ensure need-based continued medical support to the child, including psychological care and counselling; and shall ensure resumption of education of the child, or continued education of the child, or shifting of the child to a new school, if required.

vi **Appendix vi**

POCSO Act, 2012

19. Reporting of offences.—

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

vii **Appendix vii**

POCSO Act, 2012

Section 39 of the POCSO Act, 2012 enables the CWC to requisition of services of various experts for making its assessments. Section 39 of the POCSO Act, 2012 is quoted below: "39. Guidelines for child to take assistance of experts, etc— Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child."

viii **Appendix viii**

J.J.Act, 2015

The relevant parts of **Section 27** are stated below:

"27. Child Welfare Comittee— (1) The State Government shall by notification in the Official Gazette constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation

to children in need of care and protection under this Act and ensure that induction training and sensitisation of all members of the committee is provided within two months from the date of notification."

……..

(8) The District Magistrate shall conduct a quarterly review of the functioning of the Committee.

(10) The District Magistrate shall be the grievances redressal authority for the Child Welfare Committee and anyone connected with the child, may file a petition before the District Magistrate, who shall consider and pass appropriate orders."

The functions and responsibilities of the Child Welfare Committee, are described in Section 30 of the J.J. Act, 2015. The material provisions speak thus:

"30. The functions and responsibilities of the Committee shall include— (xv) ***co-ordinate*** with the police, labour department and other agencies involved in the care and protection of children with support of the District Child Protection Unit or the State Government; *(emphasis supplied)*

(xvii) ***accessing appropriate legal services for children***; *(emphasis supplied)*

Section 106 of the J.J. Act, 2015 creates the State Child Protection Society and District Child Protection Unit:

"106. Every State Government shall constitute a Child Protection Society for the State and Child Protection Unit for every District, consisting of such officers and other employees as may be appointed by that Government, to take up matters relating to children with a view to ensure the implementation of this Act, including the establishment and maintenance of institutions under this Act, notification of competent authorities in relation to the children and their rehabilitation and co-ordination with various official and non-official agencies concerned and to discharge such other functions as may be prescribed."

ix. **Appendix ix**

Legal Services Authorities Act, 1987

Section 6 defines the "State Legal Services Authority" and Section 7 describes its functions.

Section 7 of the LSA Act, 1987 defines the functioning of the State Authorities, while Section 8 contemplates the State Authority to act in coordination with relevant governmental agencies and other bodies, engaged in promoting the cause of legal services to the court.

Material parts of the provisions are reproduced below:

"Section 7. Functions of the State Authority- 2(a) give legal service to persons who satisfy the criteria laid down under this Act."

"Section 8. State Authority to act in co-ordination with other agencies, etc.; can be subject in directions given by Central Authority.—In the discharge of its functions the State Authority shall appropriately act in co-ordination with other governmental agencies, non-governmental voluntary social service institutions, universities and other bodies engaged in the work of promoting the cause of legal services to the poor and shall also be guided by such directions as the Central Authority may give to it in writing."

(emphasis supplied)

Section 8 (A) creates the "High Court Legal Services Committee". While Section 9 constitutes the District Legal Services Authorities.

Section 12 details the criteria for giving legal services and Section 13 provides for the entitlement to legal

services. Relevant provisions are stated hereunder:

"Section 12. Criteria for giving legal services-Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is -

(a) a member of a Scheduled Caste or Scheduled Tribe;

(b) a victim of trafficking in human beings or begar as referred to in Article 23 of the Constitution;

(c) a woman or a child;

(d) a person with disability as defind in clause (i) of section 2 of the persons with Disabilities (Equal Opertunities, Protuction of Rights & Full Participation) Act ,1995]

(e) a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood,drought, earthquake or industrial disaster; or

(f) an industrial workman; or (g) in custody, including custody in a protective home within the meaning of clause

(g) of Section 2 of the Immoral Traffic (Prevention) Act,1956(104 of 1956) or in a juvenile home within the meaning of clause(j) of Section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of Section 2 of the Mental Health Act, 1987(14 of 1987);or

(h) in receipt of annual income less than rupeees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.]

"Section 13. Entitlement to Legal Services- (1) Persons who satisfy all or any of the criteria specified in Section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima-facie case to prosecute or to defend.

(2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit."

(2021)07ILR A325
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Writ Petition No. 2102 of 2021

Prem Chand & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rakesh Tripathi - I

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure, 1973 – Section 156 (3) - FIR challenged being lodged as counter blast-to injunction order passed against complainant-and without approaching police officer-application u/s156 (3) filed-for invocation of power u/s 156 (3)Cr.P.C. - compliance of section 154 (3) Cr.P.C.not mandatory-section 156 (3) Cr.P.C. gives power to Magistrate u/s 190 Cr.P.C. to direct for investigation. (E-7)

List of Cases cited:

1.St. of Har. Vs Bhajan Lal; 1992 SCC (Cr.) 426

2. St.of Telangana Vs Habib Abdullah Jeelani & ors.; 2017 (2) SCC 779

3. Sakiri Vasu Vs St. of U.P. & ors.; 2008 (1) RLW (SC) 136

(Delivered by Hon'ble Munishwar Nath Bhandari, J.
&
Hon'ble Shamim Ahmed. J.)

1. Heard Sri Rakesh Tripathi I, learned counsel for the petitioners and Sri Patanjali Mishra, learned AGA appearing for the State.

2. By this writ petition, a challenge is made to the FIR dated 04.02.2021 registered as Case Crime No. 0042 of 2021, under Sections 323, 504, 506 and 307 IPC, Police Station Garhmukteshwar, District Hapur.

3. The FIR has been challenged having been lodged as a counter blast to the injunction order passed against the complainant on a suit preferred by the petitioner. In view of the above, prayer is to quash the FIR, as it is motivated one.

4. The second argument of the learned counsel for the petitioners is in reference to Section 154 Cr.P.C. He submits that one needs to approach the office incharge for registration of the FIR. If FIR is not registered then to approach the Superintendent of Police. Without approaching the police officer, an application under Section 156(3) Cr.P.C. was filed. The FIR was registered pursuant to the order passed by the Court under Section 156(3) Cr.P.C. ignoring that order aforesaid could not have been passed without first complying the provision of Section 154 Cr.P.C. On both the grounds, challenge is made to the FIR.

5. We have considered the submissions made by the learned counsel for the petitioners and perused the record.

6. The challenge to the FIR has been made alleging it to be as a counter blast. It is ignoring that allegation for commission of offence under Section 323 and 307 has also been made thus case does not fall under any of the ground set out by the Apex Court in the case of **State of Haryana Vs. Bhajan Lal; 1992 SCC (Cr.) 426** and in a recent judgment of the Apex Court in the case of **State of Telangana Vs. Habib Abdullah Jeelani and others; 2017 (2) SCC 779**. Any comment on the facts may cause prejudice to either of the party. We are thus not making any comment on facts.

7. So far as second argument is concerned, a reference of Section 154(3) Cr.P.C. has been given. The same is quoted hereunder for ready reference:

154. Information in cognizable cases. *(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read Over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:*

Provided that if the information is given by the woman against whom an offence under Section 326A, Section 326B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376AB, Section 376B, Section 376C, Section 376D, Section 376DA, Section 376DB, Section 376E or Section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that-

(a) in the event that the person against whom an offence under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376AB, Section 376B, Section 376C, Section 376D, Section 376DA, Section 376DB, Section 376E or Section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of aninterpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5A) of section 164 as soon as possible.

(2) A copy of the information as recorded under sub- section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in subsection (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

8. Section 154(3) Cr.P.C. gives remedy to the complainant if a case is not registered by the office incharge.

9. Learned counsel for the petitioners has made a reference to a judgment of Apex Court in the case of **Sakiri Vasu Vs. State of U.P. and others; 2008 (1) RLW (SC) 136.** It is to show that Section 156(3) can be involved only when steps were earlier taken under Section 154(3).

10. Here we refer to Section 156(3) Cr.P.C. for ready reference:

***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.

11. The perusal of section 156 (3) Cr.P.C. shows the power of the Magistrate to send the matter for investigation. The jurisdiction can be exercised by the Magistrate empowered Section 190 Cr.P.C. to order for such investigation as mentioned in sub section (1) and (2) of Section 156 Cr.P.C. Since a reference of Section 190 Cr.P.C. has been given in Section 156(3) Cr.P.C., it would be gainful to refer even Section 190 Cr.P.C. which is quoted thus:

190. Cognizance of offences by Magistrates.-- *(1) Subject to the provisions of this Chapter, any Magistrate of*

the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may

take cognizance of any offence--

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

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that

such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under

sub-section (1) of such offences as are within his competence to inquire into or try.

12. Section 190 Cr.P.C. provides for filing of the complaint on such facts which constitute an offence. The Magistrate empowered under Section 190 Cr.P.C. can pass an order under Section 156 (3) Cr.P.C. to send the matter for investigation. Section 156(3) Cr.P.C. does not provide for an application but gives power to the Magistrate empowered under Section 190 Cr.P.C. to direct for investigation.

13. It would be gainful to refer even chapter XII in which section 156 Cr.P.C. exist. Chapter XII is about information to the police and their powers to investigate. Section 156 (3) Cr.P.C. falls under Chapter XII which is basically in regards to power of the police to investigate the matter.

14. In the light of aforesaid, we are of the opinion that for invocation of power under Section 156(3) Cr.P.C. the compliance of section 154 (3) Cr.P.C. is not mandatory though even after exhausting aforesaid provision, FIR is not lodged, one can invoke Section 190 Cr.P.C. Therein an order can be passed under Section 156(3) Cr.P.C. The perusal of the FIR however reveals invocation of Section 154(3) Cr.P.C. The complainant first approached the station officer and thereafter the S.P. of the district.

15. Taking into consideration the discussion made above, we do not find a case for quashing of the FIR. The writ petition is, accordingly, dismissed.

16. It is, however, made clear that the investigation in the matter would not be guided by any observations made by us rather it would be made independently on merits of the case.

(2021)07ILR A328
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.03.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE VIVEK AGARWAL, J.

Crl. Misc. Writ Petition No. 10162 of 2020

Namdev Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Tiwari, Sri Kartikeya Saran, Sri Anand Bhasker Srivastava

Counsel for the Respondents:
Ms. Katyayini, Ms. Manju Thakur, A.G.A.

Respondent lodged an FIR against Petitioner-final report submitted-protest filed-rejected-directed-treated as complaint-meanwhile Petitioner lodged two FIR for irregularities and forgeries commited by Respondent in respect of trust properties-chargesheet submitted-On respondent Application -all three cases transfered to Crime branch-challenged-If it appears that police investigation is also in progress in same offence-complaint proceeding s shall be stayed and both cases shall be tried together as a police case.-W.P. dismissed.

Held, as a complaint case and a police investigation against 5 the petitioner are being proceeded in respect of same offence, the provisions of Section 210 are squarely attracted and thus the contention of the learned Senior Counsel for the petitioner that provision of Section 210 would not be attracted as the proceedings had originally not arisen on a complaint rather on an FIR is liable to be rejected outrightly as the cognizance of the offence was taken on a protest now treated as a complaint. To attract the applicability of Section 210 of the Code, the case before the Magistrate is to be instituted on a complaint.(para 9) (E-7)

List of Cases cited:

1. Abhinandan Jha Vs Dinesh Mishra, AIR 1968 SC 117

2. H.S. Bains Vs St. of U.P., AIR 1980 SC 1883,

3. India Carat Pvt. Ltd. Vs St. of Karn., AIR 1989 SC 885

4. Bhagwant Singh Vs Commissioner of Police, (1985) 2 SCC 537

5. Vishnu Kumar Tiwari Vs St. of U.P., (2019) 8 SCC 27

6. Dharmendra Swami Vs St. of U.P. (2007) 2 JIC 275

7. Harkesh Vs St. of U.P., (2002) Cr.L.J. 285

8. A.R. Antulay Vs R.S. Nayak, AIR 1984 SC 718

9. Suresh Chand Jain Vs St. of M.P., AIR 2001 SC 571

(Delivered by Hon'ble Pankaj Naqvi, J.
&
Hon'ble Vivek Agarwal. J.)

Heard Sri Manish Tiwari, the learned Senior Counsel assisted by Sri Kartikeya Saran for the petitioner, Ms. Katyayini, learned counsel for the informant and Ms. Manju Thakur, the learned AGA.

1. The dispute between the parties is essentially relating to maladministration and misfeasance of the trust properties situate at Mathura in which both sides are trading allegations against each other.

2. Sri Swami Gopanand Ban Maharaj / respondent no. 4 lodged an FIR against the petitioner on 9.12.2018 as Case Crime No.1783/2018, under Sections 420/467/468/471/506 IPC in which after investigation, a final report came to be submitted on 7.1.2019. Respondent no. 4 filed a protest on 24.4.2019 before the learned CJM, Mathura who on 23.12.2019 rejected the final report and directed the matter to be treated as a complaint fixing dates for statements under Section 200 Cr.P.C. Meanwhile, the petitioner (Namdev Sharma) lodged two FIR's relating to forgeries and illegalities committed against respondent no.4 on 11.10.2019 and 25.10.2019 as Case Crime Nos.930/2019, under Sections 420 /467 /468 /471 /504 /506 /120-B IPC & 964/2019, under

Sections 420/406/506 IPC, wherein after investigation, a charge-sheet came to be submitted on 20.2.2020 in Case Crime No.964/2019 against respondent no.4. It appears that respondent no. 4 not being satisfied with the investigation, preferred an application dated 14.9.2020 before the I.G., Agra Zone in which on the same date, he directed the S.S.P., Agra to get all the 3 matters investigated by the Crime Branch and directed to submit a progress report by 30.9.2020. Consequently investigation of all the 3 cases was handed over to Crime Branch on 16.9.2020. Challenging the orders dated 14.9.2020 and 16.9.2020, the present writ petition has been filed.

3. The learned Senior Counsel for the petitioner assiduously urged that once Case Crime No.1783/2018 after investigation on a protest, has been directed to be treated as a complaint then it was not open for respondent no.2 to transfer the investigation relating to the said case to the Crime Branch. To put it differently once the learned Magistrate under the order dated 23.12.2019 decided to take recourse and proceeded under Chapter XV of the Code then unless the learned Magistrate at the stage of Section 202 Cr.P.C itself directs for investigation to be conducted by police, the matter cannot be investigated by the police, the impugned order passed by respondent no. 2 is not sustainable in law in the garb of further investigation that too with no prior permission of the learned Magistrate.

4. Learned counsel for the informant and the learned AGA vehemently opposed the submissions on the premise that the contentions raised have no force as the option for the petitioner is to approach the Magistrate concerned under Section 210 of the Code.

5. It is well settled that in the event a police report is submitted disclosing commission of no offences before the Magistrate concerned, then such Magistrate shall have the following options:

(i) He may reject the report and proceed to take cognizance on available materials.

(ii) He before accepting the report shall put the informant to notice as to why the closure report be not accepted, who would be at liberty to file a protest.

(iii) He may take cognizance on a protest as a complaint.

(iv) He may not accept the report and call for further investigation.

(v) He while rejecting the protest may accept the final report.

Reference is made to the decisions of the Apex Court in **Abhinandan Jha vs. Dinesh Mishra, AIR 1968 SC 117, H.S. Bains vs. State of U.P., AIR 1980 SC 1883, India Carat Pvt. Ltd. vs. State of Karnataka, AIR 1989 SC 885, Bhagwant Singh vs. Commissioner of Police, (1985) 2 SCC 537** and **Vishnu Kumar Tiwari vs. State of U.P., (2019) 8 SCC 27.**

6. Admittedly petitioner is an accused in a complaint case which is pending at the stage of Section 200 Cr.P.C as also investigation by Crime Branch is pending against him in Case Crime No.1783/2018 which is the genesis of the said complaint. The resultant scenario is that in respect of same offence, petitioner is facing a complaint case as well as investigation by police authorities.

7. Section 210 of the Code is a self-contained provision which provides a mechanism to deal with such situations where a complaint case and police investigation in respect of same offence is

being proceeded. Section 210 of the Code is extracted hereunder:

210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence.

(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject- matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code.

8. A perusal of the aforesaid provision indicates that in a case which is instituted on a complaint, the Magistrate is made to appear during the inquiry or trial that a police investigation is also in progress in respect of same offence, he shall stay the proceedings of the complaint case and call for a report from the Investigating Officer and upon receipt of such report if he takes cognizance of offence against a person who is an accused in complaint case, both the cases shall be tried together as a police case and if the police report is not related to the accused in complaint or no cognizance has been taken then complaint case shall proceed in accordance with law.

9. We, in view of above provisions, are of the considered view that as a complaint case and a police investigation against the petitioner are being proceeded in respect of same offence, the provisions of Section 210 are squarely attracted and thus the contention of the learned Senior Counsel for the petitioner that provision of Section 210 would not be attracted as the proceedings had originally not arisen on a complaint rather on an FIR is liable to be rejected outrightly as the cognizance of the offence was taken on a protest now treated as a complaint. To attract the applicability of Section 210 of the Code, the case before the Magistrate is to be instituted on a complaint. To ascertain as to whether a protest petition can be treated as complaint or not, it would be noteworthy to place reliance on the decision of the Apex Court in **Vishnu Kumar Tiwari (supra)** wherein it is held in paragraph-46 thereof that if a protest petition fulfills the requirement of a complaint, the Magistrate may treat the protest as a complaint and deal with the same as required under Section 200 read with Section 202 of the Code.

10. The next submission of the learned Senior Counsel is that even though

the matter is pending before the Magistrate yet police investigation is being carried on without any approval of the Magistrate which cannot be countenanced in law. The submission appears to be attractive but deserves to be rejected only on the premise that Section 210 of the Code itself contemplates such a scenario wherein the learned Magistrate is vested with the powers to consolidate and proceed as a police case while staying the complaint proceedings and after calling a police report from the Investigating Officer.

11. We now propose to deal with the judgments cited by the learned Senior Counsel for the petitioner. The judgments of the learned Single Judges in **Dharmendra Swami vs. State of U.P. (2007) 2 JIC 275** and **Harkesh vs. State of U.P., (2002) Cr.L.J. 285** and the decisions of the Apex Court in **H.S. Bains (supra), India Carat Pvt. Ltd. (supra)** essentially rely on **Abhinandan Jha (supra)** that Magistrate is not bound with the conclusion of the police report, opining that no offence is made out and that in an appropriate case the Magistrate can take cognizance under Section 190(1)(a) on the basis of protest petition, which is an undisputed position. The decision in **A.R. Antulay vs. R.S. Nayak, AIR 1984 SC 718** deals with an issue involving a private complaint lodged under Prevention of Corruption Act, 1947, before a Special Court wherein the Apex Court inter alia held that Special Judge was competent to take cognizance on a private complaint. Lastly reliance is placed on **Suresh Chand Jain vs. State of Madhya Pradesh, AIR 2001 SC 571** which unfortunately has no relevance with the fact in issue.

12. We, in the ultimate analysis, are of the view that the orders impugned relating to transfer of investigation and handing over the cases to the Crime Branch do not suffer from any error apparent on the face of record.

13. The writ petition is dismissed.

(2021)07ILR A332
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2021

BEFORE

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

Crl. Misc. Writ Petition No. 16806 of 2020

Amit & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rajnish Dubey

Counsel for the Respondents:
A.G.A.

FIR challenged-stating false implication-against three brothers-FIR has to be looked prima facie for invoking writ jurisdiction-no case for interference.

W.P. dismissed. (E-7)

List of Cases cited:

1.Rupan Deol Bajaj Vs K.P.S. Gill, (1995) SCC (Cri) 1059

2. Rajesh Bajaj Vs State of NCT of Delhi; (1999) 3 SCC 259

3.Medchl Chemicals & Pharma (P) Ltd. v. Biological E Ltd. & Ors; reported in 2000 SCC (Cri) 615

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

&
Hon'ble Gautam Chowdhary. J.)

1. Heard learned counsel for the petitioners and learned AGA for the State.

2. The petitioners have prayed for the following reliefs:

"(i) Issue a writ, order or direction in the nature of certiorari quashing the F.I.R. dated 6.10.2020 in Case Crime No.0409 of 2020 under Sections 147, 506 I.P.C. and 10(1) U.P. Regulation of Money - Lending Act 1976, Police Station - Badalpur District- Gautambudhnagar.

(ii) Issue a writ, order, or direction in the nature of Mandamus directing the respondent not to arrest the petitioners in pursuance of F.I.R. dated 6.10.2020 in Case Crime No.0409 of 2020 under Section 147, 506 I.P.C. and 10(1) U.P. Regulation of Money - lending Act 1976, Police Station - Badalpur District- Gautambudhnagar.

(iii) Issue any such other and further order, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case."

3. The brief facts as culled out from the records and the petition are that the respondent No.3, Kuldeep Kumar lodged an First Information Report against the petitioners and criminal intimation. This complain was lodging on 6.10.2020. The police authorities registered the same as F.I.R. dated 6.10.2020 in Case Crime No.0409 of 2020 under Sections 147, 506 I.P.C. and 10(1) U.P. Regulation of Money - Lending Act 1976, Police Station - Badalpur District- Gautambudhnagar. The First Information Report dated 6.10.2020 is lodged against all the three brothers who were alleged to have been involved in money lending business.

4. It is stated that the petitioners have falsely implicated in the said F.I.R. after a malacious thought, according to learned counsel for petitioners, hence, not carried out the investigation and he is trying to harass the petitioners and it is submitted that the F.I.R. does not discloses any prima facie case.

5. Learned Counsel for the State has submitted that there are serious disputed questions of fact and this Court should not interfere into the factual data as the investigation is going on and there are facts which can be said to be in the realm of disputed questions of fact.

6. The Apex Court in catena of decisions has cautioned, the High Courts show causing its jurisdiction way the F.I.R. prima facie for the complaint and the evidence which may be collected would show that offence has been made out.

7. 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.

8. Should we quash the complaints where serious allegations of money laundering under the regulations of U.P. Regulation of Money Lending Act, 1976? We have expressed our mind to the learned counsel that the petitioners may move for anticipatory bail before the competent Court.

9. The First Information Report prima facie has to be looked into for quashment for invoking jurisdiction under Article 226 of the Constitution of India.

10. It is submitted by counsel for the petitioners that only with a view to arrest the petitioners and show that the complainant who has taken money may not have to repay this complaint is lodged. The petitioners are lending money whether they have the licence to lend or not is not on record and question requires to be investigated.

11. In that view of the matter, we do not think that any case is made out for interference by this Court. It cannot be said that they have been falsely implicated in the said first Information Report, they should thanks the police officials who have for a period of three months not cause they arrest as the complaint is filed in the month of October, 2020.

12. The petition being devoid of merits, does not require our issuance of certiorari of mandamus writ.

13. Accordingly, the writ petition is **dismissed**.

(2021)07ILR A334
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.07.2021

BEFORE
THE HON'BLE JASPREET SINGH, J.

FAFO No. 237 of 2014
Along with
FAFO No. 238 of 2014
Along with
FAFO No. 244 of 2014

United India Insurance Co. Ltd.
...Appellant
Versus
Smt. Neetu Soni & Ors. ...Respondents

Counsel for the Appellant:
Anil Kumar Srivastava

Counsel for the Respondents:
Sandeep Kumar Agrawal, Vishal Tahlani

United India Insurance Company Ltd. Thru. Divisional Manager Vs Smt. Neetu Soni & ors.

Insurance Claim - The Court finds that in absence of any original receipt of cancellation of insurance policy which ought to have been kept by the Insurance Company at its end in the usual course of business.The photocopy of the dispatch register simply bearing that a letter was sent on a particular date is inadmissible in evidence. There is nothing on record to show that the information stating that the insurance policy has been cancelled on 15.03.2011 due to dishonor of cheque on 14.03.2011, has been conveyed to the insured M/s Deep Oil Tanker, the relevant Transport Authorities and the traffic Authorities. (Para 41)

Contributory Negligence - Merely because three persons were riding the motorcycle and they were not wearing helmets in itself will not give rise to any inference that this act contributed towards the accident. (Para 54)

Appeals Rejected. (E-8)

List of Cases cited:

1. National Insurance Company Vs Seema Malhotra & ors. 2001 (3) SCC 151

2. National Insurance Company Ltd. Vs Parwathenene & anr. 2009 (4) TAC 382

3. United India Company Vs Laxmanna & ors. 2012 (5) SCC 234

4. Mangla Ram Vs Oriental Insurance Company Ltd. & ors. 2018 (5) SCC 656 (followed)

5. New India Insurance Co. Ltd. Vs Rula & ors. 2000 (3) SCC 195 (followed)

6. Oriental Insurance Co. Ltd. Vs Inderjit Kaur & ors. 1998 (1) SCC 371 (followed)

7. National Insurance Co. Ltd. Vs Jitender Kumar& anr. AIR 2009 Alld 70 (followed)

8. The New India Assurance Company Ltd. Vs Smt. Khatoon & ors. 2011(1) TAC 24 (Allahabad) (DB) (followed)

9. Mohammad Siddique & anr. Vs National Insurance Company Ltd. & ors. 2020 (3) SCC 572

10. National Insurance Company Ltd. Vs Swaran Singh & ors. 2004 (3) SCC 297

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

1. This is a batch of three appeals filed under Section 173 of the Motor Vehicles Act, 1988 against the award dated 24.12.2013 passed by the Motor Accident Claims Tribunal/ADJ, Court No. 16, Lucknow.

2. An accident took place on 31.01.2012 at around 10:00 PM wherein Sri Anuj Kumar Soni, Yadu Nath @ Guddu and Sanjay Sharma, all three, were riding on a motorcycle bearing No. U.P. 32-BQ-9201 and while moving towards Lucknow from Atariya side, near Ram Avtar Dhaba, Bhitauli Wahad, P.S. Madion, District Lucknow, a truck bearing No. HR-38 D-1220 belonging to Sri Owais Khan and was said to be driven rashly and negligently hit the motorcycle from behind as a result the three riders of the motorcycle suffered grievous injuries and all three died on the spot.

3. The legal heirs of Anuj Kumar Soni preferred claim petition No. 101 of 2012 wherein by means of the award dated 24.12.2013, a sum of Rs. 6,95,000/- was awarded along with 7 % interest per annum from the date of filing of the claim petition till the date of its actual payment. This claim petition No. 101 of 2012 has given rise to F.A.F.O. No. 237 of 2014. In the aforesaid F.A.F.O. No. 237 of 2014, it was pointed out by the learned counsel for the private respondents that Smt. Rameshwari Devi had expired during the pendency of the appeal while her legal heirs are already on record as respondent nos. 1 and 2.

4. Considering the aforesaid, the Court permitted the appellants to carry out the necessary amendments in the array of parties during the course of the day.

5. The legal heirs of Yadu Nath @ Guddu preferred claim petition No. 99 of 2012 wherein the MACT/ADJ Court No. 16, Lucknow awarded a sum of Rs. 5,4,600/- along with 7 % interest per annum from the date of filing of the claim petition till the date of its actual payment and this claim petition has given rise to F.A.F.O. No. 238 of 2014.

6. The legal heirs of Sanjay Sharma preferred a claim petition no. 100 of 2012 wherein by means of award dated 24.12.2013 passed by the MACT/ADJ,

Court No. 16, Lucknow awarded a sum of Rs. 4,74,000/- along with 7% interest per annum payable from the date of filing of the claim petition till the date of its actual payment and this claim petition has given rise to F.A.F.O. No. 244 of 2014.

7. That since the three claim petitions relates to the same accident and three separate and different persons lost their lives, consequently, the legal heirs of the said deceased had preferred the claim petitions wherein the defendant i.e. the owner of the offending vehicle namely Owais Khan was impleaded as respondent no. 4 in F.A.F.O. No. 237 of 2014 whereas in the other two connected F.A.F.Os., he is impleaded as respondent nos. 7 and 6 respectively. Since the appellant namely United India Insurance Company Ltd. had assailed the award dated 24.12.2013 passed in the above mentioned three appeals on similar grounds and common questions of law and facts are involved, hence, the Court proceeds to decide three appeals together by means of this common judgment.

8. In order to appreciate the controversy involved in the aforesaid three appeals, briefly, the facts giving rise to the appeals are being noticed first:-

9. On 31.01.2012 at around 10:00 PM, three persons namely Anuj Soni, Yadu Nath @ Guddu and Sanjay Kumar Sharma were riding on a motorcycle bearing No. U.P. 32-BQ-9201. It is further stated that while they were moving from Attaria towards Lucknow and had reached Ram Avtar Dhaba at Bhitauli Wahad, P.S. Madiyaon, District Lucknow, the offending truck bearing No. HR-38-D-1220 which was being driven rashly and negligently hit the said motorcycle from behind as a result, three riders of the motorcycle sustained grievous injuries and they expired on the spot. It is also stated that the offending vehicle belonged to Sri Owais Khan and was duly insured with United India Insurance Company Ltd.

10. The owner of the truck Owais Khan filed his written statement and had submitted that the offending truck in question was initially in the name of M/s Deep Oil Tanker and the said truck was insured with United India Insurance Company Ltd. The said Insurance Cover was purchased by M/s Deep Oil Tanker and the premium thereof was paid through cheque. The policy was valid for the period 04.03.2011 till 03.03.2012. It is also stated that Owais Khan purchased the aforesaid truck from M/s Deep Oil Tanker on 14.12.2011 along with the Insurance Cover. It is also stated that the driver of the aforesaid truck had valid and subsisting license and the truck also possessed other valid documents, hence, if at all any liability accrued, the same was liable to be indemnified by the Insurance Company.

11. The plea raised by Sri Owais Khan was that the three riders of the motorcycle were also negligent, inasmuch as, it is not permitted for three persons to ride on the motorcycle, coupled with the fact that all three of them were not wearing helmets. It was also stated that the offending truck did not hit the motorcycle from behind rather the motorcycle was being driven rashly and negligently and while overtaking the truck, it hit the middle part of the truck which caused the accident, ultimately, this being a case of contributory negligence, hence, the owner sought to avoid its liability.

12. The Insurance Company initially preferred its written statement raising

general defences in order to avoid its liability rather it amended its written statement wherein it pleaded that the Insurance Company was not liable to indemnify the award as the truck in question was not insured with the Company in the first place.

13. Elaborating the defence, the Insurance Company took a specific plea that the truck in question belonged to M/s Deep Oil Tanker. They received a check for the payment of premium, however, the said cheque was dishonoured on 14.03.2011. The Insurance Company cancelled the policy on 15.03.2011 and informed the insurer i.e. M/s Deep Oil Tanker of the aforesaid. Despite the information having been conveyed, the insured i.e. M/s Deep Oil Tanker did not make good the payment of premium, consequently, the truck was never insured for the aforesaid reason and as the incident occurred on 31.01.2012, thus, on the said date, the truck was not insured.

14. It further took a plea that Sri Owais Khan purchased the truck on 14.12.2011 and the said information was also not conveyed to the Insurance Company nor the Insurance Cover was transferred along with the transfer of vehicle, thus, for all the aforesaid reasons, it was a clear case where the truck was un-insured and no liability could accrued with Insurance Company.

15. The Motor Accident Claims Tribunal after considering the respective pleadings of the parties framed seven issues.

16. Considering the evidence both oral and documentary brought on record, the Tribunal concluded that the accident was an outcome of rash and negligent driving of the offending truck bearing No HR-38-D-1220. It also negatived the plea of contributory negligence, inasmuch as, the Tribunal took note of the eye-witness account who was the owner of Ram Avtar Dhaba who categorically deposed that the offending truck hit the motorcycle from behind and there was no negligence on the part of the motorcycle.

17. The Tribunal further concluded that merely because three persons were riding the motorcycle this in itself cannot be factored to conclude that the motorcycle riders contributed to the accident, inasmuch as, the manner in which the accident was caused, there was no negligence of the riders despite that they had violated the traffic rules. Since the said violation had nothing to do with the accident as it was caused by the truck hitting from behind.

18. The Tribunal also noticed that though the Insurance Company had taken the plea that the Truck was un-insured, however, the Insurance Company failed to establish that after the dishonour of cheque, it communicated the information to the erstwhile owner namely Deep Oil Tanker nor the said information was communicated to the appropriate Transport Authorities and other Traffic Authorities, hence, in absence of such evidence, the Tribunal concluded that the truck was not insured, nevertheless, it directed the Insurance Company to pay since the compensation to the third parties who cannot be deprived but allowed the Insurance Company to recover the amount from the owner.

19. With the aforesaid findings, the Tribunal assessed the compensation in respect of three deceased persons and in the

case of Anuj Kumar Soni (deceased), the legal heirs were awarded a sum of Rs. 6,95,000/- alongwith 7% interest per annum. In respect of Yadu Nath @ Guddu (deceased) his legal heirs were awarded a sum of Rs. 5,04,600/- along with 7 % interest and in respect of Sri Sanjay Sharma (deceased) his legal heirs were awarded a sum of Rs. 4,74 along with 7% interest per annum.

20. The aforesaid three claim petitions though decided separately but their award is of the same date i.e. 24.12.2013, have been assailed by the Insurance Company in the three appeals.

21. It has been urged by the learned counsel for the appellant that once the truck was not insured and the appellant had led cogent evidence to indicate that upon receiving the information from the Bank that the cheque for the payment of premium had been dishonoured, an information was sent to the M/s Deep Oil Tanker who did not revert back to make good the payment of premium, consequently, the policy was cancelled on 05.03.2011, hence, on the date of the accident i.e. 31.01.2012, the offending truck bearing No. HR-38-D-1220 was not insured. In such a situation where the truck in itself was not insured and the truck was sold by M/s Deep Oil Tanker to Sri Owais Khan on 14.12.2011 who also did not inform the Insurance Company nor got it insured, hence, in such a circumstance, the Insurance Company cannot be made to pay the compensation and the Tribunal has erred in directing the Insurance Company to pay and then recover from the owner such direction is erroneous.

22. In support of his submissions, the learned counsel for the appellant has relied upon the decision of the Apex Court in the case of ***National Insurance Company Vs. Seema Malhotra and Others*** *reported in* ***2001 (3) SCC 151; National Insurance Company Ltd. Vs. Parwathenene and Another*** *reported in* ***2009 (4) TAC 382 (SC)*** *and* ***United India Company Vs. Laxmanna and Others*** *reported in* ***2012 (5) SCC 234.***

23. The other submission of the learned counsel for the appellant is that the Tribunal has erred in ignoring the plea raised by the Insurance Company regarding contributory negligence. It has been urged that it was a categorical submission that three persons were riding the motorcycle which was being driven rashly and negligently and while overtaking the truck, it hit the middle part which was the cause of the accident. It cannot be said that the truck alone was responsible rather the three persons on the motorcycle were also responsible as they were violating the traffic rules by three persons riding a motorcycle while only two persons are permitted and all three were riding on the motorcycle without wearing helmets. This rash and negligent act also contributed to the accident, hence, the finding of the Tribunal on the aforesaid count is vitiated as appropriate evidence has not been considered.

24. The learned counsel for the claimant-respondents has refuted the aforesaid submissions and has urged that though the plea regarding the truck being un-insured on the date of the accident was raised by the Insurance Company but it did not prove the same in accordance with law.

25. It is urged that no evidence was brought on record to indicate that information was conveyed regarding the

dishonour of the cheque to M/s Deep Oil Tanker. It is also urged that there is nothing on record to indicate that the information regarding cancellation of the policy was conveyed to the insured i.e. M/s Deep Oil Tanker nor there was any evidence to indicate that the same was conveyed to the relevant Transport Authorities and the Traffic Authorities.

26. It is also urged that, had, the aforesaid information been conveyed to the appropriate authorities as alleged by the Insurance Company, then at the relevant time when Sri Owais Khan purchased the truck and presented the papers for transfer before the relevant transport authorities, the same would have been flagged and Sri Owais Khan would have been required to get the truck insured before the transfer could take place which has not been done and for the said reason the truck was transferred from M/s Deep Oil Tanker to Sri Owais Khan, hence, in such circumstances where the Insurance Company has not complied with its obligations as provided in law it cannot avoid its liability for payment to the parties (claimants in the instant case).

27. It is further urged that the Tribunal has considered the evidence in detail both on the issue of the truck being un-insured as well as contributory negligence and has recorded its categorical findings which are not liable to be disturbed in appeal as there is no legal infirmity, hence, the appeal being devoid of merits is liable to be dismissed.

28. The learned counsel for the claimant-respondent has relied upon the decision of the Apex Court in the case of ***(i) Mangla Ram Vs. Oriental Insurance Company Ltd. and Others*** reported in ***2018 (5) SCC 656; (ii) New India Insurance Company Ltd. Vs. Rula and Others*** reported in 2000 (3) SCC 195; (iii) ***Oriental Insurance Co. Ltd. Vs. Inderjit Kaur and Others*** reported in ***1998 (1) SCC 371*** and in the case of ***(v) National Insurance Company Ltd. Vs. Jitender Kumar and Another*** reported in ***AIR 2009 Alld 70*** and ***The New India Assurance Company Ltd. Vs. Smt. Khatoon and Others*** reported in 2011***(1) TAC 24 (Allahabad) (DB).***

29. Heard Sri Anil Kumar Srivastava, learned counsel for the appellant and Sri Sandeep Agarwal, learned counsel appearing for the claimant-respondents in all the three appeals.

30. It will be relevant to notice that the owner of the offending vehicle Sri Owais Khan was issued notices including through Dasti summons yet none has appeared on his behalf to contest the aforesaid appeals.

31. In light of the submissions of the learned counsel for the parties, the two points for determination before this Court is; ***(i)*** Whether the Insurance Company can avoid its liability to the third parties i.e. the claimants for the truck being un-insured on the date of the accident i.e. 31.01.2012 ? ***(ii)*** Whether three persons riding on a motorcycle in violation of the traffic rules without helmet per-se would amount to contributory negligence or the manner in which the accident has occurred is to be ascertained and whether in the said occurrence it has to be determined that the rider of the motorcycle had committed an act which contributed to the accident ?.

32. From the perusal of the record, it would reveal that the Insurance Company

had filed its written statement wherein it amended its written statement and raised an additional plea that the cheque for payment of premium was issued by M/s Deep Oil Tanker vide Cheque No. 011986 dated 04.03.2011 for a sum of Rs. 16,855/- drawn on Deutsch Bank (Asia) which was dishonoured on 14.03.2011. The Company had informed M/s Deep Oil Tanker, its agent, the R.T.O. Faridabad and the Regional Office at New Delhi.

33. The Insurance Company also took the plea that the insurance policy was cancelled and since the Deep Oil Tanker did not come forward to pay the aforesaid amount, thus, the cancelled policy rendered the contract of insurance void, hence, for the said reason, no liability could be fastened on the company.

34. In support of the aforesaid plea, the Insurance Company examined Sri Pankaj Prakash who was posted as the Deputy Manager at the Regional Office at Lucknow and he was authorized to depose on behalf of the Company.

35. From the perusal of the statement given by Sri Pankaj Prakash, he narrated that the Company had received the cheque for the premium from M/s Deep Oil Tanker, however, the said cheque was dishonoured with the endorsement that the account was closed. He stated that the said cheque which was issued by M/s Deep Oil Tanker though actually it was drawn by an individual namely Sandeep Kumar. He also stated on oath that on the basis of the said cheque the insurance cover was issued for the vehicle in question valid for the period 04.03.2011 till 03.03.2012. It was also deposed that the policy was cancelled on 15.03.2011 and the information in this regard was conveyed to M/s Deep Oil Tanker through a letter in writing through Blaze Flash Courier Ltd. It was also deposed that the entries regarding dispatch of the said letter through courier was also recorded in the dispatch register maintained by the company. A certificate was received from the Courier Company indicating that it had delivered the said article at the address i.e. of the insured M/s Deep Oil Tanker.

36. On the strength of the aforesaid deposition and the documents placed on record by the Insurance Company vide document list bearing Paper No. Ga-32, Ga-35 and Ga-49, the Insurance Company contested its plea.

37. Per contra, the learned counsel for the claimant-respondents has drawn the attention of the Court to the alleged deposition of Sri Pankaj Prakash. It has been urged that upon cross-examining Sri Pankaj Prakash, he clearly deposed that the documents regarding cancellation of the policy which was filed by the document list dated 02.07.2013(paper no. Ga-32) were all photocopies.

38. The learned counsel for the claimants-respondents has further drawn the attention of the Court to a letter dated 12.03.2013 bearing Paper No. Ga-32/3 which is a letter issued by M/s Manoj Enterprises who gave a certificate that the letters of M/s United India Insurance Company Ltd. are sent by M/s Blaze Flash Courier Ltd. of which M/s Manoj Enterprises is the franchisee. It further stated that the said letters sent by M/s United India Insurance Company Ltd. to M/s Deep Oil Tanker on 23.03.2011 which is also reflected at serial no. 6 of the dispatch register, its details be furnished. The certificate states that the said

documents, are neither preserved by M/s Manoj Enterprises nor the parent company i.e. M/s Blaze Flash Courier Ltd, sent more than a year ago, for the aforesaid reasons, it was unable to provide any record, yet in the said letter, it indicated that the letter dated 23.03.2011 which included a letter sent to M/s Deep Oil Tanker were sent in the month of March, 2011 through Manoj Enterprises who are the franchisee of M/s Blaze Flash Courier Ltd.

39. This letter is dated 12.03.2013 and on the strength of it, it has been urged by the learned counsel that the photocopies of the dispatch register in the first place is not admissible in evidence, moreover, there is no receipt on record to establish that the said letter was couriered through M/s Blaze Flash Courier Ltd. in the first place.

40. It is also urged that the said certificate issued by the franchisee is wholly immaterial, inasmuch as, it has clearly stated that it does not have record prior to one year nor the Company Blaze Flash Courier Ltd. keeps such record prior to one year, yet, in the same breath it has certified that letters were issued which also included a letter to M/s Deep Oil Tanker.

41. Considering the rival submissions and the material on record, this Court finds that in absence of any original receipt which ought to have been kept by the United India Insurance Company Ltd. at its end in its usual course of business to indicate that a letter was sent to M/s Deep Oil Tanker. Coupled with the fact that the Insurance Company has merely brought on record a photocopy of the dispatch register dated 23.03.2011 wherein there is only a reference that on the said date a letter was also sent to M/s Deep Oil Tanker, however, the said document is a photocopy and inadmissible in evidence, yet, if the same is perused, it would indicate that at best it only shows that the information was sent to M/s Deep Oil Tanker. There is nothing on record nor there is any statement either in the examination-in-chief to state that the information was also conveyed to the relevant transport authorities or the traffic department. There is also no explanation to the effect that when the aforesaid cheque was dishonoured on 14.03.2011 and the policy was cancelled on 15.03.2011 then why the aforesaid information was sent to the alleged insured M/s Deep Oil Tanker on 23.03.2011 nor why the original was not produced when the said documents were denied by the claimants.

42. In this context if the cross-examination of the witness Pankaj Prakash is noticed, he has stated that he had sent the information through M/s Blaze Flash Courier Ltd. and the reason why it was not sent through post office was that the post office was at a distance. In his cross-examination, the witness also stated that the courier was preferred since the documents are got personally received yet no document has been brought on record to indicate that the alleged documents sent and addressed to M/s Deep Oil Tanker was received, as in the normal course, the original courier receipt as well as the original proof of delivery ought to be in the record and custody of the Insurance Company especially when they knew that the cheque in question had been dishonoured. The cross-examination further indicates that the witness could not satisfactorily explain the chain of events regarding the dishonour of cheque, the cancellation of policy, intimation sent to M/s Deep Oil Tanker as well as the fact that no information was sent to the relevant Transport Authorities or the Traffic Department.

43. In light of the aforesaid statement and the documents on record, this Court clearly finds that the conclusion arrived at by the Tribunal is based on the evidence on record and does not suffer from any infirmity which may persuade this Court to interfere. There is no explanation why the original documents were not filed nor there is any attempt to explain and to get the said documents treated as secondary evidence. The conclusion drawn by the Tribunal, coupled with the narrative as well as the tenor of the witness noticed in his cross-examination clearly points to the discrepancies and the fact that the Insurance Company could not successfully prove that the upon the cheque being dishonoured, its intimation was promptly conveyed to the insured M/s Deep Oil Tanker, the relevant Transport Authorities and the Traffic Authorities.

44. At this stage, it will be relevant to notice the decisions of the Apex Court in the case of Mangla Ram (Supra) wherein in paragraph 35 and 36 of the said report, the Apex Court has held as under:-

".....35. The next question is about the liability of insurer to pay the compensation amount. The Tribunal has absolved the Insurance Company on the finding that no premium was received by the Insurance Company nor was any insurance policy ever issued by the Insurance Company in relation to the offending vehicle. Respondents 2 and 3 had relied on a cover note which according to Respondent 1 Insurance Company was fraudulently obtained from the then Development Officer, who was later on sacked by Respondent 1 Insurance Company. The possibility of misuse of some cover notes lying with him could not be ruled out.

36. Respondents 2 and 3 have relied on the decision of this Court in Rula [New India Assurance Co. Ltd. v. Rula, (2000) 3 SCC 195 : 2000 SCC (Cri) 601] . That decision will be of no avail to Respondents 2 & 3. In that case, the Court found that the insurance policy was already issued after accepting the cheque; whereas in the present case, Respondent 1 Insurance Company has been able to show that no payment was received by the Company towards the insurance premium nor had any insurance policy been issued in respect of the offending vehicle (jeep). However, the claim of Respondents 2 & 3 to the extent that they possessed a cover note issued by the then Development Officer of Oriental Insurance Company (Respondent 1) will have to be accepted coupled with the fact that there is no positive evidence to indicate that the said cover note is ante-dated. Pertinently, the cover note has been issued by the then Development Officer at a point of time when he was still working with Respondent 1 Insurance Company. It must follow that the then Development Officer was acting on behalf of the Insurance Company, even though stricto sensu Respondent 1 Insurance Company may not be liable to pay any compensation as no insurance policy has been issued in respect of the offending vehicle, much less a valid insurance policy. But for the cover note issued by the Development Officer of Respondent 1 Insurance Company at a point of time when he was still working with Respondent 1, to do substantial justice, we may invoke the principle of "pay and recover", as has been enunciated by this Court in National Insurance Co. Ltd. v. Swaran Singh [National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297, para 110 : 2004 SCC (Cri) 733]."

45. Similarly in the case of Rula (Supra) in paragraphs 9, 10 and 11, the Apex Court has also noticed its earlier decision of Indrajit Kaur (Supra) and has held as under:-

".....9. Section 149 casts a duty on the insurer to satisfy judgments and awards against persons insured in respect of third-party risks. Sub-section (1) of Section 149 is quoted below:

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third-party risks.--(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163-A is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

10. The contract of insurance in respect of motor vehicles has, therefore, to be construed in the light of the above provisions. Section 146(1) contains a prohibition on the use of the motor vehicles without an insurance policy having been taken in accordance with Chapter XI of the Motor Vehicles Act. The manifest object of this provision is to ensure that the third party, who suffers injuries due to the use of the motor vehicle, may be able to get damages from the owner of the vehicle and recoverability of the damages may not depend on the financial condition or solvency of the driver of the vehicle who had caused the injuries.

11. Thus, any contract of insurance under Chapter XI of the Motor Vehicles Act, 1988 contemplates a third party who is not a signatory or a party to the contract of insurance but is, nevertheless, protected by such contract. As pointed out by this Court in New Asiatic Insurance Co. Ltd. v. Pessumal Dhanamal Aswani [AIR 1964 SC 1736] the rights of the third party to get indemnified can be exercised only against the insurer of the vehicle. It is thus clear that the third party is not concerned and does not come into the picture at all in the matter of payment of premium. Whether the premium has been paid or not is not the concern of the third party who is concerned with the fact that there was a policy issued in respect of the vehicle involved in the accident and it is on the basis of this policy that the claim can be maintained by the third party against the insurer."

46. The decision of the two Division Bench judgments of this Court in the case of Jitendra Kumar (Supra) and

Smt. Khatoon (supra) are worthwhile to be noticed.

47. In the case of Jitendra Kumar (supra) a division Bench of this Court while considering the provisions of Motor Vehicles Act as well as the Insurance Act and also the earlier decision of the Apex Court of Indrajit Kaur (Supra), Seema Malhotra (supra), Rula (supra) as well as the National Insurance Company Ltd. Vs. Swaran Singh and Others reported in 2004 (3) SCC 297 and after discussing both statutory provisions as well as the effect of the decisions of the Apex Court in paragraphs 10 to 18 of the said report, however, the relevant paragraph containing the dictum is being reproduced hereafter:-

"17. Before we deal with various contentions raised by the parties it is desirable to look into the legislative history of the provisions for their interpretation. The relevant provisions of the Act indisputably are beneficent to the claimant. They are in the nature of a social welfare legislation.

"18. Chapter XI of the Motor Vehicles Act, 1988, inter alia, provides for compulsory insurance of vehicles in relation to the matters specified therefor. The provision for compulsory insurance indisputably has been made, inter alia, with a view to protect the right of a third party."

48. Similarly, in the case of Khatoon (Supra), a Division Bench of this Court while noticing the statutory provisions of M.V. Act as well as the Insurance Act and the earlier decisions of the Apex Court including the decision of Jitendra Kumar (Supra) in paragraphs 35 to 40 and in paragraph 40 of the said report it has succinctly held as under:-

".....40. This decision, thus, lays down that in case the Insurance Company has cancelled the insurance coverage in respect of a vehicle, it must inform all concerned inclusive of the Regional Transport Authority and the appropriate police authority dealing with traffic simultaneously with the information of cancellation of the insurance coverage to the owner of the vehicle/insured. If the Insurance Company has informed only the owner of the vehicle regarding cancellation of insurance coverage, but has not informed the Regional Transport Authority and appropriate police authority regarding such cancellation, then the Insurance Company will not be able to avoid the liability to pay compensation to the third parties specially in the form of stop-gap arrangement and recover from the owner i.e. insured."

49. While deciding the case of Smt. Khatoon (Supra), a Division Bench of this Court also noticed that there were certain conflicting decisions and the matter has been referred to a Larger Bench of the Apex Court, however, since the reference has yet not been answered, accordingly, the decision has been taken as per the prevailing law.

50. This Court also finds that in the instant case, the Insurance Company has not been able to discharge its burden regarding the plea that the information regarding dishonour of cheque was conveyed to the various Transport and Traffic Authorities by way of cogent evidence, hence, it is not entitled to the benefit of the decisions rendered by the Apex Court in the case of Seema Malhotra (supra) and Parwathenene (Supra).

51. This Court finds that the aforesaid dictum as noticed above is binding on this Court, coupled with the fact that the Insurance Company has already been granted the right of recovery and the claimant-third parties may not suffer especially where the persons have lost their lives in an accident and the compensation granted under the Motor Vehicles Act is a part of social beneficial scheme, hence, considering the aforesaid aspect of the matter, this Court is in agreement with the findings recorded by the Tribunal.

52. Thus, for the aforesaid reasons, the first contention of the appellants fail.

53. The other issue regarding the contributory negligence, if tested on the plea as well as the evidence led before the Tribunal, it would reveal that a feeble plea regarding contributory negligence was raised by the Insurance Company, however, no evidence in this regard was led before the Tribunal. Moreover, the owner of the offending truck namely Owais Khan, though, filed his examination-in-chief and was cross-examined. He had deposed that the Truck bearing No. HR-38 D-1220 on the said date was being driven by Sri Irshad Khan S/o Moin Khan but he did not enter into the witness box. In absence of the driver, the plea of contributory negligence as raised could not be successfully proved when there was clear evidence by an eye-witness who deposed in shape of claimant-witness no. 2 namely Ram Avtar who narrated the incident that the offending truck hit the motorcycle from behind and there was no fault of the motorcyclist and stood firm by his statement which could not be shaken in his cross-examination.

54. Thus, merely because three persons were riding the motorcycle and they were not wearing helmets in itself will not give rise to any inference that this act contributed towards the accident while there is clear evidence that the offending vehicle had hit the motorcycle from behind.

55. In order to successfully contest the plea of contributory negligence, it must be shown that the person injured or deceased must have committed an act of negligence and such act contributed to the accident directly in the chain of events resulting in the cause of the accident.

56. In the present case though the three persons were riding on a motorcycle and were without helmets they may have violated the traffic rules yet from the material available on record, it has been clearly established that the offending truck hit the motorcycle from behind. Thus, the three persons on the motorcycle in the aforesaid situation cannot be said to have contributed to the occurrence of the accident, hence, the plea raised by the learned counsel for the appellant fails.

57. The Court is fortified in its view in light of the decision of the Apex Court in the case of ***Mohammad Siddique and Another Vs. National Insurance Company Ltd. and Others*** reported in ***2020 (3) SCC 572***. The relevant paragraphs nos. 12 and 13 of the said report reads as under:-

".....12. But the above reason, in our view, is flawed. The fact that the deceased was riding on a motorcycle along

with the driver and another, may not, by itself, without anything more, make him guilty of contributory negligence. At the most, it would make him guilty of being a party to the violation of the law. Section 128 of the Motor Vehicles Act, 1988, imposes a restriction on the driver of a two-wheeled motorcycle, not to carry more than one person on the motorcycle. Section 194-C, inserted by Amendment Act 32 of 2019, prescribes a penalty for violation of safety measures for motorcycle drivers and pillion riders. Therefore, the fact that a person was a pillion rider on a motorcycle along with the driver and one more person on the pillion, may be a violation of the law. But such violation by itself, without anything more, cannot lead to a finding of contributory negligence, unless it is established that his very act of riding along with two others, contributed either to the accident or to the impact of the accident upon the victim. There must either be a causal connection between the violation and the accident or a causal connection between the violation and the impact of the accident upon the victim. It may so happen at times, that the accident could have been averted or the injuries sustained could have been of a lesser degree, if there had been no violation of the law by the victim. What could otherwise have resulted in a simple injury, might have resulted in a grievous injury or even death due to the violation of the law by the victim. It is in such cases, where, but for the violation of the law, either the accident could have been averted or the impact could have been minimised, that the principle of contributory negligence could be invoked. It is not the case of the insurer that the accident itself occurred as a result of three persons riding on a motorcycle. It is not even the case of the insurer that the accident would have been averted, if three persons were not riding on the motorcycle. The fact that the motorcycle was hit by the car from behind, is admitted. Interestingly, the finding recorded by the Tribunal that the deceased was wearing a helmet and that the deceased was knocked down after the car hit the motorcycle from behind, are all not assailed. Therefore, the finding of the High Court that 2 persons on the pillion of the motorcycle, could have added to the imbalance, is nothing but presumptuous and is not based either upon pleading or upon the evidence on record. Nothing was extracted from PW 3 to the effect that 2 persons on the pillion added to the imbalance.

13. Therefore, in the absence of any evidence to show that the wrongful act on the part of the deceased victim contributed either to the accident or to the nature of the injuries sustained, the victim could not have been held guilty of contributory negligence. Hence, the reduction of 10% towards contributory negligence, is clearly unjustified and the same has to be set aside."

58. In light of the aforesaid, this Court is in agreement of the findings recorded by the Tribunal on the issue of contributory negligence and it cannot be said that any worthwhile evidence has been ignored.

59. For the reasons as recorded above, this Court finds that there is no error committed by the Tribunal while deciding the three claim petitions, accordingly, the aforesaid appeals are devoid of merit and are dismissed.

60. Any amount deposited before this Court shall be remitted along with the records to the Tribunal concerned to be released in favour of the claimants within two weeks.

61. All the three appeals are accordingly dismissed and in the aforesaid facts and circumstances, there shall be no order as to costs.

(2021)07ILR A347
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2021

BEFORE

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

FAFO Defective No. 641 of 2005

United India Insurance Co. Ltd.
...Appellant
Versus
Dilbag Singh & Anr. ...Respondents

Counsel for the Appellant:
Sri Arvind Kumar, Sri Komal Mehrotra

Counsel for the Respondents:

Practice & Procedure - Framing of question of law - Workmen Compensation Act, 1923 – The appeal should be dismissed with reasons at the admission stage only if it does not involve any substantial question of law. (Para 7)

Appeal Rejected. (E-8)

List of Cases cited:

1. Golla Rajanna Etc. Vs Divisional Manager& anr. 2017 (1) TAC 259 (SC)

2. Oriental Insurance Company Ltd. Vs Siby George & ors. LawSuit (SC) 470

3. North East Karnataka Road Transport Corporation Vs Smt. Sujatha Civil Appeal No. 7470 of 2009

4. E.S.I.C. Vs S. Prasad F.A.F.O No. 1070 of 1993

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

1. Heard Sri Arvind Kumar, assisted by Sri Komal Mehrotra, learned counsel for the appellant through video conference and perused the record.

2. This appeal, at the behest of the United India Insurance Company Limited, challenges the judgment and order dated 16.12.2004 passed by Commissioner Workmen's Compensation, Ghaziabad / Assistant Labour Commissioner U.P. Ghaziabad in W.C.A. Case No.23 of 2004 whereby the Court below had allowed the appeal upturning the decision of the medical board.

3. Substantial questions of law which are framed by the appellant herein read as under :-

(i) Whether the Commissioner is legally entitled to award higher amount of compensation than the amount claimed by the claimants ?

(ii) Whether in the absence of any proof of income or employment the Commissioner is legally entitled to award a higher compensation than the compensation claimed ?

(iii) Whether the Commissioner is legally justified to accept disability certificate without it being proved before him ?

(iv) Whether the Commissioner was legally justified to award 12% interest ?

(v) Whether the Commissioner was legally justified to fix the liability of

payment of interest on the appellant company ?

4. Brief facts as culled out from the record are that the respondent who was an employee, sustained injuries falling within the Workmens' Compensation Act. He suffered permanent disability of 55%. However, the disability which was assessed came to be 100% as he was a driver by profession and he was injured to such an extent that the medical proof showed that at the age of age 50 years he would not be able to take up the vocation of driver.

5. In that view of the matter, Workmens' Commissioner held that he suffered 100% disability. The Commissioner has relied on the decision of this High Court in National Insurance Company Limited Vs. Sri Krishna Mehta and another, hence it cannot be said that the said finding is in any way perverse calling for any interference by this Court.

6. The appeal under Workmen Compensation Act/Employees State Insurance Act has to be viewed very seriously in view of the judgment in **Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC)** and **Oriental Insurance Company Ltd. Vs. Siby George & Ors, 2012 Law Suit (SC) 470.**

7. The finding of fact is that the injured was an employee who had sustained injury during employment and was incapacitated to the tune of 100%. This finding cannot be interfered as it is not perverse.

8. I am supported in my view by the decision of the Apex Court in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided** on 2.11.2018 wherein the Court has held as under:

"15. Such appeal is then heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not. Whether the appeal involves a substantial question of law or not depends upon the facts of each case and needs an examination by the High Court. If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law.

16. Now coming to the facts of this case, we find that the appeal before the High Court did not involve any substantial question of law on the material questions set out above. In other words, in our view, the Commissioner decided all the material questions arising in the case properly on the basis of evidence adduced by the parties and rightly determined the compensation payable to the respondent. It was, therefore, rightly affirmed by the High Court on facts.

17. In this view of the matter, the findings being concurrent findings of fact of the two courts below are binding on this Court. Even otherwise, we find no good ground to call for any interference on any of the factual findings. None of the factual findings are found to be either perverse or arbitrary or based on no evidence or against any provision of law. We accordingly uphold these findings."

9. This Court, recently in **F.A.F.O. 1070 of 1993 (E.S.I.C. Vs. S. Prasad)** decided on 26.10.2017 has followed the decision in **Golla Rajana (Supra)** and has held as follows:

"The grounds urged before this Court are in the realm of finding of facts and not a question of law. As far as question of law is concerned, the aforesaid judgment in ***Golla Rajanna Etc. Etc. Versus Divisional Manager and another (supra)*** *in paragraph 8 holds as follows "the Workman Compensation Commissioner is the last authority on facts. The Parliament has thought it fit to restrict the scope of the appeal only to substantial questions of law, being a welfare legislation. Unfortunately, the High Court has missed this crucial question of limited jurisdiction and has ventured to re-appreciate the evidence and recorded its own findings on percentage of disability for which also there is no basis."*

10. As far as the question no. 1 is concerned, it can be said that it is in the realm of question of law. As far as question nos. 2 and 4 are concerned, they are in the realm of question of fact. As far as the question no. 5 is concerned, it is statutory provision under Section 4A of the Employees Compensation Act that the amount be paid with 12% rate of interest. The questions no. 1 to 5 are answered against the appellant and in favour of the respondent.

11. In view of the above, the appeal fails and is dismissed. The so called questions of law framed by the Insurance Company are answered against it. In fact the substantial questions of law raised into 2 to 4 are the questions of fact.

12. Interim relief, if any, shall stand vacated forthwith.

(Ref: Civil Misc. Delay Condonation Application)

1. Heard.

2. This is an application seeking condonation of delay in filing appeal.

3. Cause shown is sufficient.

4. The delay in filing the appeal is hereby condoned.

5. This application, accordingly, stands allowed.

(2021)07ILR A349
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2021

BEFORE

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

FAFO No. 2807 of 2013

Smt. Anita & Ors. ...Appellants
Versus
Sri Anuj Gupta & Anr. ...Respondents

Counsel for the Appellants:
Sri Nitin Sharma

Counsel for the Respondents:
Sri Ashish Kumar Singh, Sri S.K. Mehrotra

Quantum of Compensation - Composite/Contributory Negligence - It is said to be contributory or composite negligence when the deceased or the person concerned is shown to have contributed to the accident and the impact of the accident could have been minimized if he had taken care. In the instant case, since the deceased was not plying the vehicle therefore deduction of 50% from the compensation awarded is bad. (Para 14)

Appeal Partly Allowed. (E-8)

List of Cases cited:

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

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 Co. Ltd. & ors. 2015 LawSuit (SC) 469

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

5. Smt. Hansagori P. Ladhani Vs The Oriental Insurance Co. Ltd. 2007 (2) GLH 291

6. Tej Kumari Sharma Vs Chola Mandlam M.S. General Insurance Co. Ltd. First Appeal From Order No. 2871
of 2016

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

1. Heard Sri Nitin Sharma, learned counsel for the appellant and Sri S.K. Mehrotra, learned counsel for the respondent-Insurance Company. None has appeared for the owner.

2. This appeal, at the behest of the claimants, challenges the judgment and award dated 15.12.2012 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.15, Meerut (hereinafter referred to as 'Tribunal') in M.A.C. No. 344 of 2009.

3. Brief facts as culled out from the record are that on 2.11.2008 the deceased along with other villagers was going from village Kaili to Ghaziabad in the car and at about 8.40 in the morning when they reached near village Lakhankat at National Highway 24, a Scorpio bearing No.DL 4 CNB-2772 dashed with the car. As a result of that, all those who were sitting in the car sustained injuries but the deceased had sustained grievous injuries. He was shifted from one hospital to other and ultimately on 3.12.2008, he succumbed to his injuries at Safdarjung Hospital, New Delhi.

4. The deceased was 45 years of age at the time of accident. He was an agriculturist and was having vocation of advocacy and was earning Rs.8,000/- from his each profession. He was survived by his widow and two children. The Tribunal has considered his income to be Rs.5,000/-, deducted 1/3rd towards personal expenses of the deceased, granted multiplier of 13, granted Rs.3,90,000/- towards medical expenses and ultimately assessed the total compensation to be Rs.9,40,000/-. The Tribunal held both the drivers namely driver of the Car in which the deceased was travelling and the driver of the Scorpio 50:50% negligent and as the owner/driver of the car was not made party, deducted 50% of the amount of compensation.

5. It is submitted by learned counsel for the appellants that the Tribunal has deducted 50% of the award which is bad as the deceased was not plying the vehicle which met with accident.

6. Learned counsel for the appellant has submitted that the deceased was an agriculturist and was also in the profession of advocacy, hence, his income as considered by the Tribunal is on the lower side and it should be considered to be Rs.16,000/- per month namely Rs.8,000/- from each profession. It is further submitted that th Tribunal did not grant any amount for future loss of income of the deceased and also the amount awarded under non-pecuniary heads granted by the Tribunal is on the lower side and which should be as per the decision of the Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and Others,**

2017 0 Supreme (SC) 105. Lastly, learned counsel for the appellant has submitted that the interest as awarded by the Tribunal is on the lower side and requires to be enhanced.

7. As against this, Sri S.K. Mehrotra, learned counsel for the respondent-Insurance Company submits that income as suggested by the appellants cannot be granted even in the year of accident. It is further submitted by Sri Mehrotra that the Tribunal has erred in granting future loss of income to be 40% as it should be 30% in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. This submission of Sri Mehrotra is misread as the judgment does not reflect any amount under the head of future loss has been added to the datum figure.

8. It is submitted by Sri Mehrotra that the quantum of compensation and the interest awarded by the Tribunal is just and proper and does not call for any interference by this Court.

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

10. 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.

11. 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.

12. 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

13. 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*

14. 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 50% from the compensation awarded is bad and is set aside.

15. This takes this Court to the issue of compensation. The income of the deceased in the year of accident and looking to his profession can be considered to be Rs.10,000/- per month to which as the deceased in the age bracket of 40 to 50 years, 30% as future loss of income requires to be added in view of the decision of the Apex Court in **Pranay Sethi (Supra)**. As far as amount under the head of non-pecuniary damages are concerned, it should be Rs.70,000/- + 10% increase as per the decision of the Apex Court in Pranay Sethi (Supra) as three years have elapsed hence, the lump sum amount under this head would be Rs.1,00,000/-. As far as multiplier and amount awarded for medical exepenses are concerned, they are just and proper and does not call for interference of this Court.

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

i. Income Rs.10,000/-

ii. Percentage towards future prospects : 30% namely Rs.3000/-

iii. Total income : Rs. 10,000 + 3000 = Rs.13,000/-

iv. Income after deduction of 1/3rd : Rs. 8670/- (rounded up)

v. Annual income : Rs.8670 x 12 = Rs.1,04,040/-

vi. Multiplier applicable : 13

vii. Loss of dependency: Rs.1,04,040 x 13 = Rs.13,52,520/-

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

ix. Medical Expenses : 3,90,000/- + Rs. 10,000/- (for attendant and special diet) as awarded by the Tribunal.

x. Total compensation : 18,52,520/-

17. 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."

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

18. 1 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. 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.

19. 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.

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

(2021)07ILR A356
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.07.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Habeas Corpus No. 906 of 2021

Rajeev Singh ...Petitioner

Versus

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

Counsel for the Petitioner:
Pawan Kumar Pandey, Mohd. Amir Khan, Rajesh K. Agnihotri

Counsel for the Respondents:
Govt. Advocate, A.S.G.

(a) Criminal Law - Bail - National Security Act, 1980: Section 3(2) - Even one solitary incident may give rise to the disturbance of 'public order'.

In the instant case, the petitioner conspired to get persons assassinated who being the Mahant of the HulasiBagiya Ashram, his disciple and his son and so creating a menace in the society at large. To assassinate a religious persons, while sleeping at night, strikes at the root of the State's authority and is directly connected to'public order' This act of the petitioner was not directed against a single individual, but against the public at large having the effect of disturbing even tempo of life of the community and thus, breaching the 'public order' (Para 23).

The detaining authority has reason to believe that there is imminent possibility of petitioner being released on bail and on being so released, he would in all probability would indulge in prejudicial activities and to prevent him from doing so, it is necessary to detain him. (Para 24)

Writ Petition Rejected. (E-8)

List of Cases cited:

1. Ashok Kumar Vs Delhi Administration AIR 1982 SC 1143 (followed)

2. Victoria Fernandes Vs Lalmal Sawma AIR 1992 SC 687 (followed)

3. State of U.P. & anr.Vs Sanjay Pratap Gupta @ Pappu & ors. 2004 (8) SCC 591 (followed)

4. Sant Singh Vs District Magistrate, Varansi 2000 Cri LJ 2230 (followed)

5. Mustakmiya Jabbarmiya Shaikh Vs M.M. Mehta (1995) 3 SCC 237 (followed)

6. Amanulla Khan Kudeatalla Khan Pathan Vs St. of Guj. (1999) 5 SCC 613 (followed)

7. Hasan Khan Ibne Haider Khan Vs R.H. Mendonea (2000) 3 SCC 511 (followed)

8. Smt. Bimla Rani Vs U.O.I. 1989 (26) ACC

9. Alijan Mian Vs District Magistrate Dhanbad 1983 (3) SCR 930: AIR 1983 SC 1130 (followed)

10. Attorney General of India Vs Amratlal Prajivandas AIR 1994 SC 2179 (followed)

11. Kamarunnissa & ors. Vs U.O.I. (1991) 1 SCC 128 (followed)

12. Champion R. Sangma Vs St. of Meghalaya (2015) 16 SCC 253 (followed)

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

1. The instant Habeas Corpus Petition under Article 226 of Constitution of India has been filed by the petitioner, **Rajeev Singh**, through his next friend/wife Smt. Kiran Singh, challenging the validity and correctness of the order of detention dated 25.10.2020 passed by the District Magistrate, Hardoi (respondent no.2) (hereinafter referred to as "**Detaining Authority**") under Sub-section (2) of Section 3 of the National Security Act, 1980 (hereinafter referred to as "**Act, 1980**") contained in Annexure No.2 to the writ petition on being satisfied that the detention of the petitioner was necessary with a view to prevent him from acting in any manner prejudicial to the maintenance of public order as well as confirmation order dated 08.12.2020 passed by the Under Secretary, Home (Confidential) Department, Government of U.P.,

Lucknow (respondent no.2) contained in Annexure No.1 to the writ petition.

2. Heard Shri Pawan Kumar Pandey, learned Counsel for the petitioner/detenue and Shri S.P. Singh, learned Additional Government Advocate for the State and perused the material brought on record.

3. No one is present on behalf of the Union of India to press this petition.

4. The order of detention along with grounds of detention was served upon the petitioner on 25.10.2020 in jail, while he was in jail in a criminal case. Against the said order of detention, the petitioner made a representation dated 10.11.2020 to the Detaining Authority, the Secretary, Department of Home and another representation to the Advisory Board constituted under Section 9 of the Act, 1981. The State Government, in exercise of powers conferred under Section 12 (1) of the Act, 1981, has confirmed the order of detention and directed that the petitioner be detained for a period of three months from the date of detention vide order dated 29.10.2020, which was communicated to the petitioner on 10.11.2020.

5. It transpires from the grounds of detention that in the night of 31.08.2020/01.09.2020, Baba Heeradas, his disciple Meeradas and his son Netram were brutally murdered by suffocating and assaulting them with bricks, stones, rolling board, knife and butt of country made pistol in Hulasi Bagiya Aashram near Kumaon Village. On account of the said incident, the public order was completely breached and attempts were made to spread religious fanaticism by various social organizations and political parties.

6. On the basis of written report of Om Shankar in respect of the aforesaid incident, an F.I.R. was lodged, which was registered as Case Crime No. 353 of 2020, under Section 302 I.P.C. against unknown persons, at Police Station Tadiyawa, District Hardoi on 01.09.2020. During investigation, it came into light that the main accused for murdering three deceased persons is Rakshpal, who used to stay at Ashram. On the clue of the informer, main accused Rakshpal was arrested by the police on 02.09.2020 at about 04:30 P.M. near Badauli Petrol Pump and on his interrogation, he admitted his guilt in murdering three deceased persons and narrated the story in detail to the police and disclosed the names of Sanjay and Shafiq in their connection of murder of the deceased persons and also disclosed the name of Rajiv Kumar Singh (petitioner herein) and his brother Hariram in connection of preparing forged "Will deed'. Immediately thereafter, on the pointing out of Rakshpal, the police had recovered forged "Will deed', blood stained brick, blood stained knife and T-Shirt. Thereafter, the associate of Rakshpal, namely, Sanjay, was also arrested and on his pointing out, blood stained brick was also recovered. On 07.09.2020, the accused Shafiq was arrested, whereas on 21.09.2020, accused Hariram was arrested.

7. During investigation, the confessional statements of accused persons including the petitioner were recorded. All the accused in their statements admitted the fact that it was Rajiv Singh (petitioner herein), who made conspiracy in making forged "Will' in favour of Rakshpal and on his advise, they killed the deceased. The petitioner/detenue in his confessional statement admitted the fact that friendship with Rakshpal was made in jail several years ago and since then Rakshpal is in his contact and Rakshpal has treated him as elder brother. The petitioner has stated that

Rakshpal told him that if land of the Ashram is given to him on any count, then, he would give 1/3rd of the land to him and life will go smoothly for both of them. On this, the petitioner told Rakshpal that if he will give him thumb impression of Heeradas on any count in a blank stamp paper, he would make forged "Will deed' with the help of his Advocate and on the basis of the said forged Will, he become the owner of whole property of the Ashram, whereupon Rakshpal had given him a blank stamp paper affixing therein thumb impression of Netram, who was the son of Heeradas, to which he (the petitioner), after making a forged "Will deed' in favour of Rakshpal, has given to Rakshpal. Later on, Rakshpal told him that Heeradas has already made a "Will deed' in favour of his disciple Meerdas and prepared for selling seven bigha of land and also wanted to evict him from the Ashram. On this, he (the petitioner) told Rakshpal that if you get all the three out of the way, then, no heirs would remain alive and both of them will succeed in their design.

8. On the basis of the statements of the accused persons and recovery of weapons of assault on their pointing out and also other available evidences, Investigating Officer found the involvement of the petitioner in the crime and has filed charge-sheet before the competent Court. The petitioner is having a criminal history of 21 criminal cases, which are registered at various police stations of the district. On account of the said triple murder, thousands of villagers of village Kuamau and nearby villages had gathered at the place of occurrence and a panic situation has been prevailed in the village. The children and women have closed their door due to fear. On account of death of Mahant, a malicious attempt was made to spread religious frenzy. The different political and social party have tried to disturb the social harmony. The atmosphere remained panic for about ten days. Extra forces and P.A.C. were also deployed to bring the situation under control. On 05.10.2020, the petitioner applied for bail before the Court which was fixed for 27.10.2020 and there was possibility of release of the petitioner on bail and he would again indulge in such activities which were likely to affect adversely public order, therefore, his detention became necessary under the Act of 1980.

9. In the aforesaid circumstances, Station House Officer, P.S. Tadiyawan, District Hardoi sent a report with relevant papers to Superintendent of Police, Hardoi for detaining the petitioner under Section 3 (2) of the Act, 1980. Thereupon, the Superintendent of Police, Hardoi, after considering the matter became satisfied with the report sent by Station House Officer and submitted his report to the District Magistrate, Hardoi for detaining the petitioner under Section 3 (2) of the Act, 1980 to prevent him from indulging in such activities causing disturbance of public order.

10. On the basis of material placed before him, as briefly referred to above, the Detaining Authority came to the conclusion that the activity of the petitioner are prejudicial to the maintenance of public order and his activities has disturbed the public tranquility, hence keeping in view his criminal record and activities, the Detaining Authority felt satisfied that there was every likelihood that just after his release from jail, he will again indulge in such type of activities which will adversely affect the maintenance of public order and peace and, therefore, to prevent him from committing similar activities prejudicial to the maintenance of public order, it became necessary to detain

him with immediate effect under Section 3 (2) of the Act, 1980. Thus, the Detaining Authority passed the impugned order dated 25.10.2020 for detaining the petitioner under Section 3 (2) of the Act, 1980. The Detaining Authority communicated the grounds of detention to the petitioner on 25.10.2020. On 10.11.2020, the petitioner has sent his representation through Superintendent of Jail, District Hardoi to the Detaining Authority, which was rejected by the Detaining Authority on 13.11.2020 and other representation, which was sent by the petitioner, to the State Government was also rejected on 25.11.2020 and the Central Government has rejected the representation of the detenue on 07.12.2020. The aforesaid order of rejection has also been communicated to the petitioner.

11. The pleadings between the parties have been exchanged.

12. While challenging the impugned detention orders, learned Counsel for the petitioner has argued that on account of taking active part in public agitation against the local police, the police personnel became annoyed with the petitioner and lodged 21 criminal cases against him. He argued that on the basis of the said criminal cases, the District Magistrate, vide order dated 25.10.2020, invoked the provisions of Section 3 (2) of Act, 1981 and detained the petitioner/detenue in jail. He argued that out of 21 criminal cases lodged against the petitioner/detenue, the petitioner /detenue was acquitted in five cases and enlarged on bail in eleven cases, whereas in three cases, final report has been submitted.

13. Learned Counsel for the petitioner further argued that in Crime No. 353 of 2020, under Section 419, 420, 467, 468, 302, 120-B I.P.C. and Section 3 (ii) (v) of the Scheduled Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989, Police Station Tadiyawan, District Hardoi, the allegation against the petitioner is only to the effect that forged "Will deed' was prepared by him in conspiracy with Rakshpal with regard to the properties of the Ashram of Heeradas in favour of accused Rakshpal but there is no allegation for killing the three deceased persons. He further argued that the petitioner has no connection with co-accused Rakshpal and only on the basis of call details of co-accused Rakshpal and his confessional statement, the petitioner has falsely been implicated in the aforesaid criminal case. Further, the petitioner has no connection with the said incident or property of Baba Heeradas. The aforesaid F.I.R. has been lodged against the petitioner due to political enmity with local M.L.A. In these backdrops, the submission is that the District Magistrate, while passing the impugned order dated 25.10.2020 under the Act of 1980, curtailed his personal liberty.

14. Per contra, learned Additional Government Advocate appearing on behalf of the State, while supporting the order of detention, have submitted that the activities of the petitioner were prejudicial to the maintenance of public order; his activities have disturbed the normalcy of the society; there was every possibility that just after his release from jail, he will again indulge in such activities, which will adversely affect the public order and peace, therefore, to prevent him from further committing similar criminal activities prejudicial to the maintenance of public order, the detention order was passed by the Detaining Authority after its subjective satisfaction.

15. Learned Additional Government Advocate has further argued that the

activities of the petitioner were directed against the public at large and were sufficient to bring them within the ambit of public order. The satisfaction of the Detaining Authority is based on reliable and relevant material and that there was no illegality in the impugned orders. He further argued that if the Detaining Authority arrives at the subjective satisfaction that the activities of the detenue are prejudicial to the maintenance of public order and passes the detention order, it cannot be interfered by this Court. The grounds of detention were promptly communicated to the petitioner. He further argued that the petitioner is a man of criminal antecedents and 21 criminal cases have been registered against the petitioner at different police stations of the district. He also pointed out that the State Government, vide order dated 08.12.2020, had extended detention period tentatively for three months and the same was also served upon the petitioner. Thereafter, the State Government, vide order dated 20.01.2021, had extended the detention period for six months tentatively w.e.f. actual date of detention i.e. on 25.10.2020 and the same was also communicated to the petitioner through radiogram on 20.01.2021. He argued that till date no representation against the extension of detention order has been filed by the petitioner.

16. Having heard learned Counsel for the petitioner/detenue and learned AGA on behalf of the State, it transpires that the main question for consideration before this Court is whether the activities of the petitioner mentioned in the grounds of detention fall within realm of public order or law and order.

17. The distinction between the two concepts of *"public order"* and *"law and order"* has been lucidly explained by the Apex Court in **Ashok Kumar Vs. Delhi Administration** : AIR 1982 SC 1143, wherein the Apex Court has observed that the true distinction between the areas of *"public order"* and *"law and order"*, being fine and sometimes overlapping, does not lie in the nature or quality of the act but in the degree and extent of its reach upon society. The Apex Court has further observed that the act by itself is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it *"prejudicial to the maintenance of public order"*. If the contravention in its effect is confined only to a few individuals directly involved, as distinct from a wide spectrum of public, it would raise the problem of *"law and order"* only. It is the length, magnitude and intensity of the terror wave unleashed by a particular act or violence creating disorder that distinguishes it as an act affecting "public order" from that concerning "law and order". On the facts of that case the Apex Court held that whenever there is an armed hold up by gangsters in a residential area of the city and persons are deprived of their belongings at the point of knife or revolver they become victims of organised crime and such acts when enumerated in the grounds of detention, clearly show that the activities of a detenu cover a wide field falling within the ambit of the concept of "public order".

18. The Apex Court, to the aforesaid effect, has made observations in ***Victoria Fernandes Vs. Lalmal Sawma*** : AIR 1992 SC 687, wherein, relying on its earlier decisions, including **Ashok Kumar Vs. Delhi Administration** (supra), it was reiterated that while the expression "law and order" is wider in scope, in as much as contravention of law always affects order,

"public order" has a narrower ambit and public order would be affected by only such contravention which affects the community and public at large.

19. The distinction between violation of *'law and order*' and an act that would constitute disturbing the maintenance of *'public order'* had also fallen for consideration of the Apex Court in **State of U.P. & Anr. Vs. Sanjay Pratap Gupta @ Pappu and others** : 2004 (8) SCC 591, wherein the Apex Court, after an extensive survey of authority on the issue brought out the distinction in fine detail, which reads as under :-

"12. The true distinction between the areas of law and order and public order lies not merely in the nature or quality of the act, but in the degree and extent of its reach upon society. Acts similar in nature, but committed in different contexts and circumstances, might cause different reactions. In one case it might affect specific individuals only, and therefore touches the problem of law and order only, while in another it might affect public order. The act by itself, therefore, is not determinant of its own gravity. In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different.

13. The two concepts have well-defined contours, it being well established that stray and unorganized crimes of theft and assault are not matters of public order since they do not tend to affect the even flow of public life. Infractions of law are bound in some measure to lead to disorder but every infraction of law does not necessarily result in public disorder. Law and order represents the largest scale within which is the next circle representing public order and the smallest circle represents the security of State. "Law and order" comprehends disorders of less gravity than those affecting "public order" just as "public order" comprehends disorders of less gravity than those affecting "security of State". (See Kuso Sah v. State of Bihar 1974 1 SCC 185, Harpreet Kaur v. State of Maharashtra 1992 2 SCC 177, T.K Gopal Alias Gopi v. State Of Karnataka 2000 6 SCC 168 and State of Maharashtra v. Mohd. Yakub 1980 2 SC 1158).

14. The stand that a single act cannot be considered sufficient for holding that public order was affected is clearly without substance. It is not the number of acts that matters. What has to be seen is the effect of the act on the even tempo of life, the extent of its reach upon society and its impact."

20. The issue has also been dealt with in the case of **Sant Singh vs. District Magistrate, Varanasi** : 2000 Cri LJ 2230, wherein in paragraph 7 of the report, while dealing with the point, the Apex Court has held as under :-

"7. The two connotations 'law and order' and 'public 'order' are not the words of magic but of reality which embrace within its ambit different situations, motives and impact of the particular criminal acts. As a matter of fact, in a long series of cases, these two expressions have come to be interpreted by the apex Court. It is not necessary to refer all those cases all over again in every decision for one simple reason that they have been quoted and discussed in earlier decision of this Court dated 14-10-1999 in Habeas Corpus Writ Petition No. 33888 of 1999- Udaiveer Singh v. State of U.P. and the decision dated 1-12-1999 in Habeas Corpus Writ Petition No. 38159 of 1999

Rajiv Vashistha v. State of U.P. (Reported in 1999 All Cri R 2777). The gamut of all the above decisions in short is that the true distinction between the areas of 'public order' and 'law and order' lies not in nature and quality of the act, but in the degree and extent of its reach upon society. Sometimes the distinction between the two concepts of law and order' and 'public order' is so fine that it overlaps. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore, touch the problem of 'law and order', while in another it might affect 'public order'. The act by itself, therefore, is not determination of its own gravity. It is the potentiality of the act to disturb the even tempo of the community which makes it prejudicial to the maintenance of 'public order''.

21. The scope of expression *"acting in any manner prejudicial to the maintenance of public order"* as appearing in Sub-Section 2 of Section 3 of the Act, 1980 also came up for consideration of the Apex Court in **Mustakmiya Jabbarmiya Shaikh Vs. M.M. Mehta**, (1995) 3 SCC 237; **Amanulla Khan Kudeatalla Khan Pathan Vs. State of Gujarat**, (1999) 5 SCC 613 and **Hasan Khan Ibne Haider Khan Vs. R.H. Mendonca**, (2000) 3 SCC 511. The Apex Court held that the fallout, the extent and reach of the alleged activities must be of such a nature that they travel beyond the capacity of the ordinary law to deal with the person concerned or to prevent his subversive activities affecting the community at large or a large section of the society. It is the degree of disturbance and its impact upon the even tempo of life of the society or the people of a locality which determines whether the disturbance caused by such activities amounts only to a breach of "law and order" or it amounts to a breach of "public order". In **Amanulla Khan Kudeatalla Khan Pathan Vs. State of Gujarat (supra)**, the Apex Court has held that the activities involving extortion, giving threat to public and assaulting businessmen near their place of work were sufficient to affect the even tempo of life of the society and in turn amounting to the disturbance of the *"public order"* and not mere disturbance of *"law and order"*.

22. While dealing with the question as to whether one solitary instance can be the basis of an order of detention, the Apex Court in **Smt. Bimla Rani Vs. Union of India :** 1989 (26) ACC 589 SC, observed that the question is whether the incident had prejudicially affected the 'public order'. In other words, whether it affected the even tempo of the life of the community. In **Alijan Mian v. District Magistrate Dhanbad**, 1983 (3) SCR 930 AIR 1983 SC 1130 it was held that even one incident may be sufficient to satisfy the detaining authority in this regard, depending upon the nature of the incident. Similar view has been expressed in the host of other decisions. The question was answered more appropriately and with all clarity in the case of **Attorney General of India v. Amratlal Prajivandas** : AIR 1994 SC 2179, wherein the Apex Court ruled that it is beyond dispute that the order of detention can be passed on the basis of a single act. The test is whether the act is such that it gives rise to an inference that the person would continue to indulge in similar prejudicial activities. It cannot be said as a principle that one single act cannot be constituted the basis for detention. Thus, the argument of learned counsel for the petitioner that since it is solitary incident of the petitioner, he

deserves sympathy, is rejected. Now the law, as it stands, is that even one solitary incident may give rise to the disturbance of 'public order'. It is not the multiplicity but the fall out of various criminal acts. Though there is consistency in the various decisions of the apex Court about the interpretation of the expressions of 'law and order' and 'public order' undue insistence on the case law is not going to pay any dividend as each case revolves round its own peculiar facts and has to be viewed in the light of the various attending factors. It is difficult to find a case on all fours with the case in hand.

23. In the instant case, after examining the grounds of detention, briefly referred to above, on the touchstone of the legal position as emerging from the aforementioned decisions, we are of the view that the activities relied upon by the Detaining Authority to come to the aforementioned conclusion, cannot be said to be mere disturbance of *"law and order"*. As noted in the grounds of detention, the activities of the petitioner pertains to engage into conspiracy to get a persons assassinated who being the Mahant of the Hulasi Bagiya Ashram, namely, Baba Heeradas, his disciple Meeradas and his son Netram and so creating a menace in the society at large. There is material on record to show that petitioner, being the friend of main accused Rakshpal and Rakshpal has treated him as elder brother, engaged into conspiracy to get the forged "Will deed' and on the advise of the petitioner, the main accused Rakshpal, Sanjay and Shafiq, brutally murdered the deceased Baba Heeradas, his disciple Meeradas and his son Netram, which created panic in the public affecting the normal tempo of life. On getting information of triple brutal murder, thousands of villagers of village Kuamau and nearby villagers were gathered there. In the village, fear and panic atmosphere were prevailed. The children and women closed their doors due to said panic. On account of murder of Mahant, the religious fanaticism had erupted. The normal life in the village was paralysed, which resulted in disturbance of public order and public tranquility. To assassinate a religious persons, while sleeping in night, strikes at the root of the State's authority and is directly connected to *'public order'*. This act of petitioner was not directed against a single individual, but against the public at large having the effect of disturbing even tempo of life of the community and thus, breaching the "public order". Thus, we are unable to hold that there was no material before the Detaining Authority to come to the conclusion, it did, to say that the activities of petitioner can be construed as activities prejudicial to the maintenance of "public order," within the meaning of Sub-Section (2) of Section 3 of the Act, 1981. We have, therefore, no hesitation in holding that the instances of petitioner's activities, enumerated in the grounds of detention, clearly show that his activities cover a wide field and fall within the contours of the concept of "public order"and the Detaining Authority was justified in law in passing the impugned order of detention as its confirmation order against the petitioner.

24. So far as the plea of learned counsel for the petitioner that the impugned orders are vitiated because it has been passed with a *mala fide* intention to frustrate the bail likely to be allowed to the petitioner, we are of the view that there is no substance in the contention. The Detaining Authority has reason to believe, on the basis of material placed before him, that there is imminent possibility of his

being released on bail and that on being so released, he would in all probability indulge in prejudicial activities and to prevent him from doing so, it is necessary to detain him. A detention order cannot be struck down on the ground that the proper course for the authority was to oppose the bail application and if bail is granted notwithstanding such opposition, to question it before a higher Court, as is sought and pleaded by learned counsel for the petitioner. In this regard, criteria was laid down by the Apex Court in the case of **Kamarunnissa and others vs. Union of India** : (1991) 1 SCC 128 also fortified in **Champion R. Sangma vs. State of Meghalaya** : (2015) 16 SCC 253, wherein the Apex Court was held :-

"13. In case of a person in custody a detention order can validly be passed (1) if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing."

25. It is not the case of the petitioner that the grounds of detention while extending the period of his detention has not been supplied to the petitioner or any particulars in regard to slapping detention order upon him has not been supplied to him.

26. However, needless to mention here that the grounds of detention were communicated to the petitioner along with the detention order dated 25.10.2020. It was further extended by the State which was communicated to the petitioner in due time.

27. For the reasons aforesaid, we are of the considered view that the apprehension entertained by the Detaining Authority, to the effect that petitioner's activities are prejudicial to the maintenance of public order, is genuine and well founded. Thus, we do not find any illegality in the impugned orders, warranting our interference in extra ordinary jurisdiction under Article 226 of the Constitution of India.

28. The instant Habeas Corpus Writ Petition lacks merit and is, accordingly, **dismissed**.

29. For the facts and circumstances of the case, there will be no order as to costs.

(2021)07ILR A365
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 Cr.P.C. No. 7972 of 2021

Raju Maurya @ Abhijeet Maurya
...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Narsingh Pandey

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

A. Criminal Law-Code of Criminal Procedure, 1973-Section 482, 110/111 - Indian Penal Code, 1860- Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 147, 325, 504, 506 - Section 3(1) Da, Dha-challenge to-notice issued by Sub Divisional Magistrate u/s 110/111 Cr.P.C.- notice contains a bare recital that there is apprehension of commission of cognizable offence-Impugned notice does not contain full substance of information given by concerned Police Officer- concerned Magistrate has not acted judiciously while issuing the notice- it has been issued only on the basis of one case in a routine manner on a printed format-Accordingly, the same is liable to be quashed.(Para 1 to 10)

B. Making an order under Section 111 of the Code is not an idle formality. It should be clear on the face of the order under Section 111, Cr.P.C. that the order has been passed after application of judicial mind. If no substance of information is given in the order under Section 111, the person against whom the order has been made will remain in confusion. Section 114 of the Code provides that the summons or warrants shall be accompanied by a copy of the order made under Section 111. This salutary provision has been enshrined in the Code to give notice of the facts and the allegations which are to be met by the person against whom the proceedings under Section 107, Cr.P.C. are drawn. It should be borne in mind that the proceedings under Section 107/116 of the Code some times cause irreparable loss and unnecessary harassment to the public, who run to the Court at the costs of their own vocations of life. Unless it is absolutely necessary, proceedings under Section 107/116, Cr.P.C. should not be resorted to. Experience tells that proceedings like the one under Section 107/116 of the Code are conducted in a most lethargic and lackadaisical manner by the learned Executive Magistrate causing harassment to public beyond measure.(Para 6)

The application is allowed. (E-5)

List of Cases cited:

1. Baleshwar S/o Ram Saran & ors. Vs St. of U.P. (2008) 63 ACC 374

2. Aurangzeb & others Vs St. of U.P. & anr. (2004) 5 ACC 734

3. Ranjeet Kumar &o rs. Vs St. of U.P. &ors. (2002) 45 ACC 627

4. Har Charan Vs St. of U.P. & anr. (2008) 61 ACC 540

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

1. Heard Mr. Narsingh Pandey, learned counsel for applicant as well as learned A.G.A. for State through video conferencing and perused the record.

2. This application under section 482 Cr.P.C. has been filed challenging entire proceeding of Case No. 5713 of 2021 (State Vs. Raju Maurya @ Abhijeet Maurya) arising out of Case Crime No. 72 of 2020, under Section 110 Cr.P.C. P.S. Paikoliya, District- Basti.

3. Record shows that Police of Police Station Paikoliya, District- Basti submitted a challan report dated 05.9.2020 against applicant Raju Maurya @ Abhijeet Maurya, whereby he has been challaned under sections 110 Cr.P.C. It is alleged in aforesaid report that Case Crime No. 69 of 2020 under Sections 147, 325, 504, 506 IPC and Section 3(1) Da, Dha SC/ST (Prevention of Atrocities) Act, 1989 (Amendment 2015) (State Vs. Raju Maurya @ Abhijeet Maurya) has been registered on account of which there is tension between parties. Allegations and counter allegations are being made by either side. There is every possibility of breach of peace. In

order to prevent same, aforesaid persons has been callaned under section 110 Cr.P.C. In the interest of Justice, requisite amount of personal bond and surety bond be obtained from above named persons.

4. After aforesaid report was forwarded by S.H.O. P.S. Paikoliya, District- Basti, Sub Divisional Magistrate, Haraiya, Basti issued notice dated 11.1.2021 under sections 110/111 Cr.P.C asking applicant to furnish personal bond of Rs. 1 lac each and two sureties of the same amount.

5. Feeling aggrieved by aforesaid notice dated 11.1.2021, applicant namely Raju Maurya @ Abhijeet Maurya has now approached this Court by means of present application under section 482 Cr.P.C.

6. Learned counsel for applicant contends that notice dated 11.1.2021, issued by Sub Divisional Magistrate, Hariya, Basti, is patently illegal. Same does not contain full particulars nor the full substance of Police Report, on the basis of which aforesaid notice has been issued. It is thus urged that impugned notice does not fullfil the requirement of Section 111 Cr.P.C. In support of above, reliance is placed upon ***Baleshwar S/o Ram Saran and Others Vs. State of U.P., 2008 (63) ACC 374***, wherein a learned Single Judge has observed as follows in paragraphs 6, 7 and 8:

"6. Having given my thoughtful consideration to the rival submissions made by parties Counsel and after going the impugned notice, I find force in the aforesaid contention of the learned Counsel for the applicants that the impugned notice is wholly illegal and void. Annexure 1 is the copy of the impugned notice, which was issued by SDM Mawana (Meerut) to the applicants, whereby they were called upon to appear on 10.12.2004 and show cause as to why they be not ordered to execute a personal bond for Rs. 30,000/- and furnish two sureties each in the like amount to keep peace for a period of one year. In this notice it is only mentioned by the SDM concerned that he is satisfied with the report of S.O. of P.S. Mawana that due to old litigation, there is enmity between the parties, due to which there is likelihood of the breach of peace. It is not mentioned in this notice that what type of litigation is going on between the parties and in which Court the said litigation is pending. Number of the case and other details of the said litigation have also not been mentioned in the impugned notice. As such the impugned notice issued by the learned SDM Mawana is vague and it does not fulfil the requirements of Section 111, Cr.P.C. This type of notice has been held to be illegal by this Court in the case of Ranjeet Kumar v. State of U.P. (supra).

7. Making an order under Section 111 of the Code is not an idle formality. It should be clear on the face of the order under Section 111, Cr.P.C. that the order has been passed after application of judicial mind. If no substance of information is given in the order under Section 111, the person against whom the order has been made will remain in confusion. Section 114 of the Code provides that the summons or warrants shall be accompanied by a copy of the order made under Section 111. This salutary provision has been enshrined in the Code to give notice of the facts and the allegations which are to be met by the

person against whom the proceedings under Section 107, Cr.P.C. are drawn.

8. It should be borne in mind that the proceedings under Section 107/116 of the Code some times cause irreparable loss and unnecessary harassment to the public, who run to the Court at the costs of their own vocations of life. Unless it is absolutely necessary, proceedings under Section 107/116, Cr.P.C. should not be resorted to. Experience tells that proceedings like the one under Section 107/116 of the Code are conducted in a most lethargic and lackadaisical manner by the learned Executive Magistrate causing harassment to public beyond measure. "

7. Learned counsel for the applicant has placed further reliance upon judgments of this Court reported in ***2004 (5) ACC 734 Aurangzeb and others Vs. State of U.P. and another, 2002 (45) ACC 627 Ranjeet Kumar and others Vs. State of U.P. and others and 2008 (61) ACC 540 Har Charan Vs. State of U.P. and another*** in support of his contention.

8. In view of aforesaid, this Court has examined the impugned notice dated 11.1.2021, issued by Sub Divisional Magistrate, Haraiya, Basti under sections 110/111 Cr.P.C. The Court finds that impugned notice contains a bare recital that there is apprehension of commission of cognizable offence. Impugned notice does not contain full substance of information given by concerned Police Officer. Consequently, concerned Magistrate has not acted judiciously while issuing the impugned notice dated 11.1.2021. The notice under Section 110G Cr.P.C. has been issued only on the basis of one case the impugned notice does not contain the substance of allegation which has been made against the applicant and has been issued in a routine manner on a printed format.

9. In view of above, the impugned noticed dated 11.1.2021, issued by Sub Divisional Magistrate, Haraiya Basti, cannot be sustained. Accordingly, the same is liable to be quashed.

10. Consequently, present application succeeds and is liable to be allowed. It is accordingly **allowed**. Impugned notice dated 11.1.2021 is quashed. Sub Divisional Magistrate, Haraiya Basti, shall issue a fresh notice after undertaking requisite exercise in the light of observations made herein above and in accordance with law, if deem fit under the circumstances of the case.

(2021)07ILR A368
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 Cr.P.C. No. 7990 of 2021

Preethu Singh ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Sanjay Kumar Singh, Sri Shrawan Kumar Pandey

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482, 110/111 - Indian Penal Code, 1860- Section 447 & Prevention of the Damage to the Public Property Act, 1984- Section 2/3 **-challenge to-notice issued by Sub Divisional Magistrate u/s**

110G/111 Cr.P.C.- possibility breach of peace-allegations and counter allegations made by either side- **notice contains a bare recital that there is apprehension of commission of cognizable offence-Impugned notice does not contain full substance of information given by concerned Police Officer- concerned Magistrate has not acted judiciously while issuing the notice- it has been issued only on the basis of one case in a routine manner on a printed format-Accordingly, the same is liable to be quashed.(Para 1 to 10)**

B. Making an order under Section 111 of the Code is not an idle formality. It should be clear on the face of the order under Section 111, Cr.P.C. that the order has been passed after application of judicial mind. If no substance of information is given in the order under Section 111, the person against whom the order has been made will remain in confusion. Section 114 of the Code provides that the summons or warrants shall be accompanied by a copy of the order made under Section 111. This salutary provision has been enshrined in the Code to give notice of the facts and the allegations which are to be met by the person against whom the proceedings under Section 107, Cr.P.C. are drawn. It should be borne in mind that the proceedings under Section 107/116 of the Code some times cause irreparable loss and unnecessary harassment to the public, who run to the Court at the costs of their own vocations of life. Unless it is absolutely necessary, proceedings under Section 107/116, Cr.P.C. should not be resorted to. Experience tells that proceedings like the one under Section 107/116 of the Code are conducted in a most lethargic and lackadaisical manner by the learned Executive Magistrate causing harassment to public beyond measure.(Para 6)

C. The application is allowed. (E-5)

List of Cases cited:

1. Baleshwar S/o Ram Saran & ors. Vs St. of U.P. (2008) 63 ACC 374

2. Aurangzeb & others Vs St. of U.P. & anr. (2004) 5 ACC 734

3. Ranjeet Kumar & ors. Vs St. of U.P. & ors. (2002) 45 ACC 627

4. Har Charan Vs St. of U.P. & anr (2008) 61 ACC 540

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

1. Heard Mr. Sanjay Kumar Singh, learned counsel for applicant through video conferencing as well as learned A.G.A. for State and perused the record.

2. This application under section 482 Cr.P.C. has been filed challenging entire proceeding of Crime No. 79 of 2020 (State Vs. Preethu Singh), under Section 110(G) Cr.P.C. as well as notice under Section 111 Cr.P.C., P.S. Amaria, District- Pilibhit.

3. Record shows that Police of Police Station Amaria, District-Pilibhit submitted challan reports dated 12.10.2020 and 19.10.2020 against applicant Preethu Singh, whereby he has been challaned under Sections 110(G) and 111 Cr.P.C. It is alleged in aforesaid report that Case Crime No. 155 of 2020 under Section 447 IPC and Section 2/3 Prevention of the Damage to the Public Property Act, 1984 has been registered on account of which there is tension between parties. Allegations and counter allegations are being made by either side. There is every possibility of breach of peace. In order to prevent same, aforesaid persons has been callaned under Sections 110(G) and 111 Cr.P.C. In the interest of Justice, requisite amount of

personal bond and surety bond be obtained from above named persons.

4. After aforesaid report was forwarded by S.H.O. P.S. Amaria, District-Pilibhit, Sub Divisional Magistrate, Amaria, Pilibhit issued notices dated 12.10.2020 and 19.10.2020 under Sections 110G and 111 Cr.P.C asking applicant to furnish personal bond of Rs. 1 lac each and two sureties of the same amount.

5. Feeling aggrieved by aforesaid notices dated 12.10.2020 and 19.10.2020, applicant namely Preethu Singh has now approached this Court by means of present application under section 482 Cr.P.C.

6. Learned counsel for applicant contends that notices dated 12.10.2020 and 19.10.2020, issued by Sub Divisional Magistrate, Amaria, Pilibhit, is patently illegal. Same does not contain full particulars nor the full substance of Police Report, on the basis of which aforesaid notice has been issued. It is thus urged that impugned notice does not fullfil the requirement of Sections 110(G) and 111 Cr.P.C. In support of above, reliance is placed upon ***Baleshwar S/o Ram Saran and Others Vs. State of U.P., 2008 (63) ACC 374,*** wherein a learned Single Judge has observed as follows in paragraphs 6, 7 and 8:

"6. Having given my thoughtful consideration to the rival submissions made by parties Counsel and after going the impugned notice, I find force in the aforesaid contention of the learned Counsel for the applicants that the impugned notice is wholly illegal and void. Annexure 1 is the copy of the impugned notice, which was issued by SDM Mawana (Meerut) to the applicants, whereby they were called upon to appear on 10.12.2004 and show cause as to why they be not ordered to execute a personal bond for Rs. 30,000/- and furnish two sureties each in the like amount to keep peace for a period of one year. In this notice it is only mentioned by the SDM concerned that he is satisfied with the report of S.O. of P.S. Mawana that due to old litigation, there is enmity between the parties, due to which there is likelihood of the breach of peace. It is not mentioned in this notice that what type of litigation is going on between the parties and in which Court the said litigation is pending. Number of the case and other details of the said litigation have also not been mentioned in the impugned notice. As such the impugned notice issued by the learned SDM Mawana is vague and it does not fulfil the requirements of Section 111, Cr.P.C. This type of notice has been held to be illegal by this Court in the case of Ranjeet Kumar v. State of U.P. (supra).

7. Making an order under Section 111 of the Code is not an idle formality. It should be clear on the face of the order under Section 111, Cr.P.C. that the order has been passed after application of judicial mind. If no substance of information is given in the order under Section 111, the person against whom the order has been made will remain in confusion. Section 114 of the Code provides that the summons or warrants shall be accompanied by a copy of the order made under Section 111. This salutary provision has been enshrined in the Code to give notice of the facts and the allegations which are to be met by the person against whom the proceedings under Section 107, Cr.P.C. are drawn.

8. It should be borne in mind that the proceedings under Section 107/116 of the Code some times cause irreparable loss and unnecessary harassment to the public,

who run to the Court at the costs of their own vocations of life. Unless it is absolutely necessary, proceedings under Section 107/116, Cr.P.C. should not be resorted to. Experience tells that proceedings like the one under Section 107/116 of the Code are conducted in a most lethargic and lackadaisical manner by the learned Executive Magistrate causing harassment to public beyond measure. "

7. Learned counsel for the applicant has placed further reliance upon judgments of this Court reported in ***2004 (5) ACC 734 Aurangzeb and others Vs. State of U.P. and another, 2002 (45) ACC 627 Ranjeet Kumar and others Vs. State of U.P. and others and 2008 (61) ACC 540 Har Charan Vs. State of U.P. and another*** in support of his contention.

8. In view of aforesaid, this Court has examined the impugned notices dated 12.10.2020 and 19.10.2020, issued by Sub Divisional Magistrate, Amaria, Pilibhit under Sections 110(G) and 111 Cr.P.C. The Court finds that impugned notice contains a bare recital that there is apprehension of commission of cognizable offence. Impugned notice does not contain full substance of information given by concerned Police Officer. Consequently, concerned Magistrate has not acted judiciously while issuing the impugned notices dated 12.10.2020 and 19.10.2020. The notice under Section 110G and 111 Cr.P.C. has been issued only on the basis of one case the impugned notice does not contain the substance of allegation which has been made against the applicant and has been issued in a routine manner on a printed format.

9. In view of above, the impugned notices dated 12.10.2020 and 19.10.2020, issued by Sub Divisional Magistrate, Amaria, Pilibhit, cannot be sustained. Accordingly, the same is liable to be quashed.

10. Consequently, present application succeeds and is liable to be **allowed**. It is accordingly allowed. Impugned notices dated 12.10.2020 and 19.10.2020 are quashed. Sub Divisional Magistrate, Amaria, Pilibhit, shall issue a fresh notice after undertaking requisite exercise in the light of observations made herein above and in accordance with law, if deem fit under the circumstances of the case.

(2021)07ILR A371
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 Cr.P.C. No. 8078 of 2021

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

Counsel for the Applicants:
Sri Shashi Kumar Mishra

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

A. Criminal Law - Code of Criminal Procedure, 1973-Section 482 - Indian Penal Code, 1860 - Section 323, 504 & 506 - quashing of-chargesheet and summoning order- the impugned summoning order was passed in mechanical manner without application of judicial mind-the order is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court-the cognizance order dated 10.9.2020 cannot be legally

sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice-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.(Para 1 to 26)

B. 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 therefore, the impugned order cannot be upheld.(Para 14 to 23)

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. P. Ramchandra Rao Vs St. of Karnatka (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 All 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. Application No.19647 of 2009

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 UP Pollution Control Board Vs Mohan Meakins (2000) 2 JIC 159 SC: AIR 2000 SC 1456 Kanti Bhadra Vs St. of W. B. (2000) 1 JIC 751 SC: 2000 (40) ACC 441 SC

14. Kavi Ahmad Vs St. of U.P. & anr. CRLR No. 3209 of 2010

15. 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 through video conferencing, learned AGA for the State and perused the record.

2. This application under Section 482 Cr.P.C. has been filed for quashing of the criminal proceedings in pursuance of the charge-sheet dated 19.03.2020 as well as cognizance order dated 08.05.2020 passed by learned Additional Chief Judicial Magistrate-I, Mainpuri in Case No. 2212 of 2020 (State Vs. Surendra Kumar) arising out of Case Crime No. 086 of 2020, under

Sections 323, 504, 506 I.P.C., Police Station-Kuraoli, District-Mainpuri, pending in the Court of learned Additional Chief Judicial Magistrate-I, Mainpuri.

3. Learned counsel for the applicants submit that on 12.03.2020 respondent no.2 lodged an F.I.R. against the applicants for an incident alleged to have taken place on 11.03.2020 which was registered as case crime no.0086/2020, under Sections 452, 323, 504, 506 I.P.C., Police Station Kuraoli, District Mainpuri.

4. As per the prosecution version of the F.I.R, on 11.03.2020 at about 7:30 p.m., when wife of the informant was cooking food, Surendra Kumar and Sonpal son of Nekram, Sanju son of Vijaypal and Vijaypal son of Sardar Singh of the same village as the informant who were armed with lathi and danda reached the place of informant's wife and started hurling abuses and also beaten her. Accused- Vijaypal who was armed with axe attacked on the head of informant's wife upon which blood was bleeding out from her head and when the informant's elder daughter namely Shivani reached there for solving the matter, accused-Surendra and Sonpal started beating to the informant's daugher and wife by lathi and danda as a result both have sustained serious injuries. Also, informant's younger daughter, Rosni who was playing outside from her house when she reached the house, Sanju who was standing near the door, picked her up and slammed as a result she sustained serious injuries. Thereafter, the aforesaid accused, Sanjay flew away from the place of occurrence with dire consequences, if informed to police about the aforesaid incident.

5. 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.

6. 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 323, 504, 506 IPC on 19.3.2020, copy of the same is filed as Annexure No.7 to the affidavit, whereas he further submits that on the charge-sheet, the learned Magistrate had taken cognizance on 10.9.2020 and the case was numbered as Case No.2212 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.8 to the affidavit.

7. Learned counsel for the applicants further submits that by the order dated 10.9.2020 cognizance taken by the learned Magistrate on printed proforma without assigning any reason is abused of process of law.

8. Learned counsel for the applicants further submits that after submission of charge sheet the applicants have been summoned mechanically by order dated 10.9.2020 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 applicant through a printed order, which is wholly illegal.

9. It is vehemently urged by learned counsel for the applicants that the impugned summoning order dated 10.9.2020 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 10.9.2020 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.

10. 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.

11. 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.

12. I have heard the learned counsel for the parties and perused the record.

13. 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."

14. 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.

15. 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.**

16. 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.

17. 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."

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 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.

19. 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.."

20. 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."

21. 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."*

22. 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.

23. 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."

24. 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.

25. In light of the judgments referred to above, it is explicitly clear that the order dated 10.9.2020 passed by Additional Chief Judicial Magistrate-I, Mainpuri is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance order dated 10.9.2020 cannot be legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice.

26. Accordingly, the present Criminal Misc. Application U/S 482 Cr.P.C succeeds and is allowed. The impugned cognizance order dated 10.9.2020 passed by Additional Chief Judicial Magistrate-I, Mainpuri is hereby quashed in Case No.2212 of 2020 (State vs. Surendra Kumar), Crime No.086 of 2020 under Sections 323, 504, 506 IPC, P.S. Kuraoli District Mainpuri, is hereby quashed.

27. The Additional Chief Judicial Magistrate-I, Mainpuri 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.

28. With the above direction, the application filed under Section 482 Cr.P.C. stands **allowed**.

(2021)07ILR A379
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.07.2021

BEFORE

THE HON'BLE MRS. SAROJ YADAV, J.

U/S 482/378/407 Cr.P.C. No. 8523 of 2017

Ram Charitra Tiwari & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Rajendra Pratap Singh

Counsel for the Opposite Parties:
Govt. Advocate, Mohd. Naeem, Puttu Lal Mishra

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power - The Dowry Prohibition Act 1961 - Section 3 - penalty for giving or taking dowry - giving or abetting to give dowry is a punishable offence , Section 4 - mere demand of 'dowry' is sufficient to bring home the offence to an accused - Any "demand" of money, property or valuable security made from the bride or her parents or other relatives by the bridegroom or his parents or other relatives or vice-versa would fall within the mischief of 'dowry' under the Act where such demand is not properly referable to any legally recognised claim and is consideration of marriage - Cognizance is taken of cases and not of persons.(Para -10,14)

F.I.R. lodged by opposite party no. 2 (complainant) against petitioners - allegation - marriage of complainant's daughter to be solemnized with (petitioner no. 3) - petitioners demanded dowry in different forms - kept pending solemnization of marriage - (petitioner no. 3) and his father (petitioner no. 1) went to complainant's house and demanded additional dowry - investigation made - submitted charge sheet - Court finding sufficient ground took cognizance against petitioners - aggrieved with order of taking cognizance and summoning petitioners - petition filed.

HELD:-Demand of dowry even before the solemnization of marriage and even if marriage has not taken place will be an offence . No difference whether marriage was solemnized or not to attract the provisions of Dowry Prohibition Act . Demand of dowry even at the negotiation stage of marriage will constitute offence. While taking cognizance of the offence, Magistrate or Court concerned is not obliged to give detailed reasons for its satisfaction. No valid ground for interference in the matter to quash the charge sheet as well as summoning order. (Para - 14)

Application u/s 482 Cr.P.C. dismissed. (E-6)

List of Cases cited:

1. Pooja Saxena Vs St. & anr., 2010 (4) JCC 2780

2. S. Gopal Reddy Vs St. of A..P., (1996) 4 SCC

3. L.V. Jadhav Vs Shankarrao Abasaheb Pawar & ors., 1983 AIR 1219

4. Bhushan Kumar Vs St. (NCT of Delhi), (2012) 5 SCC 424

(Delivered by Hon'ble Mrs. Saroj Yadav, J.)

1. On account of prevailing Covid-19 Pandemic, the case was heard through video conferencing.

2. Heard Sri Rajendra Pratap Singh, learned counsel for the petitioners, Sri Anurag Singh Chauhan, learned Additional Government Advocate appearing on behalf of the State-respondent and perused the record.

3. This petition under Section 482 Cr.P.C. has been filed by the petitioners to quash the impugned charge sheet no. 27 of 2017 dated 25.03.2017 as well as the summoning order dated 19.05.2017 passed by the Additional Chief Judicial Magistrate, Court No. 14, Pratapgarh in Case No. 160 of 2017.

4. The charge sheet as well as summoning order have been challenged mainly on the ground that learned Court below failed to apply its legal mind on the evidence collected by the Investigating Officer as the same was not sufficient for taking cognizance and summoning the petitioners. According to Section 3 of the Dowry Prohibition Act 1961 (hereinafter referred to as "the Act"), taking or giving of dowry both are punishable offences, then under what circumstances the Investigating Officer did not register a case against the complainant, who alleged that he gave dowry in the form of "Cash" to the petitioners.

5. In this matter, the first information report was lodged by the complainant-opposite party no. 2-Krishna Prasad Mishra against the petitioners alleging that marriage of the complainant's daughter was settled to be solemnized with Vipin Chandra Tiwari (petitioner no. 3). Thereafter, the petitioners started demanding dowry in different forms for different reasons and kept pending solemnization of marriage. After repeated requests the date of marriage was fixed and the necessary arrangements as booking of Marriage Hall, arrangements of catering etc. were made. Thereafter on 16.06.2016, Vipin Chandra Tiwari (petitioner no. 3) and his father (petitioner no. 1) went to complainant's house and demanded additional dowry and threatened that if the money is not given, they will not marry the daughter of the complainant. Facing such difficult situation, the complainant gave additional three lacs rupees to Vipin Chandra Tiwari (petitioner no. 3) but they again started demanding more. The complainant was unable to pay more and he realized that the petitioners have taken the money on the pretext of marriage and they did not want to marry his daughter.

6. Upon a complaint so moved by the complainant, an F.I.R. was registered, investigation made and Investigating Officer submitted charge sheet before the Court concerned. The Court finding sufficient ground took cognizance against the petitioners. Being aggrieved with the order of taking cognizance and summoning the petitioners, this petition has been filed before this Court.

7. Learned counsel for the petitioners argued mainly on two counts. Firstly, according to Section 3 of the Act, the giving of dowry is also a punishable offence, then why a case was not registered against the complainant. Secondly, the marriage was not solemnized so the offence could not be said to have been committed.

8. Learned A.G.A. while opposing the above submissions has submitted that the Dowry Prohibition Act is a legislation to protect the women and their family from the menace of demand of dowry, therefore to punish the complainant will cause injustice to the complainant and will be against the intention of legislature. Learned A.G.A. further submitted that under the definition of dowry, any property or valuable security given or agreed to be given before or after marriage comes under the definition of dowry. He further submitted that in the first information

report cognizable offence was disclosed and after investigation, Investigating Officer submitted charge sheet against the petitioners. Thereafter, learned Court below after applying its legal mind took cognizance of the offence and passed the summoning order, which is perfectly legal, hence, this petition lacks any merit.

9. Considered the rival submissions and perused the material available on record.

10. As far as the first argument put forth by the learned counsel for the petitioners is concerned, it has no force in the light of the observation made by Delhi High Court in the case of ***Pooja Saxena Versus State & Another, 2010 (4) JCC 2780***. The extract of relevant paragraph is quoted herein below:-

"No doubt, as per Section 3 of the Dowry Prohibition Act, giving or abetting to give dowry is a punishable offence, but the petitioner does have protection of Section 7(3) of the Act. Section 7(3) provides that notwithstanding anything contained in any law for the time being in force, a statement made by the person aggrieved by the offence under the Act shall not subject him to prosecution under this Act."

11. Against the aforesaid order, a Special Leave to Appeal (Crl) No(s) 1339-1340/2011 (Sameer Saxena Versus State of NCT of Delhi & Another) was filed by the petitioners before the Hon'ble Apex Court, which was dismissed vide order dated 07.03.2011.

12. As far as second argument is concerned, that too is not sustainable as Section 4 read with Sub-section (2) of the Act covers the demand of dowry even at the negotiation stage as a consideration in a proposed marriage which has not taken place. Hon'ble Apex Court in the case of ***S. Gopal Reddy Versus State of Andhra Pradesh, (1996) 4 SCC***, in this regard has held as follows:-

"The definition of the term 'dowry' under Section 2 of the Act shows that any property or valuable security given or "agreed to be given" either directly or indirectly by one party to the marriage to the other party to the marriage "at or before or after the marriage" as a "consideration for the marriage of the said parties" would become 'dowry' punishable under the Act. Property or valuable security so as to constitute 'dowry' within the meaning of the Act must therefore be given or demanded "as consideration for the marriage.

The definition of the expression 'dowry' contained in Section 2 of the Act cannot be confined merely to the 'demand' of money, property or valuable security 'made at or after the performance of marriage' as is urged by Mr. Rao. The legislature has in its wisdom while providing for the definition of 'dowry' emphasised that any money, property or valuable security given, as a consideration for marriage, 'before, at or after the marriage would be covered by the expression 'dowry' and this definition as contained in Section 2 has to be read wherever the expression 'dowry' occurs in the Act. Meaning of the expression 'dowry' as commonly used and understood is different than the peculiar definition thereof under the Act. Under Section 4 of the Act, mere demand of 'dowry' is sufficient to bring home the offence to an accused. Thus, any "demand" of money, property or valuable security made from

the bride or her parents or other relatives by the bridegroom or his parents or other relatives or vice-versa would fall within the mischief of 'dowry' under the Act where such demand is not properly referable to any legally recognised claim and is consideration of marriage. Marriage in this context would include a proposed marriage also more particularly where the non-fulfilment of the "demand of dowry" leads to the ugly consequence of the marriage not taking place at all. The expression 'dowry' under the Act must be interpreted in the sense which the Statute wishes to attribute to it. Mr. P.P. Rao, learned senior counsel referred to various dictionaries for the meaning of 'dowry', 'bride' and 'bridegroom' and on the basis of those meanings submitted that 'dowry' must be construed only as such property, goods or valuable security which is given to a husband by and on behalf of the wife at marriage and any demand made prior to marriage would not amount to dowry. We cannot agree. Where definition has been given in a statute itself, it is neither proper nor desirable to look to the dictionaries etc. to find out the meaning of the expression. The definition given in the statute is the determinative- factor. The Act is a piece of social legislation which aims to check the growing menace of the social evil of dowry and it makes punishable not only the actual receiving of dowry but also the very demand of dowry made before or at the time or after the marriage where such demand is referable to the consideration of marriage. Dowry as a quid pro for marriage is prohibited and not the giving of traditional presents to the bride or the bride groom by friends and relatives. Thus, voluntary presents given at or before or after the marriage to the bride or the bridegroom, as the case may be, of a traditional nature, which are given not as a consideration for marriage but out of love, affection or regard, would not fall within the mischief of the expression 'dowry' made punishable under the Act. "

13. The Hon'ble Apex Court in the case of ***L.V. Jadhav Versus Shankarrao Abasaheb Pawar and Others, 1983 AIR 1219***, has held as under:-

"We are of the opinion that having regard to the object of the Act a liberal construction has to be given to the word "dowry" used in s. 4 of the Act to mean that any property or valuable security which if consented to be given on the demand being made would become dowry within the meaning of s. 2 of the Act. We are also of the opinion that the object of s. 4 of the Act is to discourage the very demand for property or valuable security as consideration for a marriage between the parties thereto. Section 4 prohibits the demand for 'giving' property or valuable security which demand, if satisfied, would constitute an offence under s. 3 read with s. 2 of the Act. There is no warrant for taking the view that the initial demand for giving of property or valuable security would not constitute an offence and that an offence would take place only when the demand was made again after the party on whom the demand was made agreed to comply with it."

14. Hence, it is clear that demand of dowry even before the solemnization of marriage and even if marriage has not taken place will be an offence. It makes no difference whether marriage was solemnized or not to attract the provisions of Dowry Prohibition Act. Demand of dowry even at the negotiation stage of marriage will constitute offence. On the basis of FIR, matter was investigated and

charge sheet was filed. Thereafter, the learned Court below after applying its legal mind took cognizance of the offence. While taking cognizance of the offence, Magistrate or Court concerned is not obliged to give detailed reasons for its satisfaction. Hon'ble Apex Court in the case of ***Bhushan Kumar Versus State (NCT of Delhi), (2012) 5 SCC 424***, in this regard has held as under:-

11. In Chief Enforcement Officer Vrs. Videocon International Ltd. (SCC p. 499, para 19) the expression "cognizance" was explained by this Court "as it merely means 'become aware of' and when used with reference to a court or a Judge, it connotes 'to take notice of judicially'. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. 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 enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code."

15. In the light of the above discussions, there remains no valid ground for interference in the matter to quash the charge sheet as well as summoning order.

16. This petition under Section 482 Cr.P.C. deserves dismissal and is accordingly ***dismissed.***

(2021)07ILR A383
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 Cr.P.C. No. 10216 of 2021

Tej Singh Verma & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Rabindra Bahadur Singh

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power , Section 2(d) - complaint , Section 155 - Information as to non - cognizable cases and investigation of such cases - Indian Penal Code, 1860 - Sections 323 & 392 - charge sheet submitted by police in non-cognizable offence after investigation made in pursuance of Magistrate order stands at par with charge sheet submitted by police in cognizable offence - Explanation to Section 2(d) of Cr.P.C. is not applicable where charge sheet has been submitted by police in non-cognizable offence after investigation made in pursuance of order passed by Magistrate.(Para -12)

Police submitted charge sheet after investigation - contention - in non-cognizable case charge sheet submitted by police after investigation shall be deemed to be complaint under section 2(d) of Cr.P.C. - cognizance taken by Magistrate is against law - hence application under 482 Cr.P.C. - for quashing the charge-sheet as well as cognizance order.

HELD:- Submission of charge sheet by police in non-cognizable offence without order of Magistrate under section 155(2) Cr.P.C. , held to be complaint under section 2(d) of Cr.P.C. . Impugned order (cognizance order) dated 24.07.2019 quashed. Matter remanded back before the Additional Chief Judicial Magistrate to pass a reasoned and speaking order afresh after giving opportunity of hearing to the parties concerned.(Para - 14,15)

Application u/s 482 Cr.P.C. disposed of. (E-6)

List of Cases cited:-

1. Dr. Rakesh Kumar Sharma Vs St. of U.P. & anr., 2007(9) ADJ 478

2. Ghansyam Dubey @ Litile & ors. Vs St. of U.P. & anr., 2013(4) ADJ 474

3. Alok Kumar Shukla Vs St. of U.P. & anr., Appl. u/s 482 Cr.P.C. No.42698 of 2013

4. Budhi Ram & 3 ors. Vs St. of U.P. & anr., Appl. u/s 482 Cr.P.C. No.42082 of 2014

5. Keshab Lal Thakur Vs St. of Bihar, (1996) 11 S.C.C. 55)

6. Dr. Rakesh Kumar Sharma Vs St. of U.P. & anr., 2007(9) ADJ 478

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

1. Heard learned counsel for the applicants as well as perused application moved under section 482 Cr.P.C.

2. By filing this application under section 482 Cr.P.C. applicants have prayed to quash the charge-sheet No.69 of 2018 dated 05.05.2018 as well as cognizance order dated 24.07.2019 in Criminal Case No.125 of 2019 (Case Crime No.80 of 2018) under Section 323 I.P.C., Police Station Lohamandi, District Agra pending in the Court of Additional Chief Judicial Magistrate, 11th Agra.

3. Learned counsel for applicants contended that an F.I.R. No.0080 of 2018, under Sections 323 and 392 I.P.C. has been registered in Police Station Lohamandi in which police has submitted charge sheet after investigation. Learned counsel for applicants contended that in non-cognizable case charge sheet submitted by police after investigation shall be deemed to be complaint under section 2(d) of Cr.P.C. Therefore, cognizance taken by Magistrate is against law.

4. Learned counsel for applicants placed reliance upon following judgments of this Court:

1. 2007(9) ADJ 478 Allahabad High Court, Dr. Rakesh Kumar Sharma Vs. State of U.P. and another.

2. 2013(4) ADJ 474 Allahabad High Court, Ghansyam Dubey @ Litile and others Vs. State of U.P. and another.

3. Judgment and order dated 26.11.2013 passed by Hon'ble Single Judge of this Court in Application u/s 482 Cr.P.C. No.42698 of 2013 (Alok Kumar Shukla Vs. State of U.p. and another).

4. Judgment and order dated 30.10.2014 passed by Hon'ble Single Judge of this Court in Application u/s 482 Cr.P.C. No.42082 of 2014 (Budhi Ram and 3 others Vs. State of U.P. and another).

5. I have considered the submission made by learned counsel for applicants.

6. The applicants are named in F.I.R. No.0080 of 2018, under Sections 323 and 392 I.P.C. Investigation has been made by police in compliance of Magistrate order passed under section 155(2) Cr.P.C. as is apparent from charge sheet submitted by police.

7. **Section 2(d) Cr.P.C. defines complaint which is as follows:**

"complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report".

8. **Explanation added to Section 2(d) is as follows-**

"A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

9. Reading of explanation added to Section 2(d) shows that this explanation speaks about cases where police has investigated a cognizable case but investigation made discloses a non-cognizable offence.

10. In the case of **Keshab Lal Thakur Vs. State of Bihar (1996) 11 S.C.C. 55)** Hon'ble Apex Court has already held that explanation to Section 2(d) of the Code covers only those cases where the police initiates investigation into a cognizable offence but the offence is turned into a non cognizable offence.

11. It is relevant at this juncture to go through provisions of Section 155(2) and (3) of Criminal Procedure Code which are reproduced below:-

Section 155(2) Cr.P.C.

"No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial."

Section 155(3) Cr.P.C.

"Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case."

12. It is abundantly clear from above provisions of Section 155(2) and 155(3) Cr.P.C. that police is competent to investigate non cognizable offence with order of Magistrate and in such investigation the police officer receiving order of investigation may exercise same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case. Thus is clear that charge sheet submitted by police in non-cognizable offence after investigation made in pursuance of Magistrate order stands at par with charge sheet submitted by police in cognizable offence. Therefore Explanation to Section 2(d) of Cr.P.C. is not applicable where charge sheet has been submitted by police in non-cognizable offence after

investigation made in pursuance of order passed by Magistrate.

13. In the case of **2007(9) ADJ 478 Allahabad High Court, Dr. Rakesh Kumar Sharma Vs. State of U.P. and another** the case was originally registered under sections 307 I.P.C. and after investigation non-cognizable offence punishable under section 504 I.P.C. was found. Therefore, charge sheet submitted for offence punishable under section 504 I.P.C. was held to be complainant under section 2(d) of Cr.P.C.

14. In the case of **Alok Kumar Shukla Vs. State of U.P. and another** mentioned above police submitted charge sheet in non-cognizable offence without order of Magistrate under section 155(2) Cr.P.C. Therefore charge sheet submitted by police was held to be complaint under section 2(d) of Cr.P.C.

15. In view of the discussions made above, the impugned order dated 24.07.2019 is hereby quashed. The matter is remanded back before the Additional Chief Judicial Magistrate, 11th Agra, to pass a reasoned and speaking order afresh after giving opportunity of hearing to the parties concerned.

16. With these observations and directions, the application is finally **disposed of**.

(2021)07ILR A386
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.07.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 13181 of 2020

Tarun Jain ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Kamlesh Kumar Tiwari, Sri Navin Chandra Srivastava

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Inherent power , Section 41A - notice of appearance before police officer, Section 144 - Power to issue order in urgent cases of nuisance or apprehended danger , Indian Penal Code, 1860 - Sections 182 - false information with intent to cause public servant to use his lawful power to the injury of another person , Section188 - Disobedience to order duly promulgated by public servant , Section 271- Disobedience to quarantine rule - An unfair, biased, one-sided investigation is no investigation in the eyes of law, and vitiates the resultant charge-sheet . (Para - 8)

Tweet by applicant - maid servants and courier boys entering the society, where the applicant resides - without sanitizing themselves - maintenance staff have not provided for sanitizers - Sub-Inspector (Informant) lodged a First Information Report - orders under Section 144 of the Code promulgated in district - looking to Corona Virus (CoViD-19) pandemic - applicant, by his tweet spread a rumour, violating prohibitory order - police after investigation submitted impugned Charge-sheet - Magistrate took cognizance of offence - issued summons - hence application.

HELD:- Impugned prosecution not only fails to disclose a cognizable case against the applicant, but is one that is a reckless abuse of the process of Court. Duty of this Court under Section 482 of the Code to prevent abuse of process of Court. Cases of this kind ought to be scuttled, whenever and wherever it comes to

the notice of a competent court, whether it be at the stage of discharge or in a criminal revision or through an application, asking the proceedings to be quashed. (Para - 11)

Application u/s 482 Cr.P.C. allowed. (E-6)

List of Cases cited:

1. Babubhai Vs St. of Guj. & ors. , (2010) 12 SCC 254

2. Sanjay Kumar Rai Vs St. of U.P. & Anr., 2021 SCC Online SC 367

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

This Application under Section 482 of the Code of Criminal Procedure, 19731 seeks to quash proceedings of Case No. 1111 of 2020, State v. Tarun Jain (arising out of Case Crime No. 325 of 2020), under Sections 182, 188 and 271 of the Indian Penal Code, 18602, pending before the court of the Additional Chief Judicial Magistrate-II, Gautam Buddh Nagar.

2. This application was initially heard on 21.09.2020, and an interim stay of further proceedings before the Magistrate was granted pending admission, for reasons indicated in the order of that date. Later on, this application came up on 19.01.2021, when, by a detailed order, it was admitted to hearing and notice was issued not only to the State, but also the second opposite party, requiring both these opposite parties to file a counter affidavit. The time-bound interim order granted on 21.09.2020 was directed to remain in operation until further orders. A counter affidavit was filed on behalf of the State on 01.02.2021. The complainant-opposite party no. 2, who is a Sub-Inspector of Police, and to whom notice was directed to issue, has not been served, with the Office not putting in a report either way. It is a little hard to believe that a Sub-Inspector of Police would not be served through the criminal process that is routed through the Police. In any case, the presence of the second opposite party is not much required in his case, instituted on a Police Report, where the State is before us. For the said reason, this matter was heard on 24.03.2021, and judgment reserved.

3. Heard Mr. Navin Chandra Srivastava, learned Counsel for the applicant and Mr. Shashi Shekhar Tiwari, the learned Addtional Government Advocate appearing on behalf of the State.

4. The case against the applicant is that the second opposite party lodged a First Information Report3 with Police Station - Sector 49, NOIDA, District - Gautam Buddh Nagar to the effect that the informant, who is a Sub-Inspector and was on duty on 25.03.2020. A tweet by the applicant came to his notice, which said that maid servants and courier boys were entering the society, where the applicant resides, without sanitizing themselves and the maintenance staff have not provided for sanitizers to enable them to do so. The FIR further goes on to say that orders under Section 144 of the Code had been promulgated in the district, looking to the Corona Virus (CoViD-19) pandemic, and the applicant, by his tweet aforesaid, had spread a rumour, violating the prohibitory order. On this short information, an FIR was registered against the applicant, giving rise to Case Crime No. 325 of 2020, under Sections 182, 188 and 271 of the Penal Code, Police Station - Sector 49, NOIDA, District - Gautam Buddh Nagar. The police, after investigation, have submitted the impugned Charge-sheet dated

02.06.2020, saying that offences punishable under Sections 182, 188 and 271 of the Penal Code are disclosed against the applicant from the investigation made, the statement of the complainant, statement of the witnesses, statement of the accused and on an inspection of the place of occurrence. The Magistrate has taken cognizance of the offence, by means of an order dated 07.07.2020 and issued summons to the applicant to stand his trial for the offences alleged.

5. It is argued by learned Counsel for the applicant that though a notice under Section 41A of the Code was issued to the applicant, asking him to attend the police station on 25.03.2020, but when he went there, the Police did not record his statement or ask him any questions; rather they released him on furnishing a personal bond. It is specifically argued with reference to the averments in Paragraph Nos. 6 and 8 of the affidavit filed in support of the application that the Police have not undertaken any investigation worth the name and have filed a charge-sheet, doing a mere show of investigation, recording cyclo-styled statements of policemen alone. The investigation has been castigated as unfair and biased by the learned Counsel for the applicant. It is also argued that no *prima facie* case is made out against the applicant, inasmuch as his act in saying that maid servants were entering the society without sanitizing their hands etc. and that there was no provision made by the society's maintenance staff for the ready availability of sanitizers, the intention of the applicant *ex-facie* was to secure the health of residents of Plot No. 7, Golf City, Sector 75, NOIDA, the society where the applicant resides in Flat No. 604, Tower A3. The purpose of the tweet was not to create any alarm at large in the town or the district, but to caution the other residents of the society against the impending risk that he had observed. There is absolutely no violation of the prohibitory orders promulgated under Section 144 of the Code in the district, even if every word of what the Police have said in the charge-sheet about the applicant's act is to be accepted on its face value; of course, sans the perverse inference of its effect drawn by the Police. The State, in their counter affidavit, have said that the information posted by the applicant on his Twitter account to the effect that maids were entering the society, where the applicant resides, without sanitizing their hands etc. was found to be incorrect and that, therefore, the applicant had violated the prohibitory orders promulgated in the district. It is also very fairly indicated in the counter affidavit that there is no other case registered against the applicant.

6. This Court has perused the statements recorded by the Police under Section 161 of the Code, which say no more than this, that the applicant's tweet was found to be incorrect for a fact, on a visit made to the premises of the society, where sanitizers were available and those entering the society were being required to sanitize. There is an added stand in the almost cyclo-styled statements of various witnesses, all policemen, that the aforesaid tweet, carrying an incorrect information, amounts to spreading a rumour that violates prohibitory orders promulgated in the district under Section 144 of the Code. Ex-facie, this Court fails to understand as to how a vigilant tweet by the resident of a society about breach of the CoViD-19 protocol in relation to outsiders entering the premises could constitute a violation of prohibitory orders. Assuming that the applicant, a resident of the Golf City

Society, was wrong in his information carried in the tweet, how would the tweet amount to a rumour that violated prohibitory orders promulgated under Section 144 of the Code in the district, is beyond comprehension. Supression of any breach of the CoViD-19 protocol could have devastating consequences, rather than an over zealous misreporting of a fact, even if that stand of the Police were to be believed as true. Though certainly not intending to determine it for a fact, this Court is clear in mind that either the Police might never have visited the society to verify the truth of what the applicant said in his tweet, or else upon the Police appearing on the gates of the society, the maintenance staff put their house in order, to escape penal consequences.

7. A resident of a society like the applicant can never be imagined to harbour any kind of a culpable intention to tweet about a fact, wrong or right, affecting the health of the residents. Even if the applicant went wrong in his observation that maids and courier boys were entering the society without proper sanitization or that the necessary sanitizers were not being made available by the society's mangament, it can no more than be a human error about a matter affecting health of the residents of the society, or for that matter, the health of a larger section of citizens in the town or district. An information about breach of the CoViD-19 protocol that may, on verification, be found to be wrong, cannot give rise to any offence about furnishing a false information to the Police. At its worst, so far as the applicant goes, it can be regarded as nothing more than erring on the side of caution. The fact that the Police registered that kind of an FIR and then *ex-facie* did a one-sided, perfunctory and biased investigation mechanically, recording cyclo-styled statements, renders the charge-sheet void on its face.

8. This Court would have thought that the investigation was a serious exercise, if the Police had recorded statements of some residents of the society, and those in charge of the maintenance there, or the security guards at the entrance gates. Whatever of the Case Diary has been annexed by the applicant shows statements of the first informant and other policemen recorded, carrying a parroted version of facts that *ex-facie* do not inspire any confidence. An unfair, biased, one-sided investigation is no investigation in the eyes of law, and vitiates the resultant charge-sheet as held by the Supreme Court in **Babubhai v. State of Gujarat & Others**4. In **Babubhai** *(supra)*, it has been held :

44. The charge-sheets filed by the investigating agency in both the cases are against the same set of accused. A charge-sheet is the outcome of an investigation. If the investigation has not been conducted fairly, we are of the view that such vitiated investigation cannot give rise to a valid charge-sheet. Such investigation would ultimately prove to be a precursor of miscarriage of criminal justice. In such a case the court would simply try to decipher the truth only on the basis of guess or conjectures as the whole truth would not come before it. It will be difficult for the court to determine how the incident took place wherein three persons died and so many persons including the complainant and the accused got injured.

45. Not only fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and

judicious as it is the minimum requirement of rule of law. The investigating agency cannot be permitted to conduct an investigation in a tainted and biased manner. Where non-interference of the court would ultimately result in failure of justice, the court must interfere. In such a situation, it may be in the interest of justice that independent agency chosen by the High Court makes a fresh investigation.

7. In the opinion of this Court, the impugned charge-sheet is vitiated on account of the entire investigation being a sham to the face of the record. Quite apart, the provisions of Sections 182 and 188 of the Penal Code read :

182. False information, with intent to cause public servant to use his lawful power to the injury of another person.-- Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant--

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Illustrations

(a) A informs a Magistrate that Z, a police-officer, subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to dismiss Z. A has committed the offence defined in this section.

(b) A falsely informs a public servant that Z has contraband salt in a secret place knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this section.

(c) A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assistants, but knows it to be likely that in consequence of this information the police will make enquiries and institute searches in the village to the annoyance of the villages or some of them. A has committed an offence under this section.

188. Disobedience to order duly promulgated by public servant.-- Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or trends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. Explanation.--It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to

produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm. Illustration An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this section.

8. A perusal of Section 182 of the Penal Code shows that a person to be liable has to be credited with the act of giving any information to a public servant, which he knows or believes to be false. Here, the applicant never gave any information to the Police or any public servant. What the applicant did was a tweet, that was perhaps a matter of concern for other residents of the society, rather than a busy body like the Sub-Inspector, who lodged the FIR in this case. Thus, the ingredients of Section 182 of the Penal Code are *prima facie* not disclosed. So far as Section 188 of the Penal Code is concerned, it is not even remotely shown as to how the applicant, by his tweet, violated the prohibitory orders promulgated in the district, except for a vague remark that he spread a rumour. The information, to emphasize again, carried in the tweet, was for the safety or intended safety of the residents of society; these were certainly not meant to raise any kind of alarm in the town or district at large. One can hardly envisage a situation where a tweet about the safety of residents of a society would be construed as an obstruction, annoyance, injury or risk, or of all these to any person lawfully employed. To construe the tweet as one within the mischief of Section 188 of the Penal Code would be unacceptable violence to the Statute.

9. Again, the last offence charged is one punishable under Section 271 of the Penal Code. It reads :

271. Disobedience to quarantine rule.-- Whoever knowingly disobeys any rule made and promulgated 1[by the 2[***] Government 3[***] for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

10. Now, Section 271 is one about disobedience to a quarantine rule, and that too, largely about vessels or one regulating intercourse of vessels, where an infectious disease prevails at other places, and not about someone warning other residents of a locality that some precaution about an infectious disease, according to medical protocol, is being observed in breach. In the opinion of this Court, a tweet of the kind that is the subject matter of the impugned prosecution can never be regarded as one within the mischief of Section 271; not even remotely.

11. This Court finds that the impugned prosecution not only fails to disclose a cognizable case against the applicant, but is one that is a reckless abuse of the process of Court. The Commissioner of Police, Gautam Buddh Nagar ought to bear caution and ensure that frivolous

prosecutions, like the one in question, are not launched against respectable citizens. It is the duty of this Court under Section 482 of the Code to prevent abuse of process of Court. This Court would expect that the Trial Court would also not permit frivolous cases to survive, burdening its already overloaded docket on one hand, and on the other, resulting in utterly uncalled for harassment of a respectable citizen. Cases of this kind ought to be scuttled, whenever and wherever it comes to the notice of a competent court, whether it be at the stage of discharge or in a criminal revision or through an application, asking the proceedings to be quashed. In this regard, reference may be made to the principles laid down by the Supreme Court in **Sanjay Kumar Rai v. State of U.P. & Another**5. In **Sanjay Kumar Rai** *(supra)*, it has been held :

16. The correct position of law as laid down in *Madhu Limaye*(supra), thus, is that orders framing charges or refusing discharge are neither interlocutory nor final in nature and are therefore not affected by the bar of Section 397 (2) of CrPC. That apart, this Court in the above-cited cases has unequivocally acknowledged that the High Court is imbued with inherent jurisdiction to prevent abuse of process or to secure ends of justice having regard to the facts and circumstance of individual cases. As a caveat it may be stated that the High Court, while exercising its afore-stated jurisdiction ought to be circumspect. The discretion vested in the High Court is to be invoked carefully and judiciously for effective and timely administration of criminal justice system. This Court, nonetheless, does not recommend a complete hands off approach. Albeit, there should be interference, may be, in exceptional cases, failing which there is likelihood of serious prejudice to the rights of a citizen. For example, when the contents of a complaint or the other purported material on record is a brazen attempt to persecute an innocent person, it becomes imperative upon the Court to prevent the abuse of process of law.

12. In the considered opinion of this Court, the impugned proceedings cannot be permitted to continue and deserve to be quashed.

13. In the result, this application **succeeds** and stands **allowed**. The proceedings of Case No. 1111 of 2020, State v. Tarun Jain (arising out of Case Crime No. 325 of 2020), under Sections 182, 188 and 271 of the Penal Code, Police Station - Sector 49, NOIDA, District - Gautam Buddh Nagar, pending before the Additional Chief Judicial Magistrate-II, Gautam Buddh Nagar are hereby **quashed**.

14. Let an entry be made in the General Diary of Police Station - Sector 49, NOIDA, District - Gautam Buddh Nagar to the effect that proceedings of Case Crime No. 325 of 2020, under Sections 182, 188 and 271 of the Penal Code stand quashed under orders of this Court. The aforesaid part of the order shall be caused to be carried out in the records of the police station concerned by the Additional Chief Judicial Magistrate-II, Gautam Buddh Nagar within a week of receipt of a copy of this order.

15. Let a copy of this judgment be communicated to the learned Additional Chief Judicial Magistrate-II, Gautam Buddh Nagar, through the learned Sessions Judge, Gautam Buddh Nagar and the Station House Officer, Sector 49, NOIDA, District - Gautam Buddh Nagar, through

the Commissioner of Police, Gautam Buddh Nagar by the Registar (Compliance).

(2021)07ILR A393
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Special Appeal Defective No. 202 of 2021

Neelu Dwivedi ...Petitioner
Versus
Artificial Limbs Manufacturing Corp. of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Tarun Varma, Sri Kaushalendra Nath Singh, Sri Shesh Kumar

Counsel for the Respondents:
Sri Bal Mukund, Sri Rahul Shukla

A. Artificial Limbs Manufacturing Corporation of India, Kanpur, Conduct, Discipline & Appeal Rules, 1975 – Rule 20 (1) – Suspension –Departmental enquiry – Charge of obtaining the graduation degree and training certificate simultaneously even both being regular courses –Employer's Jurisdiction to conduct it – Writ petitioner possessed verifiable graduation degree and a vocational training certificate – Held, till such time the certificates are cancelled by the University or the Body that issued them, the employer having acted upon them, in our view, would now have no jurisdiction to question the correctness of those certificates, after 20 years of their acceptance, by assuming that both the courses being regular could not have been undertaken simultaneously – A charge-sheet, however, may be quashed if it is without jurisdiction or on the face of it illegal. (Para 20A and 25)

B. Service Law – Departmental enquiry – Charge of not having requisite work experience at the time of selection – Validity – In the advertisement, the condition of work experience was made relaxable –Held, after 20 years of service, it does not lie in the mouth of the employer to say that the appellant made a misstatement with respect to her work experience, particularly, when that misstatement could not have earned her an offer of appointment, unless that condition was relaxed or waived. (Para 26 and 28)

C. Service Law – Departmental enquiry – Quashing of the charge-sheet – Principle laid down – (a) Long delay in initiation of departmental inquiry, in absence of proper explanation, if proves prejudicial to the incumbent, may be a ground to quash the charge-sheet; (b) ordinarily, a charge-sheet is not to be quashed by examining the correctness of the charge(s) levelled therein as that is to be examined in the inquiry; (c) a charge-sheet, however, may be quashed if it is without jurisdiction or on the face of it illegal; (d) if a decision is taken to quash the charge-sheet at the threshold, regard be had not only to the facts but also to the gravity of the misconduct alleged; and (e) where there is fraud played by an employee to secure appointment, the appointment gets vitiated and, in such a scenario, no equity comes in favour of the appointee to challenge the initiation of proceedings to question his appointment on mere ground of delay. (Para 20A)

Special Appeal partly allowed. (E-1)

Cases relied on :-

1. P.V. Mahadevan Vs MD. T.N. Housing Board; (2005) 6 SCC 636

2. St. of A.P. Vs N. Radhakishan; (1998) 4 SCC 154

3. St. of Punj. & ors. Vs Chaman Lal Goyal; (1995) 2 SCC 570

4. UCO Bank & ors. Vs Rajendra Shankar Shukla; (2018) 14 SCC 92

5. Sarwan Singh Lamba & ors. Vs U.O.I. & ors.; (1995) 4 SCC 546

6. Sanatan Gauda Vs Berhampur University; (1990) 3 SCC 23

7. District Collector, Vijyanagram Vs M. Tripura Sundari Devi; 1990 (4) SLR 237

8. District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram & anr. Vs M. Tripura Sundari Devi; (1990) 3 SCC 655

9. Ram Saran Vs IG of Police, CRPF & ors.; (2006) 2 SCC 541

10. Secretary, Ministry of Defence & ors. Vs Prabhash Chandra Mirdha; (2012) 11 SCC 565

11. U.O.I. & ors. Vs Upendra Singh; (1994) 3 SCC 357

12.U.O.I. & anr. Vs Kunisetty Satyanarayana; (2006) 12 SCC 28

13. E.P. Royappa Vs St. of T.N.& anr.; (1974) 4 SCC 3.

14. St of Bihar& anr. Vs P.P. Sharma; 1992 Supp (1) SCC 222.

15. St. of M.P. Vs Bani Singh & anr.; 1990 (Supp) SCC 738

16. Bharti Reddy Vs St. of Karn. & ors.; (2018) 6 SCC 162

17. Dr. M.S. Mudhol & anr. Vs S.D. Halegkar & ors; (1993) 3 SCC 591

(Delivered by Hon'ble Manoj Misra, J.

1. This intra-court appeal arises from a judgment and order dated 27.01.2021 of a Single Judge in Writ A No. 7132 of 2020 disposing off the writ petition of the appellant.

FACTS GIVING RISE TO THE APPEAL

2. The appellant (writ petitioner @ petitioner) filed Writ A No. 7132 of 2020 for quashing the suspension order dated 16.12.2019 and five departmental charge-sheets issued to her as also for a direction upon the respondents not to take coercive action against her pursuant to the said charge-sheets.

3. The appellant was appointed as Secretary to the Chairman-cum-Managing Director (for short CMD), Artificial Limbs Manufacturing Corporation of India (for short ALIMCO), Kanpur, a Government of India undertaking, vide letter dated May 10, 2000, on her selection pursuant to an Advertisement dated 20.02.2000. She joined the post on 01.06.2000. On 21.08.2007, she was designated as Deputy Manager (P & A) with additional duties at CMD Secretariat and as a Public Information Officer. Thereafter, on 01.07.2012, she was promoted on E-4 level post of Manager (P & A) and was assigned additional duties of a Vigilance Officer. Later, on 01.01.2015, she was promoted to E-5 level post as Senior Manager (P & A) and, on 03.08.2018, was transferred to APOC (ALIMCO Prosthetic and Orthotic Centre) from P & A department. It is the case of the appellant that a close relative of the CMD (third respondent) was appointed as Marketing Officer in the respondent company in the year 2015. A complaint in respect of nepotism was made in the Ministry concerned. Some officers, inimical to the appellant, poisoned the third respondent that the complaint is at the behest of the appellant. As a consequence whereof, persecution of the appellant began resulting in issuance of five charge-sheets preceded by suspension.

4. In the writ petition the appellant claimed that the charge-sheets were to harass the petitioner by raising stale and frivolous issues; and were deliberately issued during the lock-down period to conduct enquiry through virtual mode to the detriment of the petitioner even though it was not permissible under the Rules.

5. The learned Single Judge by the impugned judgment and order rejected the prayer of the appellant to quash the charge-sheets and the order of suspension, however, after recording the undertaking of the respondents that they would hold a de novo inquiry in respect of three charge-sheets dated 01.06.2020; 12.06.2020; and 13.06.2020, wherein the inquiry had proceeded substantially, the learned Single Judge disposed off the petition by providing that the enquiry officer would conduct the inquiry at Kanpur; the appellant would cooperate in the inquiry and would not seek unnecessary adjournments; the reply to the charge-sheets would be submitted within a month, if not already filed, and the inquiries shall be completed within a period of three months provided the appellant co-operates.

6. Aggrieved with the refusal of the prayer to quash the impugned charge-sheets and the order of suspension, this intra-court appeal has been filed by the writ petitioner against the judgment and order of the learned Single Judge.

7. We have heard Sri Shesh Kumar and Sri Tarun Varma for the appellants; Sri Rahul Shukla and Sri Bal Mukund, for the respondents.

AN EXAMINATION OF THE ALLEGATIONS IN THE IMPUGNED CHARGE-SHEETS

8. Before we proceed to notice the submissions of the learned counsel for the parties, it would be apposite for us to have a glimpse at the five impugned charge-sheets and the order of suspension dated 16.12.2019 to have a clear understanding of the context.

9. The impugned order of suspension has been passed by the General Manager (Marketing) & Disciplinary Authority in contemplation of departmental inquiry in exercise of power conferred upon it by Rule 20 (1) of the Artificial Limbs Manufacturing Corporation of India, Kanpur, Conduct, Discipline & Appeal Rules, 1975 (for short the Rules, 1975). The suspension order does not specify the misconduct with reference to which the appellant was placed under suspension.

10. The five impugned charge-sheets were collectively filed as Annexure 4 to the writ petition. The allegations in those charge-sheets along with our brief observation in respect of the thrust of the charge(s) mentioned therein are being summarised below:

10(i). **Charge-sheet dated 13.03.2020 (Reference No. GM(M)A-30/ND/01) (hereinafter referred to as the first charge-sheet)** contains two articles of charge:

ARTICLE 1 is to the effect that according to the advertisement, pursuant to which the petitioner applied for appointment, the educational qualification prescribed was (i) Graduate in any discipline with a speed of 100/40 wpm in the Shorthand/Typing and (ii) Diploma in Secretarial Practice from a recognised institute. In her curriculum vitae (for short

'CV'), against educational qualification column, petitioner mentioned "B.Sc from Kanpur University in the year 1996", whereas against professional column, the petitioner had mentioned just Secretarial Course with Shorthand and Typing from ITI, Kanpur. It is alleged that the petitioner intentionally concealed year of passing the examination as 1996 as both these educational pursuits were regular and full time courses and could not have been simultaneously pursued and completed in the same year 1996. Thus, it could be inferred that the petitioner deliberately concealed the year of passing in her application, dated February 24, 2000, and thereby obtained employment in ALIMCO by committing fraud.

ARTICLE 2 is to the effect that in the advertisement, in addition to the educational qualifications, work experience was required as follows: (i) 5 years' experience as Personal Assistant in Govt/Pvt. Sector Undertaking/Private Sector and (ii) Proficiency in using computer for secretarial job, having familiarity with windows environment. But, the petitioner in respect of the above requirement, in her 'CV', mentioned: (i) worked in Hotel Landmark, as Front Office Assistant (1996), without mentioning the exact period of such work; (ii) worked in Shivgarh Resorts Ltd. (a member of Suman Motels Ltd.) as a Regional Coordinator (1996-1998), without mentioning the exact period of such work; and (iii) presently working with Precitex Components Mfg Co (a Div of Lohia Starlinger), as Secretary to General Manager, since August, 1999. It is alleged that on the date of the advertisement i.e. 20.02.2000 she did not have work experience of 5 years as Personal Assistant but only of about 3 years 6 months and therefore, even though the requirement of experience was relaxed with the approval of CMD, the petitioner did not hold the requisite experience. It is also alleged that when verification of the work experience was sought from Vice President (HR), Lohia Corp Ltd. in the year 2018, it was intimated that the appellant had worked there since 20.12.1999. This indicated that the petitioner had falsely disclosed that she was working there since August 1999. By stating, as above, it was alleged that the petitioner obtained appointment by playing fraud.

Annexure III to the first charge-sheet provided the material in support of the articles of charges framed against the petitioner.

10(ia) In respect of the charge mentioned in Article 1, extracted above, the advertisement, as published in the Hindustan Times on 20.02.2000; and the application of the writ petitioner, dated 24.02.2000, by which she applied for appointment on the post of Secretary to CMD by enclosing her 'CV', were amongst others placed as documents to support the charge. To have a clear cut understanding of how charge mentioned in Article 1 was drawn in the first charge sheet (supra), it would be useful to extract paragraph nos. 5, 6 and 7 of Annexure II to the charge-sheet (supra) below:-

"5. In order to verify the genuineness of her qualifications and years of passing, GM(P&C). ALIMCO and DGM(QC) & Vigilance Officer, ALIMCO vide Letter No. GM(P & C)/01AU dated 27.8.2018 addressed a communication to Joint Director, Government ITI, Pandu Nagar Kanpur, regarding the correctness and validation of certificates of Miss Neelu Dwivedi, Sr. Manager (APOC), ALIMCO

citing that she has declared that in the year 1996, she passed B.Sc (Biology) from S N. Sen College, Kanpur and did her secretarial course from ITI/AFWWA in 1996 itself as well as worked in Hotel Landmark from January, 1996 to December, 1996. B.Sc and secretarial course both being regular have been completed at the same time were sought. Joint Director (Training), Kanpur Division, Office of Government Industrial Training Institute, Pandunagar, Kanpur vide his letter No.N.C.V.T./Training/Certificate/2018/1097, dated 4.9.2018 addressed to GM (P&C), ALIMCO, Kanpur informed that "Ms. Neelu Dwivedi (Enrolment No. 45416040), D/o Shri Ramkaran Dwivedi has taken admission in Industrial Training Institute, Chakeri, Kanpur Nagar in the admission session of August, 1995-96 and passed All India Professional English Stenography Examination in July, 1996. She has been granted Mark Sheet under Sl. No. 92 and 133526 by State Council for Vocational Training, Uttar Pradesh, Lucknow. Therefore, photocopy of Mark Sheet No. 92 and 133526 of Ms. Neelu Dwivedi, D/o Shri Ramkaran Dwivedi, provided by you has been verified from the office records and copy duly verified is enclosed herewith.

6. Further, in order to verify the genuineness of her qualifications and years of passing, GM(P&C), ALIMCO and DGM (QC) & Vigilance Officer, ALIMCO addressed a Letter No. GM (P&C)/01/AU, dated 30.08.2018 to Registrar, Chhatrapati Shahu Ji Maharaj University, Kalyanpur, Kanpur enclosing therewith B.Sc certificate of Miss Neelu Dwivedi for correctness and validation. Controller of Examination/Asstt/Dy. Registrar, Examn. Controller, Chhatrapati Shahu Ji Maharaj University, Kanpur-208024 vide Letter No. C.S.J.M.U./Secret (Verification)/1209/2018, dated 30.08.2018 informed GM (P&C), ALIMCO, Kanpur that Miss Neelu Dwivedi passed B.Sc. (Regular) in the year 1996 with second division.

7. Thus, it is evident that Miss Neelu Dwivedi, Senior Manager & Incharge (APOC), Artificial Limbs Manufacturing Corporation of India, Kanpur during the year 2000 vide her application, dated 24 February, 2000, in the curriculum vitae against educational qualification column, had mentioned "B.Sc from Kanpur University Year 1996". Against professional qualification column, she had mentioned only Secretarial Course with Shorthand and Typing from ITI, Kanpur and intentionally concealed year of passing the examination as 1996. Since both these courses are regular and full time courses and cannot be simultaneously pursued and completed in the same year 1996, she intentionally and deliberately concealed year of passing of diploma course in her application dated 24 February, 2000 and obtained employment in Artificial Limbs Manufacturing Corporation of India (ALIMCO) by giving false information, thereby committed fraud on the Corporation and willfully and knowingly acted against the interest of the Corporation.

Miss Neelu Dwivedi by her above act exhibited lack of integrity and conduct unbecoming an employee of Corporation and thereby violating Rule 4 (1)(i), (iii) and also Rule 5 (4), 5(5), 5(21) of Artificial Limbs Manufacturing Corporation of India, Kanpur, Conduct, Discipline and Appeals Rules. "

10.(ib) At this stage, we may observe that the above charge is not in respect of submitting a forged or fabricated certificate but is with regard to the validity of the certificate.

10.(ic) Similarly, for having a clear picture of Article II of the charges contained in charge-sheet dated 13.03.2020 (supra), we are extracting paragraph nos. 2, 3, 4 and 5 from Annexure II relating to Article II below:-

"2. Miss Neelu Dwivedi vide her application, dated 24.2.2000 applied for the post of Secretary to CMD, ALIMCO and enclosed her curriculum vitae. In the curriculum vitae against the column Work Experience, she had mentioned (i) Worked in Hotel Landmark as Front Office Assistant (1996). The exact period has not been mentioned. (ii) Worked in Shivgarh Resorts Ltd. (a member of Suman Motels Ltd) as a Regional Coordinator (1996-1998). The exact period has not been mentioned i.e. date and month (iii) Presently working with Precitex components Mfg Co (a Div of Lohia Starlinger) as Secretary to General Manager since August, 1999.

3. In the prescribed application proforma of ALIMCO duly signed by Miss Neelu Dwivedi on 1.5.2000, under column 17 experience, she has mentioned as under:

Name and address of the employer	Designation	Period From to	Nature of Work	Basic Pay	Total	Reasons for leaving
Hotel Landmark (The Mall, Kanpur)	Front Office Assistant	Jan 96 to Dec 96	Customer Service	-	2500/-	Working in shift
Shivgarh Resorts Ltd. 3rd floor Commerce Centre, Chuniganj	Regional Co-ordinator	Dec 96 to Dec 98	Customer Service & Coordination with all the branches	-	3200/-	Better opportunity
Precitex Components Ltd. Mallaman Chaubepur	Secretary to GM	Not legible as ink put on the writing till date	Corresponding with all the records, customers,	2800/-	4500/-	

maintaining records, arranging in house training, all the work relates to GM etc.

In the last page of the said prescribed application proforma, she has further mentioned "I solemnly declare that the particulars furnished in this application are true and correct to the best of my knowledge and belief. I clearly understand that any mis-statement of facts contained therein or willful concealment of any material facts will render me liable to appropriate action as may be decided by the Company. This has been signed by her on 1.5.2000.

4. Thus, it is seen that the details of her experience as claimed by her at the time of applying for the post of Secretary to CMD was as under:-

(i) M/s. Landmark from January, 1996 to December, 1996 - 11 months (experience certificate not produced by showing inability to produce the same.

(ii) Shivgarh Resorts from 5.12.1996 to 31.12.1998 - 2 years 1 month (experience does not seems to be relevant experience).

(iii) Precitex Components (Unit of Lohia Starlinger) from August 1999 to 31.5.2000 - 6 months as per bio-data submitted at the time of application, experience counted till the date of advertisement i.e. 20.2.2000).

From the above, it is apparent that she claimed 3 years and 6 months experience in the job application which is below the advertised experience of 5 years. However, the prescribed experience was relaxed with the approval of CMD, ALIMCO to 4 years instead of 5 years for those candidates having Diploma in Secretarial Course. Miss Neelu Dwivedi was not entitled for said relaxation in view of the fact that she was not having Diploma in Secretarial Practice. Even, if the relaxation of one year experience is taken into account/considered in favour of Miss Neelu Dwivedi then also she was not fulfilling requisite experience as she was in possession of only 3 years and 6 months of experience plus 1 year Diploma in Secretarial Practice = 4 years and 6 months. Besides, she did not produce the experience certificate of Hotel Landmark which reduces the effective experience to 3 years and 6 months

5. In order to verify the experience certificate of Miss Neelu Dwivedi in respect of M/s. Precitex Components, a letter No. DGM/01/AU dated 8.9.2018 was addressed to Vice President (HR), Lohia Corp Ltd., Lohia Industrial Complex, Chaubepur, Kanpur by DGM (QC) & VO and GM (P & C), ALIMCO, Kanpur. Manager (HR), Lohia Corp Ltd., Kanpur vide letter No. LCL : PERS:CERT:2018 dated 9.9.2018 intimated/verified service certificate of Miss Neelu Dwivedi and stated she has worked from 20.12.1999 to 31.5.2000 as Stenographer. Thus, it is evident that Miss Neelu Dwivedi in her curriculum vitae dated 24.2.2000 has mentioned false work experience i.e. "presently working with Precitex Components Mfg Co (a Div of Lohia Starlinger) as Secretary to General Manager since August, 1999" whereas she was working there from 20.12.1999."

10.(id) At this stage, we may observe that the above charge is not in respect of submitting a forged or fabricated certificate but is in respect of: (a) not holding the prescribed experience; and (b) giving incorrect information with regard to work experience at M/s Precitex Components in her CV. Interestingly, the information with regard to work experience at Precitex Components in the application form submitted by the appellant on which appointment was processed does not disclose as to from which date she had worked there. Noticeably, as per the imputation, that column was blotched by ink spill. Whether experience certificate was annexed with the application or the CV, the charge-sheet is silent. Thus, it can be assumed that the charge has been levelled on the basis of incorrect disclosure in the CV. Whether the entry in the CV was relied upon to provide her appointment is not clear from the charge sheet. What is important is that even if her CV (bio-data) entry is taken as correct, she neither had prescribed 5 years of experience nor did she have 4 years' experience upto which, according to the charge sheet, there was relaxation.

10.(ii**) Charge-sheet dated 13.03.2020 Reference No. GM(M)A-30/ND/02** (hereinafter referred to as the second charge-sheet), this charge-sheet contains a single article of charge which is to the effect that the appellant during the years 2009 and 2011 while working as Deputy Manager (P & A) in ALIMCO, Kanpur had applied for the post of (i) Deputy Registrar, Indian Institute of Technology, Kanpur on 28.8.2009 and (ii) Deputy General Manager (Pers & Admn) in National Seeds Corporation Limited on 02.09.2011 for outside job by giving false and misleading information pertaining to her qualifications as passed (i) B.Sc in the year 1996 from S.N. Sen BVPG College, Kanpur and (ii) shorthand one year course from ITI, Kanpur in the year 1997, whereas in her application for initial appointment in ALIMCO for the post of Secretary to CMD, she had mentioned she has done/passed both these full time regular courses in the same year 1996. Thus, by furnishing false information to prospective employer, she committed fraud on public with sole motive of self career progression and personal gain.

10.(iia) At this stage, we may observe that Annexure III to the second charge sheet though gives a list of documents by which the charge is to be proved but does not mention about submission of any certificate by the appellant to show that she passed one year course from ITI, Kanpur in the year 1997.

Thus, the charge is not of submitting a forged document but of submitting incorrect information in the application in respect of the year in which the appellant passed one year course from ITI, Kanpur.

10.(iii) **Charge-sheet dated 01.06.2020 Reference No. GM(M)A-30/ND/03 (hereinafter referred to as the third charge-sheet),** this charge-sheet contains two articles of charge:

(a) **Article 1** is to the effect that the petitioner was transferred vide Office Order No. 26/2018, dated 3.8.2018 to APOC, Head Office, Artificial Limbs Manufacturing Corporation of India, Kanpur. In terms of clause 2 of the said Office Order dated 03.8.2018, she was directed to hand over all important files to Shri M.S. Puri, Manager (P & A) before getting relieved. In violation of said instructions, she did not hand over key Recruitment File No. AD 3F 01/2013 relating to recruitment of Officer (L & IR).

(b) **Article 2** is to the effect that during the year 2018 while functioning as HOD of P & A Department, the petitioner has intentionally and deliberately committed gross irregularities in the recruitment of Quality Control Assistant (Mechanical & Electronics) by not resorting to double checking the contents of Minutes of Screening Committee for the said post in spite of clear instructions to do so, with the result, the entire process of recruitment and selection had to be cancelled by the ALIMCO Management resulting in loss of time, money and reputation of the Corporation.

10.(iv) **Charge-sheet dated 12.06.2020 Reference No. GM(M)A-30/ND/04** (hereinafter referred to as the fourth charge-sheet), this charge-sheet contains solitary article of charge, which is to the effect that while working as Manager (P & A) in the Administrative Department of the Artificial Limbs Manufacturing Corporation and dealing with the file relating to the recruitment process, during the year 2013, for the post of Officer (P & O) she intentionally did not recommend name of one applicant Sh. Jeetendra Kumar on the ground that the above applicant had filed a legal case against the Corporation which was pending in the High Court of Karnataka, in spite of the fact that the name of the above candidate was recommended by duly constituted Scrutiny Committee for inclusion in the selection process. Thus, the petitioner arbitrarily and knowingly suppressed the name of Shri Jeetendra Kumar from the list of shortlisted candidates and did not include his name thereby denying him rightful opportunity for appointment on the said post.

10.(v) **Charge-sheet dated 13.06.2020 Reference No. GM(M)A-30/ND/05** (hereinafter referred to as the fifth charge-sheet), this charge-sheet contains two articles of charge:

(a) **Article 1** is to the effect that the petitioner during the period of August to December 2019, during her posting at APOC, was habitually absenting herself from workplace and taking leave without any prior permission or approval. Despite written orders issued by the Competent Authority, she remained absent from duty on 114.5 days with irregular attendance during the period from August 2018 to December 2019 in violation of ALIMCO Leave Rules read with Office Order No. 11/2016, dated 18.4.2016.

(b) **Article 2** is to the effect that the petitioner during the year 2019 has availed 30 days Earned Leave. In terms of Clause 4(d) of Artificial Limbs Manufacturing Corporation Leave Rules, every application for grant of Earned Leave should be submitted at least seven days before the commencement of the leave where the leave asked for is less than 15 days. If the leave asked for is more than 15 days, the leave application should be submitted 14 days before the commencement of the leave. Any relaxation to this rule, in special circumstances, may be done only with the prior approval of CMD, ALIMCO.

It is alleged that in violation of such rules, the petitioner availed Earned Leave as follows:-

(i) 3.12.2018 to 06.12.2018

(ii) 14.01.2019 to 18.01.2019

(iii) 5.8.2019 to 06.08.2019

SUBMISSIONS ON BEHALF OF THE APPELLANT

11. The learned counsel for the appellant submitted that out of the five charge-sheets that were served upon the appellant, charge-sheet dated 13.03.2020 (Reference No. GM(M)A-30/ND/01) was in respect of furnishing certain information in the year 2000 at the time of seeking initial appointment and therefore, initiating proceedings in respect thereof, after 20 years of service, amounts to persecution, undue harassment and, on that very ground, the said charge-sheet is liable to be quashed at the threshold. It was submitted that the said charge-sheet does not disclose that any of the documents submitted at the time of appointment were forged or false rather it questions the validity of the eligibility certificates even though the authority concerned had verified those certificates. It was argued that so long those certificates stand uncanceled and are verifiable, the employer has no jurisdiction to question the validity of those certificates, that too, after 20 years of service. It was urged that from the charge itself it appears the requirement of having work experience was relaxable and, therefore, once appointment was offered by relaxing the work experience requirement, the employer is estopped from questioning the eligibility on that ground, particularly, after 20 years of service. It was submitted that while addressing the prayer of the appellant to quash the said charge-sheet, the learned Single Judge failed to consider these vital aspects. Hence, the order of the learned Single Judge is liable to be set aside.

12. In respect of the second charge-sheet dated 13.03.2020 (Reference No. GM(M)A-30/ND/02) it was urged that the charge levelled therein is not at all referable to any kind of misconduct on the part of the appellant in respect of her employment with ALIMCO, inasmuch as the charge levelled therein is in respect of certain information provided by the appellant to a prospective employer for seeking appointment under it. It has been urged that by taking that information as a piece of evidence to suggest that the petitioner had not given correct information at the time of her own appointment, the second charge-sheet has been drawn separately, which is totally misconceived as it just multiplies the same charge levelled in the first charge-sheet. It is, thus, urged that the second charge-sheet being not referable to any separate misconduct under the employment of ALIMCO than what was already alleged

in the first, amounts to undue harassment and, therefore, the second charge-sheet is liable to be quashed. It is urged that the learned Single Judge has failed to notice this aspect of the matter.

13. It was next urged that the remaining three charge-sheets raise frivolous minor issues just to harass the appellant and the very fact that all the charge-sheets were issued within a short period of three months, during the course of the lock-down, and the inquiry proceeded through virtual mode, it was clear that the respondents were proceeding against the appellant mala fide, with a per-determined notion.

14. Lastly, it was urged that as the first two charge-sheets are not at all sustainable in law, and the misconduct alleged in the other three charge-sheets is not of a nature that may entail a major punishment, the order of suspension is not warranted and the same is liable to be quashed. It was urged that since the learned single judge has not properly addressed the issues/ aspects mentioned above, the impugned judgment of the learned single judge is liable to be set aside and the writ petition of the appellant deserves to be allowed.

15. To support the above submissions, on behalf of the appellant, following decisions were cited:

(i) **P.V. Mahadevan vs. MD. T.N. Housing Board, (2005) 6 SCC 636** wherein it was held that inordinate delay of 10 years in initiating departmental enquiry, in absence of convincing explanation by the employer, would be extremely prejudicial to the incumbent and therefore, the charge memo is liable to be quashed.

(ii) ***State of A.P. vs. N. Radhakishan, (1998) 4 SCC 154*** wherein it was observed that whether delay vitiates disciplinary proceedings has to be considered taking into account all relevant facts and circumstances.

(iii) ***State of Punjab and others Vs. Chaman Lal Goyal, (1995) 2 SCC 570*** wherein, in paragraph 9 of the judgment, it was observed that it is trite to say that such disciplinary proceeding must be conducted soon after the irregularities are committed or soon after discovering the irregularities. They cannot be initiated after lapse of considerable time. Such delay would not be fair to the delinquent officer and it also makes the task of proving the charges difficult and is thus, not also in the interest of administration. But how long a delay is too long always depends upon the facts of a given case. Moreover, if such delay is likely to cause prejudice to the delinquent officer in defending himself, the enquiry has to be interdicted. Wherever such a plea is raised, the court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances.

(iv) ***UCO Bank and others Vs. Rajendra Shankar Shukla, (2018) 14 SCC 92*** wherein a delay of 7 years in issuing charge-sheet was considered fatal.

(v) ***Sarwan Singh Lamba and others Vs. Union of India and others, (1995) 4 SCC 546*** wherein appointments were not interfered with particularly when

there was no fraud and were of persons duly qualified and eligible for the post.

(vi) ***Sanatan Gauda Vs. Berhampur University, 1990 (3) SCC 23*** wherein, by applying the principle of estoppel, upon finding that a candidate had taken admission and had given examination of Law Course, it was held that the University could not deprive him of the fruits of his result on the ground that the student was ineligible for admission in the law course.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

16. Learned counsel for the respondents submitted that under Office Memorandum dated 19.05.1993 action could be taken against Government Servants if, later, they are found ineligible or unqualified for their initial recruitment. It was urged that Government of India, Ministry of Personnel, P.G. & Pensions (Department of Personnel and Training), upon consideration of decision of the Supreme Court **in District Collector, Vijyanagram vs. M. Tripura Sundari Devi, 1990 (4) SLR 237**, has issued a circular as follows:-

"The matter has been examined in consultation with the Ministry of Law and Justice and it has now been decided that wherever it is found that a Government Servant, who was not qualified or eligible in terms of the recruitment rules etc., for initial recruitment in service or had furnished false information or produced a false certificate in order to secure appointment, he should not be retained in service. If he is a probationer or a temporary Govt. servant, he should be discharged or his services should be terminated. If he has become a permanent Govt. servant, an inquiry as prescribed in Rule 14 of CCS (CCA) Rules, 1965 may be held and if the charges are proved, the Government servant should be removed or dismissed from service. In no circumstances should any other penalty be imposed."

17. By referring to the said circular, the learned counsel for the respondents also placed before us Rule 5(4) of the Rules, 1975 so as to demonstrate that "Misconduct" includes furnishing false information regarding name, age, father's name, qualification, ability or previous services or any other matter germane to the employment at the time of employment or during the course of employment.

18. It was urged that since charge-sheet (i) and (ii) {referred to in paras 10.(i) and 10(ii)} were in respect of furnishing false information, no period of limitation would apply for initiating departmental inquiry and therefore, the prayer of the writ petitioner to quash the departmental inquiry at the threshold is not at all sustainable. Learned counsel for the respondents further urged that other three charge-sheets, namely, charge-sheet (iii), (iv) and (v) {referred to in paras 10.(iii), 10.(iv) and 10.(v)} are referable to recent misconduct of the petitioner and therefore, there is no substance in the prayer of the petitioner. He further submitted that the petitioner in her writ petition had not made any specific statement as to what prejudice would be caused to her by the delay in drawing disciplinary proceeding against her therefore, her plea to quash the charge-sheets on the ground of delay is not at all sustainable.

19. Learned counsel for the respondents placed reliance on the following decisions:

(i) ***District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and another Vs. M. Tripura Sundari Devi, (1990) 3 SCC 655*** wherein it was held that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice.

(2***) Ram Saran vs. IG of Police, CRPF and others, (2006) 2 SCC 541***. In that case, the appointment was secured by furnishing false birth certificate. By placing reliance on GO No. 29 of 1993, the apex court took the view that whenever it is found that a government servant who was not qualified or eligible in terms of the recruitment rules etc. for initial recruitment in service or had furnished false information or produced a false certificate in order to secure appointment should not be retained in service if the charges are proved.

(3) ***Secretary, Ministry of Defence and others vs. Prabhash Chandra Mirdha, (2012) 11 SCC 565.*** In this case, the apex court, after considering a number of decisions, held that the law does not permit quashing of charge-sheet in a routine manner. In case the delinquent employee has any grievance in respect of the charge-sheet he must raise the issue by filing a representation and wait for the decision of the disciplinary authority thereon. It was also observed that proceedings are not liable to be quashed on the grounds that the same had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. It was also held that in case the charge-sheet is challenged before a court/tribunal on the ground of delay in initiation of disciplinary proceedings or delay in concluding the proceedings, the court/tribunal may quash the charge-sheet after considering the gravity of the charge and all relevant factors involved in the case weighing all the facts both for and against the delinquent employee and must reach the conclusion which is just and proper in the circumstances.

(4) ***Union of India and others vs. Upendra Singh, (1994) 3 SCC 357*** wherein it was held that at the stage of framing of charge it is beyond the scope of judicial review of Central Administrative Tibunal to examine the correctness of charges. It was further held that writ of prohibition can be issued only when patent lack of jurisdiction is made out.

(5) ***Union of India and another v. Kunisetty Satyanarayana, (2006) 12 SCC 28.*** In this case, it was held that, ordinarily, a writ petition impugning a show cause notice or charge-sheet is not maintainable and that in some very rare and exceptional cases, the High Court can quash the charge-sheet or show cause notice if it is found to be wholly without jurisdiction or otherwise wholly illegal.

(6) ***E.P. Royappa Vs. State of Tamil Nadu and another, (1974) 4 SCC 3.***

(7) ***State of Bihar and another vs. P.P. Sharma, 1992 Supp (1) SCC 222.***

The last two decisions cited are on general principles relating to the scope of judicial review.

ISSUES THAT ARISE FOR OUR CONSIDERATION

20. Having examined the impugned charge-sheets and the submissions noticed above, in our view, the issues that arise for our consideration are as follows:

(A) Whether the first charge-sheet issued to the appellant is liable to be quashed on the ground of delay; lack of jurisdiction; and on the principle of estoppel and acquiescence?

(B) Whether the second charge-sheet is liable to be quashed for it being a mere extension of the first and on the ground that it fails to disclose an act of misconduct qua the present employer (respondent herein)?

(C) Whether the third, fourth and fifth charge-sheets are liable to be quashed on ground of delay as well as mala fides, as alleged?

(D) Whether the continued suspension of the petitioner needs to be reconsidered in the light of our decision on any of the issues culled out above?

20A. Before we proceed to take up the issues culled out above, it would be useful to notice the legal principles governing quashing of departmental charge-sheet or charge, at the threshold, on the ground of delay or otherwise. In this regard, we may notice that even the decisions cited by the learned counsel for the parties are not at variance on the following aspects:

(a) long delay in initiation of departmental inquiry, in absence of proper explanation, if proves prejudicial to the incumbent, may be a ground to quash the charge-sheet; (b) ordinarily, a charge-sheet is not to be quashed by examining the correctness of the charge(s) levelled therein as that is to be examined in the inquiry; (c) a charge-sheet, however, may be quashed if it is without jurisdiction or on the face of it illegal; (d) if a decision is taken to quash the charge-sheet at the threshold, regard be had not only to the facts but also to the gravity of the misconduct alleged; and (e) where there is fraud played by an employee to secure appointment, the appointment gets vitiated and, in such a scenario, no equity comes in favour of the appointee to challenge the initiation of proceedings to question his appointment on mere ground of delay.

21. But, we may hasten to clarify, whether fraud has been played or not to secure appointment depends on the facts of a case. Ordinarily, questions related to fraud are to be left to be decided in the inquiry but superior courts, in exercise of their power of judicial review, are not precluded from examining the imputations made in the charge-sheet to find out whether, on the face of it, a case of fraud is made out or whether the employer has loosely used the word fraud to clinch jurisdiction. No doubt, while making such examination, the courts are not to assess the correctness of the allegations but if, on perusal of the allegations made in the charge-sheet itself, it finds that no case of fraud is made out it may exercise its power of judicial review.

22. In **State of M.P. v. Bani Singh & Another, 1990 (Supp) SCC 738 (paragraph 4 of the judgment**), the Apex Court had observed that a delay of 12 years in initiating disciplinary proceedings in respect of certain irregularities which the employer had been aware of, in absence of proper explanation, would prove fatal.

ANALYSIS ON THE ISSUES

ISSUES A & B

23 . As these two issues are inter-related, we deem it appropriate to deal with them under one head. Before we proceed to weigh the rival submissions in that context, we may recapitulate that the thrust of charge in the first charge-sheet is that the graduation degree and the training certificate were both regular courses and they could not be obtained simultaneously; other than that the petitioner did not have the prescribed work experience. Further, in the CV she fraudulently exaggerated her work experience under Precitex Components. Upon close scrutiny of the first charge-sheet, we find that there is no dispute between the parties with regard to:

(a) That the writ petitioner (the appellant herein) held verifiable certificates /degrees in respect of the minimum educational qualification prescribed by the advertisement. Noticeably, the prescribed educational qualifications under the advertisement were: (i) Graduate in any discipline with a speed of 100/40 wpm in shorthand typing; and (ii) Diploma in Secretarial Practice from a recognised institute. It is clear from paragraph 6 of the statement of imputations made in support of charge no.1 of the first charge-sheet dated 13.03.2020 (Reference No. GM(M)A-30/ND/01) that Controller of Examination/Asstt/Dy. Registrar, Examn. Controller, Chhatrapati Shahu Ji Maharaj University, Kanpur-208024 (for short Kanpur University) vide Letter No. C.S.J.M.U./Secret (Verification)/1209/2018, dated 30.08.2018, informed GM (P&C), ALIMCO, Kanpur that Miss Neelu Dwivedi (the appellant herein) passed B.Sc. (Regular) in the year 1996 with second division. Similarly, from paragraph 5 of the statement of imputations made in support of charge no.1 of the first charge-sheet it is clear that Ms. Neelu Dwivedi (writ petitioner-appellant herein) took admission in Industrial Training Institute, Chakeri, Kanpur Nagar in August in the academic session 1995-96 with Enrolment No.45416040 and passed All India Professional English Stenography Examination in July, 1996 and was issued Mark Sheet having Sl. No. 92 and 133526 by State Council for Vocational Training, Uttar Pradesh, Lucknow.

(b) That the writ petitioner (appellant herein) was short of the work experience prescribed by the advertisement. But the requirement of work experience was relaxable. And, according to the own stand of the respondents, requirement of work experience was relaxed from 5 years to 4 years with the approval of the CMD.

24. The interesting feature of the case is that even assuming that the CV of the petitioner, as per the allegation, disclosed incorrectly that the appellant had work experience at Precitex Components from August 1999 instead of December 1999, the said statement could not have earned her the qualification prescribed by the advertisement. Moreover, in the application

seeking employment the period of work experience at Precitex Components was not disclosed. Thus, what becomes clear on the face of the record is that even assuming that she made an incorrect statement of her work experience in her CV it did not earn her the appointment. Otherwise also, it is not clear whether she made a misstatement with regard to her work experience in the application or such misstatement occurred in her 'CV' only. Thus, whether the misstatement is just an error or is deliberate is any body's guess. Therefore, holding an inquiry after 20 years of the appointment, on that ground, particularly, when we find that the requirement of having work experience as mentioned in the advertisement was relaxable, would be seriously prejudicial to the interest of the appellant. In our view, the employer who had all the material in its possession and was free not to select the appellant, is now estopped from questioning the appellant's eligibility on that count.

25. Noticeably, the writ petitioner (the appellant herein) held verifiable graduation degree and a vocational training certificate. Till such time those certificates are cancelled by the University or the Body that issued them, the employer (respondent herein) having acted upon them, in our view, would now have no jurisdiction to question the correctness of those certificates, after 20 years of their acceptance, by assuming that both the courses being regular could not have been undertaken simultaneously. Had it been a case of the certificates being forged or fabricated then the position would have been different and, in that scenario, an enquiry would be justified at any stage of her employment. But, here, the certificates were genuine and were verified accordingly. Whether in a given set of circumstances, those certificates were to be issued or not, is not within the domain of the employer to speculate upon, that too, after 20 years of offering appointment to the appellant. At this stage, we may profit by noticing a decision of the Apex Court in Bharti Reddy vs. State of Karnataka and others, (2018) 6 SCC 162. In that case, the Apex Court took the view that as long as the Income and Caste Certificate is valid and in force, a writ of quo warranto cannot be issued on the basis of assumptions, inferences or suspicion regarding the factum of fulfilment of eligibility criteria. The principle laid there would also apply here as we find that even though the educational certificates have not been cancelled, the employer has turned suspicious about the validity of those certificates on an assumption that the petitioner could not have undertaken two regular courses simultaneously. Such suspicion is unwarranted, particularly, when with open eyes, acting on those certificates, appointment was offered 20 years ago. More so, when it is not shown that those certificates were obtained fraudulently; and that, after discovery of fraud, they have been cancelled by the authorities having competence, or jurisdiction, to cancel them. Thus, in our view, the charge framed as Article 1 in the first charge-sheet dated 13.03.2020 on the face of it is illegal and beyond the domain of the employer, that too, when it has been levelled after 20 years of service in spite of the fact that all the papers relating thereto were with the employer from the beginning. We are, therefore, of the considered view that such a charge is completely arbitrary, unreasonable and a proceeding based on such a charge, after 20 years of service, particularly, when the entire material was there with the employer to frame such a charge 20 years ago, would

be undue harassment of the appellant and extremely prejudicial to her. Hence, we are of the considered view that the same is liable to be quashed.

26. In respect of charge framed as Article 2 in the first charge-sheet dated 13.03.2020, it be observed that the said charge is in respect of the writ petitioner not having the requisite work experience of five years as provided in the advertisement. We have already noticed above, that in the application form as well as CV the petitioner had not disclosed that she held the requisite work experience. In fact, even if her statement with respect to her work experience in the CV is taken into account, she did not possess even 4 years of experience much less than the advertised 5 years. But, what is important to consider is that this eligibility condition in the advertisement was relaxable as is clear from the own stand of the respondents in the charge-sheet where it is admitted that by approval of the CMD, the condition of minimum work experience of 5 years was relaxed to 4 years. Importantly, it is not the case in the charge-sheet that the petitioner had submitted forged certificates to demonstrate her work experience or that on the basis of her statement in CV the employer was misled into granting her appointment. Thus, although the charge is that there is misstatement in the CV but it is not the charge that that misstatement led to her appointment because, admittedly, even by that misstatement she would not have gained the requisite work experience of either 5 years or 4 years.

27. At this stage, it would be useful to refer to a decision of the Apex Court in ***Dr. M.S. Mudhol And Anr. vs S.D. Halegkar And Ors, (1993) 3 SCC 591***. In that case, while dealing with a challenge to the appointment of a Principal of a Higher Secondary School on a petition for issuance of a writ of quo warranto, the Apex Court refused to interfere even though it found that the incumbent did not have the requisite qualifications at the time of appointment. While dismissing the writ petition, the Apex Court took the view that having held the post for 12 years the incumbent was not liable to be disturbed from office because he had placed all his cards before the Selection Committee and the Selection Committee, for some reasons or other, thought it fit to choose him for the post. The relevant observations of the Apex Court are contained in paragraphs 6 and 7 of the judgment, which are extracted below:-

"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, in spite 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 inequitous 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.

28. In this case also, the appellant had placed all her papers before the employer at the time of her recruitment. Importantly, her certificates are not found forged though, however, her statement in the CV is stated to be incorrect. But that would not have made a material difference to her candidature as she, despite that incorrect statement, was short of the requisite work experience. Therefore, since it has come on record that the condition of work experience was relaxable, an offer of appointment to her would be deemed to have been made by relaxing that condition. Now, after 20 years of service, it does not lie in the mouth of the employer to say that the appellant made a misstatement with respect to her work experience, particularly, when that misstatement could not have earned her an offer of appointment, unless that condition was relaxed or waived. Drawing proceeding against the appellant on that count, at this belated stage, in our view, would result in grave miscarriage of justice as it would amount to throwing out a person for hiding something which she never did. At this stage, it may be noticed that even the judgment in ***M. Tripura Sundari Devi (supra),*** on which reliance has been placed by the learned counsel for the respondent, leaves an exception for those cases where the eligibility condition is relaxable. For all the reasons recorded above, the second article of charge also, as framed in the first charge-sheet dated 13.03.2020 is unsustainable and is liable to be quashed.

29. At this stage, we may notice Rule 5(4) of the 1975 Rules relied upon by the learned counsel for the respondents to point out that *furnishing false information regarding name, age, father's name, qualification, ability or previous services or any other matter germane to the employment at the time of employment or during the course of employment is misconduct.* It is noticeable from the extracted rule itself that false information in respect of qualification, ability, or previous services should be germane to the employment at the time of employment to amount to a misconduct. Here, even assuming that appellant gave incorrect information with regard to her work experience, that was not germane to her employment because that incorrect information did not make her eligible by

showing that she held the requisite work experience. Therefore, in our considered view, once we have found that the requirement of having work experience was relaxable and was relaxed to 4 years from the advertised period of 5 years, offer of appointment to a person who held even less than 4 years of work experience, in absence of any statutory rule prohibiting further relaxation, would be deemed to have been made by relaxing that condition further. Noticeably, no statutory rule with regard to the requirement of minimum work experience is stated in the charge-sheet nor shown to us during the course of arguments. Thus, seen from any angle, it would neither be a misconduct on the part of the appellant nor such a fundamental defect in her qualification that may warrant initiation of proceedings after 20 years of service.

30. In view of the discussion made above, we are of the firm view that the first charge-sheet dated 13.03.2020 (Reference No. GM(M)A-30/ND/01) is liable to be quashed and is, accordingly, quashed. The finding of the learned Single Judge to the contrary, is set aside.

31. In respect of second charge-sheet i.e. Reference No.'B' GM(M)A-30/ND/02, dated 13.03.2020, we are of the view that the same is liable to be quashed for the following reasons:

The charge is in respect of incorrect statement made in an application to seek appointment with another employer not the respondent employer that has served the charge-sheet. Moreover, it appears, the petitioner instead of mentioning the year of undertaking the course from ITI, Kanpur as 1996, had mentioned 1997. This cannot be taken as furnishing false information. There is a fundamental difference between false information and incorrect information. All incorrect information may not be false. For an information to be termed false, a deliberate intention in its making has to be alleged and proved. An error in mentioning the year in which a person has earned the qualification cannot ordinarily be taken as furnishing false information because it is well-known that to seek appointment a person would have to enclose the certificate in proof of that qualification. It is not the charge that the appellant had submitted a false certificate stating that she obtained certificate in the year 1997. Moreover, since the statement was not made to the employer in question but to another prospective employer, it is for that prospective employer to find out whether the incorrect statement was by design or a mere error. Thus, seen from any angle, proceeding further on this charge-sheet would be completely unjustified. Otherwise also, the statement of imputation in the second charge-sheet is more a piece of evidence for the first charge-sheet but, since we have already quashed the first charge-sheet, it is liable to be quashed as proceeding further on it would be nothing but an exercise in futility. We are, therefore, of the considered view that second charge-sheet i.e. Reference No.'B' GM(M)A-30/ND/02, dated 13.03.2020, is also liable to be quashed and is, accordingly, quashed. The finding to the contrary recorded by the learned single judge is set aside. The issues A & B are decidedly accordingly.

ISSUE C:

32. In so far as third, fourth and fifth charge-sheets are concerned, misconduct has been spelt out and therefore an inquiry would have to be held on those charge-

sheets. The plea of mala fide has not been properly raised against the disciplinary authority who has drawn the charge-sheets. Otherwise also, whether there is delay in drawing a charge-sheet on the misconduct therein is a question of fact because it would depend as to when the misconduct was discovered. Therefore, the appropriate course for the petitioner is to take all such pleas in the disciplinary proceedings. We are, thus, in agreement, with the view of the learned Single Judge in that regard and we therefore affirm the judgment and order of the learned Single Judge to that extent. Issue C is decided accordingly.

ISSUE D:

33. In respect of the prayer of the petitioner to quash the suspension order, we are of the view that the order of suspension was passed in contemplation of inquiry without referring to the misconduct. As five charge-sheets were drawn, out of which, two have been quashed by us, we are of the view that the disciplinary authority would have to consider whether in the light of the charges mentioned in third, fourth and fifth charge-sheets, the petitioner's continued suspension is required or not. Issue D is decided accordingly.

34. In view of our conclusions on the issues, as discussed above, this appeal is entitled to be partly allowed and is, accordingly, **partly allowed**. The judgment and order of the learned Single Judge to the extent it rejected the prayer of the petitioner to quash the first two charge-sheets dated 13.03.2020 is set aside. The charge-sheet No. GM(M)A-30/ND/01, dated 13.03.2020; and charge-sheet No. GM(M)A-30/ND/02, dated 13.03.2020, are hereby quashed. All consequential proceedings in pursuance of those charge-sheets are also quashed. The judgment and order of the learned Single Judge in respect of the other three charge-sheets is affirmed. In addition to above, a direction is issued to the disciplinary authority to reconsider whether the continued suspension of the petitioner, on the basis of enquiry on the three surviving charge-sheets, is warranted. A decision in that regard shall be taken within six weeks from the date of this order.

(2021)07ILR A412
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.06.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE ROHIT RANJAN AGARWAL, J.

Special Appeal Defective No. 240 of 2021

Sheetal ...Petitioner
Versus
State Of U.P. & Ors. ....Respondents

Counsel for the Petitioner:
Sri Jamil Ahamad Azmi, Sri Mohd. Isa Khan

Counsel for the Respondents:
C.S.C,.Sri Rameshwar Prasad Shukla

A. U.P. Panchayat Raj Act, 1947 – Section 28-C – Fishery lease – Succession by operation of law – Widow's right in fishery lease of her husband – Entitlement thereof, even being a member of Gram Panchayat – No permission of Collector – Bar imposed under S. 28-C – Applicability – Held, when a person inherits the estate, it is by operation of law; the person steps into the shoes of his or her predecessor by devolution of interest which takes place immediately on the death of the predecessor though such devolution may be recognised later – Where the right devolves upon a person by operation of law on occurrence of an event over which

a person does not have control, no occasion arises to seek for permission before such devolution. (Para 9)

Appeal dismissed (E-1)

Cases relied on :-

1. Horn Vs State Ind, 445 N.E.2d 976-978

Authorities discussed :-

1. P. Rama Natha Aiyar's Treatise "Advanced Law Lexicon" (4th Edition)

(Delivered by Hon'ble Manoj Misra, J.)

1. This intra court appeal arises from a judgment and order dated 02.07.2019 of a Single Judge in Writ-C No.14609 of 2019 dismissing the writ petition of the appellant.

2. As per the report, the limitation for filing the appeal was upto 02.08.2019 but the same has been presented in February 2021 with a delay condonation application.

3 . Considering the explanation offered and the fact that in between there had been large scale restriction in movement due to COVID-19 pandemic, we deem it appropriate to condone the delay in filing this appeal. Consequently, the delay condonation application is allowed. The delay in filing the appeal is condoned. Office shall assign a regular number to the appeal.

4. We have heard the learned counsel for the appellant; learned Standing Counsel for the respondents 1 to 4; and Sri Rameshwar Prasad Shukla for the respondent no.5.

5. In brief, the facts giving rise to this appeal are as follows: The husband of the sixth respondent in the year 2013 obtained a fishery lease for a period of 10 years with effect from 14.08.2013. On 18.12.2015, the sixth respondent was declared elected as a member of the Gram Panchayat concerned. On 25.04.2018, the husband of the sixth respondent died. As an interest in a fishery lease is inheritable, the sixth respondent applied for substitution as a lessee in place of her late husband. When no action was taken on her application, she filed Writ-C No.42598 of 2018 which was disposed off with a direction upon the Sub-Divisional Magistrate, Azamgarh to decide the application of the sixth respondent. Pursuant thereto, by order dated 28.02.2019, the Sub Divisional Magistrate, Sigari, Azamgarh, upon finding that the period of lease remains, allowed the application and substituted the sixth respondent in place of her deceased husband. Questioning the order dated 28.02.2019 the appellant filed Writ-C No.14609 of 2019 by claiming that without the permission of the Collector, as is necessary under Section 28-C of the U.P. Panchayat Raj Act, 1947 (for short the Act), the sixth respondent, who is member of Gram Panchayat concerned, could not acquire interest in a village tank by way of lease, etc. Negativing the above claim, the learned Single Judge dismissed the writ petition of the appellant by declaring that Section 28-C of the Act would not apply to a case where the right devolves upon a person by operation of law such as in a case of succession.

6. Aggrieved with the order of the learned Single Judge, this appeal has been filed.

7. As the fate of the appeal would depend on the import of Section 28-C of the Act, the same is extracted below:-

28-C-- "Members and officers not to acquire interest in contract etc., with

Bhumi Prabandhak Samiti - *(1) No member or office bearer of Gram Panchayat*

or Bhumi Prabandhak Samiti shall, otherwise than with the permission in writing of

the Collector, knowingly acquire or attempt to acquire or stipulate for or agree to

receive or continue to have himself or through a partner or otherwise any share or

interest in any licence, lease, sale, exchange, contract or employment with, by or on

behalf of the Samiti concerned;

Provided that a person shall not be deemed to acquire or attempt to acquire or

continue to have or stipulate for or agree to receive any share or interest in any

contract or employment by reason only of his –

(a) having acquired any interest before he became a member or office bearer;

(b) having a share in a joint stock company which makes the contract; and

(c) having a share or interest in the occasional sale through the Samiti concerned of an article in which he regularly trades upto a value not

exceeding Rs. 50 in any one year.

(2) No court or other authority shall enforce at the instance of any person a

claim based upon a transaction in contravention of the provisions of sub-section (1)."

8. The contention of the learned counsel for the appellant is that the restriction placed by the provisions of Section 28-C would also cover a case of acquiring interest through succession and therefore, without the permission of the Collector, the sixth respondent could not have been substituted in place of her late husband as a lease holder of the fishery lease.

9. We have given our thoughtful consideration to the contentions of the learned counsel for the appellant and have perused the provisions of Section 28-C of the Act carefully. It is well settled that Section 28-C has been inserted with an object to protect the property of Gram Panchayat so that persons who are in a position to influence settlement of interest in Gram Panchayat property do not utilise their position to gain unethical advantage for themselves. However, what is important is that clause (a) of the proviso to sub-section (1) of Section 28-C saves those interests that were acquired by a person before he became a member or office bearer. When a person inherits the estate, it is by operation of law; the person steps into the shoes of his or her predecessor by devolution of interest which takes place immediately on the death of the predecessor though such devolution may be recognised later. Recognition of such devolution may be by way of mutation or substitution in the records but such mutation or substitution by itself does not create any right though it may amount to a recognition of the right. Thus, where the right devolves upon a person by operation of law on occurrence of an event over which a person does not have control, no occasion arises to seek for permission before such devolution. The legislature therefore to serve the legislative object of controlling acquisition of interest in Gram Panchayat property, in its wisdom, qualified the phrase "acquire or attempt to acquire any share or interest..... in any license, lease, sale, exchange, contract or

employment with, by, or on behalf of the Samiti concerned" with the word "*knowingly*". ***In P. Rama Natha Aiyar's Treatise "Advanced Law Lexicon" (4th Edition),*** it is provided that the primary meaning of the word "knowingly" is with "knowledge". The treatise thereafter proceeds to notice various facets of the term "knowingly" as interpreted by courts in different contexts. One of them being the decision in ***Horn Vs. State Ind, 445 N.E.2d 976-978***, wherein it was held that "act is done "*knowingly" or "purposely" if it is willed, is the product of a conscious design, intent or plan that it be done, and is done with awareness of probable consequences*. As succession takes place by operation of law on the death of the estate holder and death though is certain but the time of it cannot be controlled, particularly, when it occurs naturally, the successor in the event of death simply steps into the shoes of the estate holder immediately on his death, by operation of law and, therefore, no question of seeking prior permission to acquire interest arises. Accordingly, by keeping in mind the legislative intent for inserting Section 28-C as also the import of clause (a) of the proviso to its sub-section (1), we respectively agree with the view of the learned Single Judge that the provisions of Section 28-C of the U.P. Panchayat Raj Act, 1947 will not place any restriction on acquisition of interest in a fishery lease by succession. The appeal has no merit and is, accordingly, **dismissed**.

(2021)07ILR A415
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.06.2021

BEFORE

THE HON'BLE SANJAY YADAV, A.C.J.
THE HON'BLE PRAKASH PADIA, J.

Special Appeal Defective No. 242 of 2021

Mata Pher Mishra ...Petitioner
Versus
The State Of U.P. & Ors. ....Respondents

Counsel for the Petitioner:
Dr. Rajesh Kumar Srivastav

Counsel for the Respondents:
C.S.C., Sri Sunil Kumar Misra

A. Constitution of India,1950 – Article 226 – Writ – Effect of delay/laches – UP State Road Transport Corporation Employees (Other than Officers) Service Regulation, 1981 – S. 69 – Statutory appeal, limitation of three months provided – Effect of delay/laches – Sufficient cause, defined – Principle to be applied in condoning the delay laid down – Held, Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury – Court should adopt liberal approach for condonation of delay – Order of Single Judge as well as of appellate authority set aside. (Para 7 and 11)

B. Interpretation of statute – Liberal construction – Words 'sufficient cause' – Condonation of delay – Applicability and Scope – Words 'sufficient cause' should receive a liberal construction so as to advance substantial justice. (Para 9)

Special Appeal allowed. (E-1)

Cases relied on :-

1. N. Balakrishnan Vs M. Krishnamurthy; JT 1998 (6) SC 242

2. Shakuntala Devi Vs Kuntal Kumari; AIR 1969 SC 575

3. St. of W.B. Vs The Administrator, Howrah Municipality; AIR 1972 SC 749

4. Collector, Land Acquisition, Anantnag & anr. Vs Mst. Katiji & ors.; AIR 1987, S.C. 1353

(Delivered by Hon'ble Prakash Padia, J.

Order on Delay Condonation Application No. 2 of 2021

1. Matter is taken up through video conferencing.

2. Heard Sri Rajesh Kumar Srivastav, learned counsel for the appellant, learned Standing Counsel for the respondent no.1 and Sri Sunil Kumar Mishra, learned counsel for the respondents no.2 and 3.

3. The appeal is reported to be beyond time by 537 days.

4. Learned counsel for the respondents have no objection in condoning the delay.

5. The grounds taken for condonation of delay are good and sufficient.

6. Delay condoned.

7. Application is allowed.

Order on Appeal

1 . The writ petitioner-appellant was working on the post of Driver in Civil Lines Bus Depot, District Allahabad. He was placed under suspension by the Assistant Regional Manager, Civil Lines, Bus Depot, Allahabad vide order dated 10.10.2012, thereafter, matter was inquired by an Enquiry Officer duly appointed by the department. It was found by the Enquiry Officer that the charges levelled against the petitioner-appellant are correct and as such a show cause notice was issued to him on 24.4.2013. Reply to the aforesaid notice was submitted by him on 13.5.2013. Taking into consideration the aforesaid an order dated 22.5.2013 was passed by the respondent no.3/Regional Manager, U.P. State Road Transport Corporation, Allahabad by which balance salary of the suspension period and two increments were with-held effective from future. Apart from the same directions were given to recover the amount of 28 litre diesel from the salary of the petitioner-appellant.

2. Aggrieved against the aforesaid a statutory appeal was preferred by the writ petitioner-appellant as provided under Section 69 of the *U.P State Road Transport Corporation Employees (Other than Officers) Service Regulation, 1981* before the respondent no.2 namely Chief Manager (Sa), U.P.S.R.T.C, Head Office, Lucknow. It is provided under Section 69 of the Regulations of 1981 that the appeal could be preferred within a period of three months but since appeal was preferred after the expiry of three months the same was rejected by the appellate authority on the ground that the appeal submitted by the petitioner appellant was time barred. The aforesaid order was passed by the appellate authority on 03.10.2016 rejecting the appeal filed by the petitioner-appellant being barred by time.

3. Aggrieved against the aforesaid order the petitioner-appellant preferred a writ petition before this Court being Writ A No.12268 of 2019. The aforesaid writ petition was dismissed by the learned Single Judge vide judgement and order dated 06.08.2019 solely on the ground of unexplained laches on the part of the petitioner-appellant. Aggrieved against the

aforesaid petitioner-appellant has preferred the present special appeal.

4. It is argued by learned counsel for the appellant that reasons for delay in filing the writ petition as well as in filing appeal before the appellate authority was satisfactorily explained by him in the writ petition but without considering the same the writ petition filed by him was rejected by the learned Single Judge. It is further argued that due to mental and physical harassment he was not able to approach this Court within time.

5. In view of the same, it is argued that delay in filing the appeal before the appellant authority as well as in the writ petition be condoned and the appellate authority be directed to decide the appeal filed by the petitioner-appellant on merits.

6. The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

7. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered.

8. The Apex Court in the case of ***N. Balakrishnan vs. M. Krishnamurthy*** reported in ***JT 1998 (6) SC 242*** has laid down that :-

"the primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. In the judgement, it has been held that Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Ultimately, in para 14, it has been stated that it must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put-forth as part of a dilatory strategy the court must show utmost consideration to the suitor. It has been laid down that in such matters, approach of the court should be justice oriented. The paragraph 14 of the aforesaid judgement is reproduced hereinbelow :-

14. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean

against acceptance of the explanation. While condoning delay the Could should not forget the opposite party altogether. It must be borne in mind that he is a looser and he too would have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

9. The words "sufficient cause" should receive a liberal construction so as to advance substantial justice. The Supreme Court in the case of ***Shakuntala Devi vs. Kuntal Kumari reported in AIR 1969 SC 575*** held that the word "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant. If the appellant makes out sufficient cause for the delay, the Court may in its discretion condone the delay in filing an appeal. The relevant paragraph 7 in this regard is reproduced hereinbelow :-

"7. The next question is whether the delay in filing the certified copy or, to put it differently, the delay in re-filing the appeal with the certified copy should be condoned under Section 5 of the Limitation Act, If the appellant makes out sufficient cause for the delay, the Court may in its discretion condone the delay. As laid down in Krishna v. Chathappan (4) "Section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bonafides is importable to the appellant."

10. Similar view was again taken by the Supreme Court in the case of ***State of West Bengal vs. The Administrator, Howrah Municipality reported in AIR 1972 SC 749.*** It was held in the aforesaid case by the Supreme Court that the words "sufficient cause" should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. The relevant paragraph 30 is reproduced hereinbelow :-

"From the above observations it is clear that the words "sufficient cause" should receive a liberal construction so, as to advance substantial justice when no negligence nor inaction nor is, imputable to a party."

11. In the case of ***Collector, Land Acquisition, Anantnag and another vs. Mst. Katiji and others reported in AIR 1987, S.C. 1353***, it was held by the Supreme Court that the Court should adopt liberal approach for condonation of delay. Certain observations were made by the Sureme Court in paragraph 3 of the aforesaid judgement, which is reproduced hereinbelow :-

"The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice--that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been

making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

"Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908. may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is con- doned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

12. In our considered opinion the order passed by the appellate authority dated 03.10.2016 rejecting the appeal filed by the petitioner-appellant as well as the order dated 06.08.2019 passed by the learned Single Judge dismissing the writ petition filed by the petitioner-appellant are liable to be set aside and they are hereby set aside.

13. The appellant authority is directed to pass appropriate orders in that appeal preferred by the petitioner-appellant on merits in accordance with law.

14. The aforesaid exercise be completed by the aforesaid authority expeditiously and preferably within a period of four months from the date of presentation of this order.

15. Accordingly, present appeal is allowed.

(2021)07ILR A420
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.02.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Bench No. 327 of 2000

Ram Pratap Singh ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
D.P. Singh, Sameer Kalia, Srideep Chatterjee

Counsel for the Respondent:
C.S.C., Brijesh Kr. Shukla, Hari Prakash Gupta, N.K. Seth, S. Seth, Satyanshu Ojha

A. Service Law – Statute of *UP Krishi Evam Prodyogik Vishwavidyala Adhiniyam, 1958* **– Ch. XII – Designation of Assistant Professor granted w.e.f 13.03.1992 – Subsequently modified to the extent that the benefit shall be provided from the date of issuance of Government Order i.e. 22.07.1999 – Validity – Held, the impugned order has been passed without taking into consideration the provisions contained under Chapter XII of the Statute; It does not record reasons that why the petitioners shall be paid salary with effect from the date of issuance of government order – Further held, the impugned order being illegal and unreasoned cannot be sustained. (Para 14, 29 and 33)**

B. Statute and Government Order – Overriding effect – Government order cannot override the provisions contained under the statute. ((Para 27)

C. Precedent – Parity of wrong – Permissibility – Held, parity of wrongs cannot be granted to similarly situated persons – Respondents are taking parity of wrongs, which is not permissible in the eyes of law. (Para 30)

Writ Petition allowed .(E-1)

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

1. Heard Sri S.K. Kalia, learned Senior Advocate assisted by Sri Srideep Chatterjee, learned counsel for the petitioners, Sri Alok Sharma, learned Additional Chief Standing Counsel for respondent-State and Sri Satyanshu Ojha, learned counsel for respondent Nos.3 and 4.

2. By means of the present writ petition, the petitioners are challenging the order dated 18.2.2000 with a prayer to issue writ in the nature of Mandamus directing the opposite parties not to give effect impugned order dated 18.2.2000.

3. Brief facts of the case are that the petitioners were granted appointment on the post of Senior Research Associates in the scale of Rs.570-1100 between February, 1986-1988. Later on, they were granted pay scale of Rs.700-1600 of Assistant Professor / Teacher w.e.f. 06.06.1981, which was revised in the pay scale of Rs.2200-4000 and subsequently, it has been revised in the pay scale of Rs.8000-13500/- in pursuance to 5th Pay Commission.

4. Vide resolution dated 15.10.1990, the Board of Management of the University resolved that all the employees of University should be given U.G.C. scale, as has been given by G.B. Pant University of Agriculture & Technology, Pantnagar, District Udhamsinghnagar (Nainital) and communicated a letter dated 23.10.1990 in this regard to the State Government.

5. The University again sent a reminder to the State Government on

19.11.1990 for grant of U.G.C. Scale to the Senior Research Assistants and in the meeting dated 27.12.1990, the Board of Managment of the University has resolved that in case the State Govenrment did not take decision for grant of U.G.C. scale to the Senior Research Assistants, the Board itself shall take a decision in the next meeting.

6. Accordingly, when no action has been taken by the State Government, the Board of Management in its meeting dated 26.03.1991 considered the matter and accepted with immediate effect for grant of U.G.C. pay scale of Rs.2200-4000 to the Senior Research Associates.

7. In pursuance thereof, vide order dated 29.04.1991, the State Government sought clarification that whether the Senior Research Assistants perform the work of teachers and with regard to upcoming financial burden on the State Government, reply of which was given by Vice Chancellor of the University vide letter dated 08.05.1991 with the statement that Senior Research Associates are discharging duties of teachers and demanded for changing of nominclature of the petitioenrs as "Teacher" and for grant of U.G.C. pay scale to them after declaring as Teacher.

8. The State Govenrment sent another letter dated 18.06.1991 directing the University that in case the Senior Research Assistants fulfill the eligibility criteria of teachers, they will be declared Teacher under the relevant Act.

9. Vide letter dated 15.10.1991, the Vice Chancellor of the University had informed the State Government that in view of provisions contained under Section 2(k) of the Act, all the Senior Research Associates fulfill the conditions of being a Teacher.

10. In pursuance thereof, the State Government sent a letter dated 29.11.1991 by declaring the Senior Research Associates as "Teachers" under Chapter XII of the Statute, if they fulfill necessary conditions and in pursuance thereof, the Board of Management also requested to the State Government for grant of U.G.C. pay scale to the petitioners vide resolution dated 13.03.1992, reminder to which has been sent vide letter dated 16.11.1992, however, in place of granting pay scale of U.G.C. to the petitioner, the State Government issued a government order on 14.10.1993 to the Unierisity informing that name and designation of Senior Research Associates is being converted to the post of "Project Assistant" and they were given pay scale of Rs.1740-3000/-.

11. Feeling aggrieved, the petitinoers filed Writ Petition No.1082 (S/B) of 1995 before this Court, wherein, when no counter affidavit was filed by the respondent, this Court granted interim order vide order dated 07.05.1999, as under:

" ..... We have no option but to pass order to the effect that the respondents shall either pay the same scale of teachers / Assistant Professors to the petitioners or respondents will show cause as to why the same cannot be given to the petitioners."

12. In pursuance thereof, the State Government vide government order dated 22.07.1991, granted the pay scale of "Teachers" to the petitioners w.e.f. 13.03.1992.

13. The Vice Chancellor of the University vide order dated 27.10.1999 recommended for pay scale of Assistant Professor to the petitioners and in pursuance thereof, the petitioners were adjusted in the cadre of Assistant Professor in Research and Extension Department vide order dated 14.12.1999 and were getting salary, accordingly.

14. By means of impugned order dated 18.02.2000, the benefits provided to petitioners of designation of Assistant Professor with effect from 13.03.1992 was modified to the extent that the benefit shall be provided from the date of issuance of Government Order i.e. 22.07.1999 and their designation shall be "Senior Research Assistant" on the place of Teacher / Assistant Professor. Being aggrieved, the present writ petition has been filed before this Court.

15. Assailing the impugned order, submission of Sri S.K. Kalia, learned Senior Advocate for the petitioners is that the designation of Teacher/Assistant Professor was granted by following the procedure prescribed under Chapter XII of the Statute framed under the Universities Act. Recommendation to the same was made by the Academic Council which was considered by the Board of Management as per the provisions of Chapter XII and thereafter, the petitioners were paid salary, thus, by means of a government order, the status given to petitioners cannot be taken away. Therefore, his submission is that the order impugned is wholly without jurisdiction.

16. He next submitted that the order impugned does not contain reasons in modifying the benefits granted vide Government Order dated 22.07.1999. The designation of a Teacher/Assistant Professor cannot be taken away by issuing a government order, once it has been provided by following the procedure prescribed under the Statute.

17. He further submitted that claim of parity of Research Assistant cannot be made a ground for taking right provided to petitioners as Teacher/Assistant Professor. He submitted that parity cannot be taken of wrongs. In this view of the matter, his submission is that the impugned order is per se illegal and is liable to be set aside.

18. His last submission is that under the Universities Act, statutes are framed which have statutory binding effect. In case the University decided to take any decision otherwise, the procedure prescribed under the Statute would have been followed.

19. On the other hand, Sri Alok Sharma, learned Additional Chief Standing Counsel submitted that the order impugned does not suffer from any infirmity or illegality. The Hon'ble Governor has exercised his power in consonance with the provisions provided under the Statute, therefore the same is not liable to be interfered by this Court.

20. He next submitted that once the benefits have been provided to the Research Assistants from the date of issuance of government order, the petitioners would have also been granted benefit from the date of issuance of Government Order.

21. Sri Satyanshu Ojha, learned counsel for the respondent-University submitted that the decision of Board of Management dated 23.03.1992 was not approved in the subsequent meeting of the

Board of Management. He next submits that although the University has considered claim of the petitioners fro grant of designation of Teacher/Assistant Professor but under Chapter XII of the Statutes, the procedure has been prescribed to make selection on the post of Professor, Reader and Lecture, therefore, the designation of Teacher/Assistant Professor to the petitioners cannot be held to be illegal.

22. He next submitted that the post on which the petitioners have been redelegated to hold is not available in the University and that has been declared to be dying cadre.

23. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

24. In regard to first submission advanced by learned Senior Counsel for the petitioners that the designation of teachers was granted to the petitioners in accordance with the precedure prescribed under Chapter XII of the Statute framed under Universities Act and recommendation made by the academic council and consideration of Board of Management. For ready reference, the provisions contained under Chapter XII of the Statute framed under **First Statutes of The Narendra Deva Krishi Evam Prodyogik Vishwavidyalaya, Faizabad** is being quoted below:

"CHAPTER - XII

CLASSIFICATION OF THE TEACHERS OF THE UNIVERSITY

"Section 28(d):

1. The Board of Management shall, from time to time, determine after considering the recommendation of the Academic Council in this behalf, the classification of the teaching staff of the University and appropriate designations, i.e. Professors, Associate Professors/ Readers, Assistant Professor / Lecturers and the like. The Board shall also have power to later or modify such classification in any particular case.

2. The teachers of the University shall be employed on a whole-time basis on the scales of pay approved for the University provided that the proportion of time of the teachers to be devoted to teaching, research and extension or administrative duties should be specified in their contract of employment."

25. On its perusal, it is evident that the Board of Management shall consider the recommendations made by the Academic Council in regard to classification of designations like Professors, Associate Professors/ Readers, Assistant Professors / Lecturers and shall have the power to alter or modify such classification in any particular case.

26. On perusal, it is further transpired that the teachers of the University shall be employed on a whole time basis on the pay scale approved for University provided that the proportion of time of teachers to be devoted to teaching, research and extension or administrative duties and that should be specified in their contract of employment.

27. In accordance with the provisions contained under aforesaid statute, the Academic Council of the University considered the claim of the petitioners and

the same was placed in the meeting of Board of Management and thereafter, the petitioners were paid salary, therefore, by means of a government order, the right given to the petitioners, as per statute 12 cannot be taken away. The government order cannot override the provisions contained under the statute. Thus, the submissions advanced by learned Senior Counsel for the petitioners has substance in the matter.

28. In regard to his second submission that impugned order does not record reasons, I have perused the impugned order.

29. On its perusal, it is reflected that without taking into consideration the provisions contained under Chapter XII of the Statute, the impugned order has been passed. The impugned order does not record reasons that why the petitioners shall be paid salary with effect from the date of issuance of government order. It also does not contain reasons that once by following the procedure prescribed under the statute and as per govnerment order dated 22.07.1999 the designation of Teacher / Assistant Professor was granted to the petititoners, how without assigning cogent reasons the same can be withdrawn by issuing subsequent government order.

30. In regard to submission advanced that parity cannot be taken of wrongs, the Court is of the opinion that the law in this regard is very much settled that parity of wrongs cannot be granted to similarly situated persons, therefore, in the present case the respondents are taking parity of wrongs, which is not permissible in the eyes of law.

31. The University was established under the act and statute framed thereunder in pusuance to government order dated 22.07.1999. The procedure prescribed under Chapter XII of the statute framed under the University Act, the academic council after consideration of claim of the petitioners made recommnedation to the Board of Management and the same was accepted and salary was paid to the petitioners, therefore, the entire proceeding initiated subsequent thereto cannot be held to be justified.

32. The submisison advanced by learned counsel for the respondents to the effect that the decision of Board of Management dated 23.03.1992 was not approved in the subsequent meeting of Board of Management cannot be a ground for denial of benefits provided to the petitioners.

33. On over all consideration of submissions advanced by learned counsel for the parties and material available on record, the impugned order passed by the respondent dated 18.02.2000 being illegal and unreasoned cannot be sustained and is hereby set aside.

34. The writ petition succeeds and is **allowed.**

35. The respondents are directed to treat the petitioners to be Teacher / Assistant Professor, respectively, and to pay all consequential benefits as admissible to their post within a period of three months from the date of production of a certified copy of this order.

36. No order as to costs.

(2021)07ILR A425
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.07.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE DINESH KUMAR SINGH, J.

Special Appeal No. 423 of 2005
And
Special Appeal No. 408 of 2005
And
Special Appeal No. 52 of 2008

The State Of U.P. ...Petitioner
Versus
Sri Gokaran P Tiwari ...Respondent

Counsel for the Petitioner:
C.S.C., Bilendra Singh

Counsel for the Respondent:
Y.K. Misra

A. UP Intermediate Education Act, 1921 – Section 9 - Ch. II Reg. 19, Ch. III, Reg. 101 – Post of Laboratory Assistant and Clerk – Claim of appointment, though there is no sanctioned post – No prior approval of DIOS – Validity – Held, the respondents-petitioners had no legal right for appointment or consideration for appointment on nonexistent posts – Learned Single Judge has grossly erred in issuing a writ of Mandamus, directing the authorities to create posts, on which the respondent-petitioners were appointed. (Para 8 and 11)

B. Constitution of India,1950 – Article 226 – Writ – Mandamus – Scope and ambit – A writ of Mandamus lies to secure performance of public duty imposed by law. If there is no statutory duty of the authority, writ of Mandamus cannot be issued – The writ of Mandamus is issued to command; and not to inquire and adjudicate – In a petition for writ of Mandamus, the petitioner does not have to establish a legal right but it is for enforcement of the existing legal right – It is issued only where public duty is clear, unqualified and specific. [Para 10 (vii)]

Special Appeal allowed. (E-1)

Cases relied on :-

1. St. of Bihar & ors. Vs Devendra Sharma; (2020) 15 SCC 466

2. St. of Karn. Vs Umadevi (3); (2006) 4 SCC page-1

3. Rita Mishra & ors. Vs Director, Primary Education, Bihar & ors.; 1987 SCC Online Pat 159

4. R. Vishwanatha Pillai Vs St. of Kerala & ors; (2004) 2 SCC 105

5. Ashwani Kumar Vs St. of Bihar; (1997) 2 SCC 1

6. Director of Education & ors.. Vs Gajadhar Prasad Verma (1995) 1 SCC 465

(Delivered by Hon'ble Ritu Raj Awasthi, J.
&
Hon'ble Dinesh Kumar Singh, J.)

1. The cases are taken up through Video Conferencing.

2. Since the common questions of law and facts are involved in these three special appeals, they are being heard and decided by a common judgment.

3. Learned Single Judge has allowed the writ petitions filed by the respondents-petitioners and has directed for payment of salary as well as creation of posts, on which they were appointed, de hors the statutory Rules.

4. **Facts:-**

The facts of each of three cases are stated herein-under:-

(I). Special Appeal No.423 of 2005

i). Shanti Ashram Intermediate College, Saya, District Ambedkar Nagar, Faizabad (Now Ayodhya) (hereinafter referred to as 'the Institution') is a recognized Government aided Institution. It is governed under the provisions of the U. P. Intermediate Education Act, 1921, the Uttar Pradesh Secondary Education (Services Selection Board) Act, 1982 and Rules and the Regulations framed thereunder. Payment of salaries etc. of employees and Teachers of the Institution are governed under the provisions of Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971.

ii). It was the case of the respondent-petitioner in the writ petition that Committee of Management of the Institution advertised one post of Laboratory Assistant and he applied for the said post in pursuance of the advertisement. He had further stated that he was selected vide resolution dated 22.8.1993, and the Committee of Management of the Institution directed the Principal of the Institution to appoint him on the post of Laboratory Assistant. Respondent-petitioner was issued appointment letter dated 16.9.1993 by the Principal. It was further said that when the appointment of the respondent-petitioner was made, post of Laboratory Assistant was not sanctioned and the Principal of the Institution submitted necessary papers for sanction of the post of Laboratory Assistant in the office of the District Inspector of Schools. Respondent-petitioner had been performing the duties to the utmost satisfaction of the authorities. The post of Laboratory Assistant is a must for imparting education to the students in science group and, the authorities were under obligation to create the said post. It was submitted that the respondent-petitioner was entitled for payment of salary.

iii). The respondent-petitioner stated that since the Committee of Management approved his appointment on 22nd August, 1999, he had been continuously working as Laboratory Assistant, but no salary was being paid to him. The respondent-petitioner thereafter filed a writ petition before this Court, praying for the following reliefs:-

(i) to issue a writ, order or direction in the nature of mandamus commanding the respondents to pay salary to the petitioner for the post of Laboratory Assistant with effect from 16.9.1993, the date of his joining the said post;

(ii) to issue a writ, order or direction in the nature of mandamus commanding the respondents to provide all the consequential benefits arising out of the appointment and functioning as Laboratory Assistant as admissible for the post of Class IV employee;

(iii) to issue a writ, order of direction in the nature of mandamus commanding the respondents to alternatively adjust the petitioner against the vacancy likely to occur on 1-2-2002 in the event of there being any technical hurdle in granting requisite approval to his present appointment on the post of Laboratory Assistant;

(iv) to issue such other writ, order or direction as the Hon'ble Court ..... circumstances of the case; and

(v) to allow this writ..... to the petitioner."

iv). The learned Single Judge vide impugned judgment and order dated 13th October, 2004 held that denial of payment of salary to the respondent-petitioner and not creating the post of Laboratory Assistant were not sustainable in the eyes of law. A Mandamus was issued, commanding the authorities to create necessary post of Laboratory Assistant within 90 days from the date of production of certified copy of the impugned judgment and order and, the District Inspector of Schools was directed to make the payment of salary and arrears of salary to the respondent-petitioner with effect from his actual appointment on the post of Laboratory Assistant.

v). Regulations 101 to 107 of Chapter-III, framed under the provisions of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'The Act, 1921") provide for appointment on Class-IV employees in the educational institutions. Regulation 101 of Chapter-III of The Act, 1921 stipulates that without prior approval of the District Inspector of Schools, no post of a non-teaching staff should be filled in. The said Regulation 101 is extracted herein below:-

101नियुक्ति प्राधिकारी, निरीक्षक के पूर्वानुमोदन के सिवाय किसी मान्यता, सहायता प्राप्त संस्था के शिक्षणेत्तर पद की किसी रिक्ति को नही भरेगा प्रतिबन्ध यह है कि जमादार के पद की रिक्ति को निरीक्षक द्वारा भरने की अनुमति दी जा सकती है।

vi). In the present case admittedly, no prior approval of the District Inspector of Schools was obtained for making appointment on nonexistent post of Laboratory Assistant. Further, the said post was not sanctioned by the competent Authority i.e. the Director and, there was no post of Laboratory Assistant existing in the institution when the alleged advertisement was issued and, the respondent-petitioner was allegedly selected for appointment and, thereafter appointment was given to him.

vii). Section 9 of the U.P. High School and Intermediate Colleges (Payment of Salaries of Teacher and other Employees) Act, 1971 (hereinafter referred to as "The Act, 1971") puts a complete bar for creation of new post of teacher or other employees in an institution without previous approval of the Director or such other officer as may be empowered in that behalf by the Director. Section 9 of The Act, 1971 is extracted herein below:-

***"9. Approval for post**. - No institution shall create a new post of teacher or other employee except with the previous approval of the Director, or such other officer as may be empowered in that behalf by the Director*."

viii). In view of the express bar regarding creation of a post of teacher or other employee, the management of the institution was not authorized to create a post of Laboratory Assistant and appoint the respondent-petitioner on the said post. Admittedly, the post was not created by the Director and the post on which the respondent-petitioner was appointed by the Committee of Management was a nonexistent post. Regulation 19 of Chapter-II of Regulations framed under The Act, 1921 provides that if a teacher or employee is appointed in contravention of the provisions of the Regulations against any

post other than a sanctioned post, the District Inspector of Schools shall decline to make payment of salary and other allowance to such a person, if the institution concerned is covered by the provisions of The Act, 1971. Regulation 19 of the aforesaid Regulations is extracted herein below:-

*"**19. Prohibition on creation of post by the institution**. - (1) No institution shall create any post of a teacher or of any employee without the prior approval of the Director not shall it revive a post which has been held in abeyance or ordered to be kept unfilled.*

(2) Admissibility of salary against posts indicated from time to time as sanctioned shall be determined by a Committee, which shall consist of the following :

(i) The District Inspector of Schools, who will be the President of the Committee.

(ii) The Account Officer in the office of the Inspector, and

(iii) The District Basic Education Officer.

(3) Any person aggrieved by an order under sub-rule (2) may, within fifteen days of communication of such order, prefer an appeal to the Deputy of Education of the region and the order of the Deputy Director shall be final."

ix). It appears that during the pendency of this appeal, the respondent-petitioner filed contempt petition bearing Criminal Misc. Case No.992 (C) of 2010 in which the notice was issued to the District Inspector of Schools and the District Inspector of Schools was directed to remain present before the Court. Under the pain of contempt, the District Inspector of Schools passed the order dated 11th June, 2010 for the respondent-petitioner's adjustment against vacant post of peon which became available on retirement of peon, Mr. Ayodhya Prasad Tiwari on attaining age of superannuation. It was said that the said adjustment and the payment of salary to the respondent-petitioner for the said post would be subject to final outcome of the present appeal.

(II). Special Appeal No.408 of 2005

i). Sri Lallanji Brahmachari Intermediate College, Bharatpur, Ambedkarnagar (Ayodhya) as well as Acharya Narendra Dev Intermediate College, Gosaiganj, Faizabad (Ayodhya) (hereinafter referred to "Institutions") are recognized government aided institutions and, are governed under the provisions of The Act, 1921 as well as the The U.P. Secondary Education Services Selection Board Act, 1982 (hereinafter referred to as "The Act, 1982") and the rules and regulations framed thereunder for the purposes of payment of salary of the employees and teachers of the Institutions. The provisions of The Act, 1971 are also applicable.

ii). Respondent-petitioner, Shiv Prasad Shukla filed Writ Petition No.4089 (S/S) of 1997 before this Court, alleging that he was duly appointed on the post of Clerk by the Manager of the Institution after following the prescribed procedure and, therefore, he was entitled to the salary of the post on which he was appointed and, had been working. He prayed for issuance

of a writ of Mandamus to accord financial approval to his appointment and direction for payment of salary to him regularly, including the arrears since the date of his appointment. It was stated in the writ petition that the Committee of Management of the Institution had been demanding for one more post of Clerk since 1992 on increase of strength of more than 900 students, but the District Inspector of Schools did not pay any heed and did not accord requisite sanction for appointment of a Clerk. Therefore, his appointment was fully covered under the provisions of Government Order dated 20th November, 1977 and the authorities were under a legal obligation to pay salary to him. The Committee of Management, therefore, resolved vide resolution dated 28th October, 1993 to appoint one Clerk in the Institution by direct recruitment through selection. The Manager of the Institution notified one vacancy of Clerk and invited applications to fill up the said post. Respondent-petitioner, Shiv Prasad Shukla applied in pursuance of the said advertisement and after due selection, he was issued appointment letter dated 3rd December, 1993. The respondent-petitioner assumed duties in the Institution on the post of Clerk with effect from 22nd February, 1994. The Principal had submitted necessary papers relating to sanctioning of a post of Routine-Grade-Clerk in the office of the District Inspector of Schools. When payment of salary was not made, he filed the aforementioned writ petition with the prayers, as mentioned above.

iii). In the present case also, the post on which the respondent-petitioner, Shiv Prasad Shukla was appointed was not a sanctioned posted.

iv). Respondent-petitioner, Udai Bhan Singh, who was appointed similarly on the post of Junior Clerk filed Writ Petition No.5119 (S/S) of 1997, praying for issuance of a writ of Mandamus commanding the authorities to give salary with creation of post of Junior Clerk and pay the arrears of salary. He was appointed allegedly on 29th June, 1996 and, since then he had been working continuously but without payment in Acharya Narendra Dev Inter College.

v). During the pendency of the appeal, respondent-petitioner filed Criminal Misc. Case No. 1462 (C) of 2005. The District Inspector of Schools, under the pain of contempt proceedings drawn against him, transferred one post of Assistant Clerk vacant in Manoharlal Motilal Inter College to Acharya Narendra Dev Inter College, Gosaiganj and, ordered the payment of salary to respondent-petitioner, Uday Bhan Singh vide order dated 21st January, 2006. Thereafter, one post of Assistant Clerk fell vacant in Acharya Narendra Dev Inter College and, therefore, the District Inspector of Schools modified his earlier order dated 21st January, 2006 and, directed vide order dated 22nd April, 2006 that the respondent-petitioner, Udai Bhan Singh would be adjusted against the post of Assistant Clerk falling vacant on 31st August, 2006 in Acharya Narendra Dev Inter College and the post of Assistant Clerk, transferred from Manoharlal Motilal Inter College would go back to the same college. However, this modified/amended order dated 22nd April, 2006 passed by the District Inspector of Schools was not complied with by the Manager of Acharya Narendra Dev Inter College and, one Daftari was promoted to the post of Assistant Clerk. In view thereof, the respondent-petitioner has been paid salary

of the Assistant Clerk to avoid contempt proceedings, subject to final outcome of the special appeal.

vi. Respondent-petitioner, Shiv Prasad Shukla filed contempt petition bearing Criminal Misc. Case No. 713 (C) of 2005 during the pendency of the said special appeal against the impugned judgment and order dated 13th October, 2004 passed by the learned Singe Judge. The District Inspector of Schools, in order to avoid the contempt proceedings, passed the order dated 31st October, 2005, creating a temporary post of Assistant Clerk and ordered for payment of salary to the respondent-petitioner.

(III) Special Appeal No.52 of 2008

i). Adarsh Krishak Inter College, Khokhotara, Ambedkar Nagar (hereinafter referred to as "Institution") is an aided non-governmental educational institution upto intermediate and is governed by the provisions of The Act, 1921, and regulations framed under the Act, 1971.

ii). The institution was taken under grant-in-aid in the year 1978. Two posts of Clerk, including Head Clerk, were sanctioned in the Institution. Since strength of the students got increased, the Committee of Management requested the authorities for creation of one more post of Clerk. However, no heed was paid to such a request. In view thereof, the Committee of Management, in its meeting held on 27th July, 2005, resolved to constitute a 'selection committee' for appointment on the post of Clerk in the Institution as per standard laid down in the Government Order dated 20th November, 1977, as three Clerks were required in the Institution, but only two posts of Clerk were sanctioned. The Advertisement dated 2nd August, 2005 was published, inviting applications for appointment on a post of Clerk in the Institution.

iii). The respondent-petitioner applied in pursuance of the said advertisement and after selection, he was issued appointment letter for the post of Clerk. In pursuance of the said appointment letter, the respondent-petitioner assumed the charge of the Assistant Clerk. The Committee of Management of the Institution sent requisite papers to the District Inspector of Schools on 28th June, 2005 for grant of financial approval for the post of Assistant Clerk in the Institution, but no heed was paid. The respondent-petitioner had been working since the date of his appointment but without salary.

iv). The respondent-petitioner thereafter filed Writ Petition No.7586 (S/S) of 2005 before this Court, praying for the following reliefs:-

(i) to issue a writ, order or direction in the nature of mandamus commanding the respondents to pay salary to the petitioner and also accord financial approval to the appointment of the petitioner;

(ii) to issue a writ, order or direction in the nature of mandamus commanding the respondents to pay arrears of salary to the petitioner also with effect from the date of his initial appointment;

(iii) to issue a writ, order of direction in the nature of mandamus commanding the respondents to create one post of Clerk in the institution against

which the petitioner is already working in accordance with the provisions of the Act and Rules;

(iv) to issue such other.....just and proper; and

(v) to allow this writ petition with substantial costs to the petitioner."

v). The learned Single Judge, vide impugned judgment and order 22nd May, 2007 had allowed the writ petition and issued a writ of Mandamus commanding the authorities to create a post of Routine Grade Clerk in the Institution in question and make payment of salary and arrears of salary to the respondent-petitioner with effect from his actual appointment.

vi). During the pendency of this special appeal, the Government passed an order on 14th May, 2013, creating a temporary post of Routine-Grade-Clerk in the Institution and, ordered for payment of salary, however, the same was made subject to final outcome of the special appeal.

5. Heard Mr. Anil Kumar Singh Visen, learned Standing Counsel, representing appellant-State, and Mr. Birendra Singh, Mr. Y.K. Misra and Mr. Sanjay Misra for respondent-petitioners.

6 . **Contention on behalf of the appellants**

It is submitted on behalf of the appellant that there were no sanctioned post(s) available in any of the four Institutions where respondent-petitioners were allegedly appointed; the Committees of Management of the Institutions did not have power to create a post or make appointment without prior approval of the District Inspector of Schools; in none of cases of the respondent-petitioners, prior approval of the District Inspector of Schools was obtained. It is further submitted that power to create a post is vested with the Director as per Section 9 of the Act, 1971 and in view of specific Regulation 19 of Chapter-II of Regulations framed under The Act, 1921, the District Inspector of Schools does not have mandate to make payment of salary to the respondent-petitioners, who were allegedly appointed by the Committees of Management in contravention of the law. It is further submitted that the Committees of Management never came before the High Court for creation of post, but it is the respondent-petitioners, who filed the writ petitions, after their appointments, for creation of the posts in the Institutions where they were appointed by the Committees of Management; the writ petitions, for creation of post at the instance of the respondent-petitioners, were not maintainable. It is further submitted that the learned Single Judge has fallen in gross error of law in issuing writ of Mandamus for creation of the post and payment of salary for the respondent-petitioners, who were appointed de hors the statutory prescription. It is, therefore, submitted that the appeals may be allowed.

7. Contention on behalf of the respondent-petitioners

On the other hand, on behalf of the respondent-petitioners, it is submitted that due to increase in strength of the students in the Institutions, there was requirement of the additional posts on

which the respondent-petitioners were appointed, however, despite several requests made by the Committees of Management, the posts were not sanctioned. It is further submitted that in view of the Government Order 20th November, 1977, the Director ought to have created the posts in question in the four Institutions, but since he did not create the posts and the students were suffering, the Committees of Management had decided to fill up the posts and send the necessary papers for approval of the District Inspector of Schools. It is further submitted that since the respondent-petitioners have been working for such a long time and the posts are available, on which they could be adjusted, it would be against the equity to dispense with their services at this distant point of time. It is, therefore, submitted that this Court may not interfere with the impugned judgment and orders passed by the learned Single Judge.

8. Undisputed facts

A. In all the four Institutions, the posts, on which the respondents-petitioners were allegedly appointed, were not sanctioned one; the posts in question did not exist when the appointments were made.

B. No prior approval of the competent Authority was taken before initiation of process of appointing the respondent-petitioners in the Institutions.

C. As per the statutory prescription prescribed in Regulation-101 of Chapter-II of The Act, 1921, no post of non-teaching staff can be filled in without prior approval of the District Inspector of Schools.

D. As per Section 9 of The Act, 1971, no post of teacher or other employee in an Institution can be created except by the Director. The Director never sanctioned the posts on which the respondent-petitioners were allegedly appointed.

E. Under Regulation-19 of Chapter-II of regulations framed under The Act, 1921, the District Inspector of Schools is mandated to decline payment of salary and other allowances to a person who is appointed by the Committee of Management in contravention of the provisions of the Regulations against any post other than the sanctioned post.

9. Questions for consideration

The following questions are for consideration in the three appeals.

i). Whether the learned Single Judge was right in issuing a writ of Mandamus, directing the authorities to create posts on which the respondent-petitioners were appointed de hors the statutory prescription?

ii). Whether a writ of Mandamus could be issued on a petition filed by the respondent-petitioners for creation of posts after they were appointed by the Committees of Management of the Institutions de hors the statutory prescription?

iii). When the appointments of the respondent-petitioners were not in accordance with the statutory prescription and against nonexistent posts, should the High Court direct for payment of salary to such appointees?

iv). Whether the appointees have any accrued right for continuance on the posts on which they were appointed by the Committees of Management de hors the statutory prescription in absence of sanctioned posts?

10. Analysis.

i). In the case of ***State of Bihar and others v. Devendra Sharma (2020) 15 SCC 466*** in which the question of termination of large number of candidates, appointed on Class-III or Class-IV posts in the Health Department, Government of Bihar till 1990, came into consideration and the Supreme Court, relying on the case of ***State of Karnataka v. Umadevi (3), (2006) 4 SCC page-1***, has held that since these appointments were made without sanction of any post, these appointments had been made by adopting wholly illegal process. Paragraph-44 of State of Bihar Vs. Devendra Sharma's case (supra) is extracted herein below:-

"44. In view of the aforesaid judgments, it cannot be said that the appointment of the employees in the present set of appeals were irregular appointments. Such appointments are illegal appointment in terms of the ratio of the Supreme Court judgment in Umadevi (3) [State of Karnataka v. Umadevi (3), (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . As such appointments were made without any sanctioned post, without any advertisement giving opportunity to all eligible candidates to apply and seek public employment and without any method of recruitment. Such appointments were back door entries, an act of nepotism and favouritism and thus from any judicial standards cannot be said to be irregular appointments but are illegal appointments in wholly arbitrary process."

ii). As has been stated herein above, the appointments of the respondent-petitioners were against the statutory rules, arbitrary, capricious and null & void. The right to salary is a legal right of a person, who validly holds the post for which salary is claimed. If the appointment is made on nonexistent post de-hors the statutory rules, no right subsists for claiming salary for such an appointment. The right to salary and other service benefits are statutory rights which spring from legal appointment to the post. If the appointment is illegal and non-est, there cannot be any statutory entitlement for salary and other service benefits. ***The Patna High Court in the case of Rita Mishra & Ors. v. Director, Primary Education, Bihar and Ors, 1987 SCC Online Pat 159*** in paragraphs 24 and 25 has observed as under:-

24. To sum up on this aspect, I am inclined to the view that where the very letter of appointment is flagrantly violative of the statutory procedures prescribed for selection and appointment, the same would be illegal and there being no valid appointment in the eye of law, no consequential right to salary stricto sensu would arise. In any case, no writ of mandamus can possibly be claimed in such a situation.

25. Having dealt above with the aspect of the substantive right to salary stricto sensu in the aforesaid situation, one may now embark upon its procedural aspect in detail which appears to me of not only equal but even of greater importance. The writ petitioners herein, irrespective of the invalidity or illegality of the letter of

appointment and equally of the termination of their services or otherwise, claimed a writ of mandamus commanding the respondents to pay the salary for the alleged work period in the following terms:--

"It is, therefore, prayed that your Lordships may be graciously pleased to issue rule nisi calling upon the respondents to show cause as to why a writ in the nature of writ of mandamus or any other appropriate writ, order or direction be not issued directing them to pay the salaries of the petitioners and also arrear of salaries due to them....."

Now the claim for the aforesaid relief goes to the root and scope of a mandamus in the writ jurisdiction. Even at the risk of some prolixity, it becomes necessary to reiterate the same because of the vehement claim raised on behalf of the petitioners and some precedent to the contrary within the Court.'

iii). The Supreme Court in the case of ***R. Vishwanatha Pillai v. State of Kerala & Ors (2004) 2 SCC, page 105,*** approving the judgment of the Patna High Court in the case of Rita Mishra & Ors. v. Director, Primary Education, Bihar and Ors (supra) in paragraphs 17 and 18 has held as under:-

"17. The point was again examined by a Full Bench of the Patna High Court in Rita Mishra v. Director, Primary Education, Bihar [AIR 1988 Pat 26 : 1988 Lab IC 907 : 1987 BBCJ 701 (FB)] . The question posed before the Full Bench was whether a public servant was entitled to payment of salary to him for the work done despite the fact that his letter of appointment was forged, fraudulent or illegal. The Full Bench held: (AIR p. 32, para 13)

"13. It is manifest from the above that the rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of the law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise. In particular, if the very appointment is rested on forgery, no statutory right can flow from it."

18. We agree with the view taken by the Patna High Court in the aforesaid cases."

iv). The Committees of Management are not competent to create post. The authority for creation of post is vested with the Director. In the present case, the Committees of Management of the Institutions, suo motu, without there being any post and prior approval of the District Inspector of Schools, invited applications to make appointments on the nonexistent posts. These back-door entries of the respondents-petitioners made by the Committees of Management of the Institutions is an act of nepotism and favoritism inasmuch as one of the respondent-petitioners was near relative of Manager of the Institution and, therefore, these appointments cannot be said to be regular appointments from any judicial standards. We have no hesitation to hold that these appointments are not only irregular but illegal and wholly arbitrary.

v). The Supreme Court in the case of ***Ashwani Kumar v. State of Bihar***

(1997) 2 SCC 1 has held that if the initial entry itself is unauthorized and that the payment of salart is against the non-sanctioned post, the question of regularizing services of such an employee does not arise for consideration. Paragraphs 13 and 14 of Ashwani Kumar v. State of Bihar (supra), which are relevant, are extracted herein below:-

13. So far as the question of confirmation of these employees whose entry itself was illegal and void, is concerned, it is to be noted that question of confirmation or regularisation of an irregularly appointed candidate would arise if the candidate concerned is appointed in an irregular manner or on ad hoc basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorised and is not against any sanctioned vacancy, question of regularising the incumbent on such a non-existing vacancy would never survive for consideration and even if such purported regularisation or confirmation is given it would be an exercise in futility. It would amount to decorating a still-born baby. Under these circumstances there was no occasion to regularise them or to give them valid confirmation. The so-called exercise of confirming these employees, therefore, remained a nullity. The learned counsel for the appellants invited our attention to the chart showing the details of appointments of the appellants concerned as found at Annexure XXII at pp. 243 to 255 of the Paper-Book and also as a specimen a subsequent order of confirmation as found at p. 256 in the case of Ashwani Kumar. It was submitted that such confirmation orders were also given to number of employees who were initially appointed as daily-wagers/T.B. Assistants by Dr Mallick. Our attention was also invited to the letter of Joint Secretary Shri Anant Shukla written to the Superintendent, T.B. Hospital, Koelwar, Bhojpur on 17-10-1984 which is found as Annexure X at p. 127 of the Paper-Book to show that steps were taken for ratification of the orders of appointment of the daily-wage employees as per the direction of Deputy Director, T.B./Health Services, Bihar. As we have seen earlier when the initial appointments by Dr Mallick so far as these daily-wagers were concerned, were illegal there was no question of regularising such employees and no right accrued to them as they were not confirmed on available clear vacancies under the Scheme. It passes one's comprehension as to how against 2500 sanctioned vacancies confirmation could have been given to 6000 employees. The whole exercise remained in the realm of an unauthorised adventure. Nothing could come out of nothing. Ex nihilo nihil fit. Zero multiplied by zero remains zero. Consequently no sustenance can be drawn by the appellants from these confirmation orders issued to them by Dr Mallick on the basis of the directions issued by the authorities concerned at the relevant time. It would amount to regularisation of back-door entries which were vitiated from the very inception. It is not possible to agree with the contention of the learned counsel for appellants that the vacancies on the Scheme had nothing to do with regular posts. Whether they are posts or vacancies they must be backed up by budgetary provisions so as to be included within the permissible infrastructure of the Scheme. Any posting which is dehors the budgetary grant and on a non-existing vacancy would be outside the sanctioned scheme and would remain totally unauthorised. No right would accrue to the incumbent of such an imaginary or shadow vacancy.

14. In this connection it is pertinent to note that question of regularisation in any service including any government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on ad hoc basis or daily-wage basis by a competent authority and are continued from time to time and if it is found that the incumbents concerned have continued to be employed for a long period of time with or without any artificial breaks, and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularise them so that the employees concerned can give their best by being assured security of tenure. But this would require one precondition that the initial entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularisation may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the initial appointment by a competent authority and the irregular initial appointment may be regularised and security of tenure may be made available to the incumbent concerned. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment. In any case back-door entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularising the appointment of an employee whose initial entry itself is tainted and is in total breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the candidate could ever be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularising such an illegal entrant would ever survive for consideration, however competent the recruiting agency may be. The appellants fall in this latter class of cases. They had no case for regularisation and whatever purported regularisation was effected in their favour remained an exercise in futility. The learned counsel for the appellants, therefore, could not justifiably fall back upon the orders of regularisation passed in their favour by Dr Mallick. Even otherwise for regularising such employees well-established procedure had to be followed. In the present case it was totally bypassed. In this connection we may profitably refer to Government Order dated 31-12-1986 to which our attention was invited by the learned counsel for the appellants. The said Government Order is found in the additional documents submitted in CAs Nos. 10758-59 of 1995 at Annexure IV. Secretary to Government of Bihar, Health Department, by communication dated 31-12-1986 had informed all Regional Deputy Directors, Health Services; Tuberculosis Civil Surgeon-cum-Chief Medical Officer; and other authorities concerned in connection with the compliance and implementation of the orders passed and instructions issued by Deputy Director (Tuberculosis) Bihar, Patna under the Tuberculosis Control

Programme covered under the 20-Point Programme. It was stated in the said communication that steps will be taken to fill up sanctioned Third and Fourth Grade posts as soon as possible according to the prescribed procedure and all possible efforts should be made to achieve the fixed targets in a planned and phased manner. Even this letter clearly indicates that the posts had to be filled up by following the prescribed procedure. Despite all these communications neither the initial appointments nor the confirmations were done by following the prescribed procedure. On the contrary all efforts were made to bypass the recruitment procedure known to law which resulted in clear violation of Articles 14 and 16(1) of the Constitution of India both at the initial stage as well as at the stage of confirmation of these illegal entrants. The so-called regularisations and confirmations could not be relied on as shields to cover up initial illegal and void actions or to perpetuate the corrupt methods by which these 6000 initial entrants were drafted in the Scheme by Dr Mallick. For all these reasons, therefore, it is not possible to agree with the contention of the learned counsel for the appellants that in any case the confirmations given to these employees gave them sufficient cloak of protection against future termination from services. On the contrary all the cobwebs created by Dr Mallick by bringing in this army of 6000 employees under the Scheme had got to be cleared lock, stock and barrel so that public confidence in Government administration would not get shattered and arbitrary actions would not get sanctified.

vi). The Supreme Court in the case of ***Director of Education and Ors. vs. Gajadhar Prasad Verma (1995) 1 SCC 465Supp 5 SCR page-617***, which also pertains to the appointments made by the Committee of Management without their being a sanctioned post and without approval of the competent Authority, has held that if the prior approval has not been taken for creation and filling up of the posts and, appointments are made by the Committee of Management, then the Government shall not be obliged to make payment of salary to such person(s). In paragraphs 5 and 6 of the said judgment, the Supreme Court has held as under:-

5. Shri Pramod Swarup, learned counsel for the respondent, placed before us the direction issued by the State Government for creation of an additional post when the strength of the students exceeds 1100. It is his contention that since the strength of the students has been more than 1100, the creation of additional clerk has become necessary and that, therefore, the Management has resolved to appoint the respondent as an additional clerk. We are concerned with the creation of the additional post, may be, due to the increase in the strength of students. What is material is whether prior approval of the Director or the empowered officer has been obtained before creating that post. It is not the case of the respondent or the Management that such prior approval had been obtained or given by the competent officer. Therefore, so long as prior approval had not been given, though the respondent might have been appointed by the Management, the Government is not obliged to reimburse the salary paid to such clerk. The Management has to bear the expenditure from its own resources without claiming any reimbursement from the Government. The High Court, therefore, has committed grievous error of

law in not adverting to this crucial question and allowing the writ petition directing the Government to create the post and to make the payment of the salary etc. The directions are wholly illegal and legally unsustainable.

6. It is stated and brought to our notice that a post has been created by the Government pursuant to the impugned order passed by the High Court. But the Government have also stated therein that it was subject to the result in the appeal. In that view, the creation of the post would not be an advantageous feature that favours the respondent. If there is any increase in the strength and sanction of the post is needed, it is open to the Management to take appropriate steps as per law.

vii). A writ of Mandamus lies to secure performance of public duty imposed by law. If there is no statutory duty of the authority, writ of Mandamus cannot be issued. In the present case, the learned Single Judge has issued a writ of Mandamus for creation of posts on which the respondents-petitioners were appointed at their behest. The respondents-petitioners had no locus to come before this Court for creation of the posts in the Institutions in which they were appointed illegally. The writ of Mandamus is issued to command; and not to inquire and adjudicate. In a petition for writ of Mandamus, the petitioner does not have to establish a legal right but it is for enforcement of the existing legal right. It is issued only where public duty is clear, unqualified and specific. The respondent-petitioners had filed aforesaid writ petitions for creation and establishment of their legal rights. In our view, the aforesaid writ petitions were not maintainable so far as prayer for creation of posts was concerned. The learned Single Judge has grossly erred in issuing a writ of Mandamus for creation of posts. Therefore, the impugned judgment and orders are not sustainable in law. It is relevant to mention here that the Committees of Management have never approached this Court for creation of the posts on which the respondents were appointed. The respondent-petitioners had no right to be appointed against nonexistent posts. The Supreme Court in *Director of Education and Ors. vs. Gajadhar Prasad Verma* (supra) has held that even if the strength of the students is increased, in the absence of a post created by the Director, who is the competent Authority, no appointment can be made by the Committee of Management and, therefore, the order for payment of salary cannot be passed. Since the appointments of the respondent-petitioners were void ab initio, no right gets accrued on them for continuance in service.

11. Answers to the questions framed in paragraph-9

i). We are of the considered view that the learned Single Judge has grossly erred in issuing a writ of Mandamus, directing the authorities to create posts, on which the respondent-petitioners were appointed since the appointments of the respondent-petitioners by the Committees of Management on nonexistent posts were de hors the statutory prescription and the learned Single Judge has grossly erred in issuing a writ of Mandamus, directing the authorities to create posts on which the respondents-petitioners were appointed.

ii). The respondent-petitioners had no legal right for appointment or consideration for appointment on nonexistent posts. The petitioner-

respondents filed writ petitions after they were illegally appointed on nonexistent posts by the Committees of Management with prayer for creation of the posts. The Director was having no corresponding duty towards the respondent-petitioners for creation of the posts and, therefore, the writ petitions, on behalf of the respondent-petitioners with prayer for creation of the posts, were not maintainable. The writ of Mandamus, therefore, should not have been issued on these writ petitions for creation of the posts and the learned Single Judge has grossly erred in directing for creation of the posts.

iii). The payment of salary is a legal right of a person who validly holds the post for which the salary is claimed. Since the appointments of the respondents-petitioners were not in accordance with the statutory prescription and, their appointments were made against nonexistent posts, they had no legal right to be appointed on such posts. Therefore, no direction for payment of salary to the respondent-petitioners could have been issued. The learned Single Judge has grossly erred in directing the payment of salary to the respondent-petitioners, whose appointments were wholly illegal, null and void.

iv). The appointments of the respondent-petitioners were void ab initio. They were appointed by the Committees of Management de hors the statutory prescription, without there being sanctioned posts available. The Committees of Management had no authority to make appointments of the respondent-petitioners. Since their appointments were void ab initio, no legal rights ever accrued on them for their continuance in service.

36. In view of aforesaid discussions, we **allow** these special appeals and **set-aside** the impugned judgment and orders passed by the learned Single Judge. However, it is made clear that the respondents-petitioners shall not be forced to refund the salary drawn by them in pursuance of the impugned judgment and orders passed by the learned Single Judge.

(2021)07ILR A439
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.07.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE DINESH KUMAR SINGH, J.

Special Appeal Defective No. 663 of 2018

Vijay Pratap Singh ...Petitioner
Versus
The State Of U.P. & Ors. ....Respondents

Counsel for the Petitioner:
Sunil Kumar Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 – Compassionate appointment – Claim by dependent of Seasonal Collection Amin died in harness – Deceased employee was not given a regular appointment on the post of collection amin – Held, grant of certain pay scale to a seasonal collection amin does not mean that he was given substantive appointment on the post of collection amin – Father of petitioner, not being a regular employee, was not covered under the definition of 'government servant' as provided under Rules of 1974 – Full Bench decision in

Pawan Kumar Yadav's case followed. (Para 13, 14, 16 and 18)

Special Appeal dismissed. (E-1)

Cases relied on :-

1. Pawan Kumar Yadav Vs St. of U.P. & ors.; 2011 (1) AWC 1028

(Delivered by Hon'ble Ritu Raj Awasthi, J.
&
Hon'ble Dinesh Kumar Singh, J.)

1. The case is taken up through Video Conferencing.

2. Heard learned counsel for the petitioner as well as Mr. Q.H. Rizvi, learned Additional Chief Standing Counsel appearing on behalf of the respondents.

3. The special appeal has been filed with a reported delay of two years, five months and seventeen days. The objection to the application for condonation of delay has been filed by the respondents.

4. We have gone through the affidavit filed in support of application for condonation of delay and the affidavit filed in support of objection.

5. The grounds taken in the affidavit filed in support of application for condonation of delay are sufficient to condone the delay, as such, we feel it appropriate to condone the delay.

6. Accordingly, application for condonation of delay (C.M. Application No.14267 of 2018) is allowed.

7. Delay in filing special appeal is hereby condoned.

Order on Memo of Appeal:

8. Heard learned counsel for the appellant as well as learned Additional Chief Standing Counsel on behalf of the respondents on the special appeal.

9. This intra court appeal has been filed challenging the impugned final order dated 10.05.2016, passed by learned Single Judge in Writ Petition No.10079 (SS) of 2016; Vijay Pratap Singh Vs. State of U.P. and others whereby the learned Single Judge relying on judgment of Full Bench of this court in the case ***of Pawan Kumar Yadav Vs. State of U.P. and others; 2011 (1) AWC 1028*** has dismissed the writ petition of the petitioner.

10. It is the case of the appellant-petitioner that the father of the appellant-petitioner was a seasonal collection amin. He had worked intermittently since 1982, but could not be regularized/regularly appointed, ultimately he died on 2.12.2013.

11. Learned counsel for the appellant-petitioner submits that the father of appellant-petitioner had worked against a substantive post since 1989 till he died in harness on 2.12.2013 and, as such, the appellant is entitled to get the benefit of Uttar Pradesh Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974, particularly Rule 2 (a) (iii). It is also submitted that the law laid down by the Full Bench of this Court in the case ***of Pawan Kumar Yadav Vs. State of U.P. and others*** (supra) is not applicable to the case of appellant-petitioner.

12. First of all, it is to be observed that the services of collection amins are governed under Uttar Pradesh Collection Amins' Service Rules, 1974. A complete procedure has been provided for giving regular appointment to the seasonal

collection amin and all such seasonal collection amins who fulfill the criteria as provided under the Rules are considered for regular appointment on the post of regular collection amin. The seasonal collection amins are engaged for a certain period (season) against the requirement of work. The seasonal collection amins unless and until given regular appointment on the post of collection amins are not to be treated working against any substantive post hence not a government servant.

13. It is not the case of the appellant-petitioner that the deceased employee was given a regular appointment on the post of collection amin. Learned counsel for the appellant-petitioner has submitted that the father of appellant-petitioner had worked against a substantive post as he was given the pay scale for the said post of collection amin and his service book was also prepared.

14. The grant of certain pay scale to a seasonal collection amin does not mean that he was given substantive appointment on the post of collection amin.

15. So far as the service book is concerned, that is prepared for the purpose of considering the seasonal collection amin for regular appointment on the post of collection amin. It is not the case that the seasonal collection amin automatically get regularized against substantive vacancies on the post of collection amin. In view of the procedure prescribed under the relevant service rules regular appointment is given to seasonal collection amin after due selection, as such, we have no difficulty in coming to the conclusion that the seasonal collection amin cannot be treated to be working against a substantive post.

16. So far as the submission of learned counsel for the appellant-petitioner that the judgment of Full Bench of this court in the case of ***Pawan Kumar Yadav Vs. State of U.P. and others*** (supra) is not applicable to the case of the appellant is concerned, suffice is to note that the Full Bench of this Court has categorically held in para 26 of the judgment that the Uttar Pradesh Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 are not applicable to the dependents of daily wager or work charge employee, they shall be applicable only to the 'government servant' as defined under Rule 2 of Uttar Pradesh Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974. The relevant paragraph of above-said judgment is reproduced below:

"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 posed 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 Dependants of Government Servant (Dying in Harness) Rules, 1974, and thus his dependants 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 2.3.1998); 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 dependants of daily wage and workcharge employee have not been correctly decided."

17. The Uttar Pradesh Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 defines the 'Government Servant' for the purpose of appointment of dependents of a deceased government employee. Rule 2 (a) in this regard is reproduced below:

"2. Definitions. - In these rules, unless the context otherwise requires,-

(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;"

18. Since we have come to the conclusion that the father of the appellant-petitioner was not a regular employee and he could not have worked against a substantive post of collection amin, as such, we are of the considered view that he was not covered under the definition of 'government servant' as provided under Uttar Pradesh Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974.

19. In view of above, we are of the considered view that the submissions made by learned counsel for the appellant-petitioner has no force. There is no infirmity or illegality in the impugned final order dated 10.05.2016, passed by learned Single Judge in Writ Petition No.10079 (SS) of 2016; Vijay Pratap Singh Vs. State of U.P. and others

20. The special appeal, being devoid of merit is ***dismissed.***

(2021)07ILR A442
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.07.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Bench No. 1432 of 2015
With
Service Bench No. 1431 of 2015

Dr. Rajendra Bahadur Singh & Ors.
...Petitioners
Versus
State of U.P. **...Respondent**

Counsel for the Petitioners:

Vidha Bhushan Kalia

Counsel for the Respondent:
C.S.C., Savitra Vardhan Singh

A. Service law – UP State Universities Act, 1973 – Section 31(3)(c) – Part time Lecturer – Regularization on the report of Committee appointed by the Executive Council, which is further approved by another Committee – Exercise of power by Executive Council to re-examine and review its earlier decision – Validity – Held, the power, which has not been expressly given by the Statute, cannot be exercised – Act of 1973 does not permit or vest any power in the Executive Council to review its earlier decision – Further held, the impugned order being illegal and un-reasoned cannot be sustained. (Para 51 and 54)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Rajeev Hitendra Vs Achyut Kashinath; (2011) 9 SCC Page 541

2. S. Nagaraj & ors. Vs St. of Karn. & anr.; 1993 Supp (4) SCC 595

3. Lily Thomas & ors. Vs U.O.I. & ors.; (2000) 6 SCC 224.

4. Ram Deo Chauhan Vs St. of of Assam; 2001 AIR SCW 2159

5. Rajeev Hitendra Pathak & ors. Vs Achyut Kashinath Karekar & anr.; (2011) 9 SCC 541.

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

1. Heard Sri S.K. Kalia, learned Senior Counsel assisted by Sri Vidhu Bhushan Kalia and Sri Jaideep Mathur, learned Senior Counsel assisted by Sri Dhruv Mathur, learned counsel for the petitioners, Sri Alok Sharma, learned Additional Chief Standing Counsel for the respondents-State and Sri Savitra Vardhan Singh, learned counsel for the respondent-University.

2. This bunch of writ petitions is being decided by means of a common order treating Writ Petition; SERVICE BENCH No. - 1432 of 2015 to be leading writ petition and the judgment passed therein shall be applicable to the connected matter also.

3. By means of the present writ petition, the petitioners have prayed as under:

"(i) to issue a writ, order or direction in the nature of Certiorari quashing the impugned decision of the Executive Council of the respondent-University dated 26.8.2015 as contained in Annexure-1 to the writ petition.

(ii) to issue a writ, order or direction in the nature of Mandamus commanding not to give effect to the impugned decision of the Executive Council of the respondent-University dated 26.8.2015, as is contained in Annexure No.1 to the writ petition;

(iii) to issue a writ, order or direction in the nature of Mandamus commanding the respondents/ Committee constituted by the impugned decision dated 26.8.2015 not to proceed any further;

(iv) to issue any other writ, order or direction which this Hon'ble Court may deem just and proper in circumstances of the case;

(v) to allow this writ petition with all costs in favour of the petitioners."

4. Brief fact of the case is that the petitioners are working on the post of Assistant Professor in various departments of Lucknow University in the pay scale of Rs.15600-39100/- with grade-pay of Rs.7000/- and Rs.8000/-.

5. For the purpose of giving substantive appointment to part-time Lecturers working in various departments in the State Universities in the State of U.P., Section 31(3)(c) of the U.P. State Universities Act, 1973 was amended vide U.P. Ordinance No.3/2004 and U.P. Ordinance No.6/2004.

6. Subsequently, U.P. Ordinance No.3 of 2004 and U.P. Ordinance No.6 of 2004 were converted into an Act of the State Legislature namely; U.P. Act No.23 of 2004. U.P. Ordinance No.3 & 6 of 2004 were prmulgated by His Excellency the Governor on 20.03.2004 and 7.6.2004, respectively. U.P. Act No.23 of 2004 i.e. the Uttar Pradesh State Universities (Amendment) Act, 2004 received the assent of the Hon'ble Governor on 13.08.2004.

7. On 10.06.2004, under the provisions of the amended Section 31(3)(c) of the Act, the case of the petitioners for giving them substantive appointment was considered by the competent authority namely; the Executive Council in its meeting held and in the said meeting, finding the petitioners suitable for being given substantive appointment under the aforesaid statutory provision contained in Section 31(3)(c) of the Act, resolved to give substantive appointment to the petitioners.

8. The Executive Council vide resolution dated 09.02.1991 resolved to constitute a Committee under the Chairmanship of Prof. Heera Lal Nigam to examine the matter of giving regularization / substantive appointment and the committee submitted its report on 25.02.2000, wherein the committee strongly felt need of regularization of part time lecturers.

9. The State Legislature in its wisdom while enacting U.P. Act No.23 of 2004 (which was preceded by U.P. Ordinance No.3 of 2004 and 6 of 2004) provided for regularization of part-time lecturers under certain conditions which was fulfilled by the petitioners and after consideration of their cases by the Executive Council, they were given substantive appointment on 10.06.2004.

10. The decision of the Executive Council dated 10.06.2004 whereby the petitioners were given substantive appointment as Lecturer was challenged by certain persons by way of filing a bunch of writ petitions with leading Writ Petition No.964 (S/B) of 2004 before this Court. In the said bunch of writ petitions, this Court was pleased to pass an interim order vide order dated 28.07.2004.

11. The aforesaid interim order dated 28.07.2004 passed by this Court was challenged by way of filing Special Leave Petition before the Hon'ble Supreme Court which was initially stayed by the Hon'ble Supreme Court vide its interim order dated 27.08.2004. In the aforesaid Special Leave Petition, Leave to Appeal was granted and the matter was finally decided by the Hon'ble Supreme Court whereby the appeal filed by the petitioners was allowed and while allowing the appeal, the Hon'ble Supreme Court observed that order of the Hon'ble Supreme Court will not affect the

case of the parties before the Executive Council or before the High Court.

12. On the strength of the order passed by the Hon'ble Supreme Court dated 03.10.2005, all the petitioners have continuously been working in the substantive capacity ever since the appointments of some of the petitioners were made substantive by the Executive Council and some of the petitioners were granted regular pay-scale in its meeting held on 10.06.2004. The petitioners have also been given further service benefits like further promotion on the post of Senior Lecturer and on the post of Reader as well. The petitioners since then have been discharging their functions without any blemish and to the utmost satisfaction of all the authorities concerned.

13. In compliance of the order passed by the Hon'ble Supreme Court on 03.10.2005, the Executive Council in its meeting dated 20.08.2007 decided to constitute a sub-committee headed by Prof. Roop Rekha Verma, Ex-Vice Chancellor of the Lucknow University to examine the matter.

14. The said Committee constituted by the Executive Council in its decision dated 21.08.2007 under the chairmanship of Prof. Roop Rekha Verma considered the cases of some of the part-time teachers and decided the cases of 24 those part-time teachers who have been given the benefit of pay scale and in respect of whom it was also decided by the Executive Council in its meeting held on 20.08.2007 that their cases for substantive appointment shall be considered as and when a substantive vacancy in the same cadre and category is available or newly created.

15. On 23.02.2008, the matter relating to 26 leftover part-time teachers was considered by the said committee headed by Prof. Roop Rekha Verma in its meeting and it was found by the said committee that except one Sri B.N. Mishra, all other part-time teachers amongst these 26 teachers fulfill the statutory qualification for regularization/ substantive appointment. Thus, the matter relating to these 26 part-time teachers was also considered in its meeting dated 23.02.2008 by the said committee headed by Prof. Roop Rekha Verma in tune with the decision taken by the Executive Council in its meeting held on 20.08.2007.

16. The entire exercise was done by the Executive Council in its meeting dated 20.08.2007 and by the sub-committee headed by Prof. Roop Rekha Verma in its meetings dated 21.08.2007 and 23.02.2008 in compliance of the judgment of the Hon'ble Supreme Court.

17. On 30.4.2008, the Executive Council, however, in its meeting considered the decision taken by the sub-committee headed by Prof. Roop Rekha Verma in its meeting held on 20.08.2007 and categorically approved the recommendations made and decision taken by the said sub-committee in its meetings held on 21.08.2007 and 23.02.2008.

18. The stand taken by the University before taking the impugned decision on 26.08.2015 have all along been that in pursuance of the orders passed by this Court and the Hon'ble Supreme Court, the matter has been reconsidered and finally decided in its meeting held on 30.04.2008 that appointment of all the petitioners on substantive posts is valid.

19. By the impugned decision dated 26.08.2015, the Executive Council has constituted a committee to re-examine the matter relating to substantive appointment of the petitioners/ teachers. Being aggrieved, the present writ petition has been filed before this Court.

20. Submission of Sri S.K. Kalia, learned Senior Counsel for the petitioners is that the impugned meeting of the Executive Council was held with respect to grant of Lecturer pay scale and with respect to the appointment of 24 part-time teachers appointed in decision of the Executive Council dated 10.06.2004 and 09.07.2004 in terms of the directions of this Hon'ble Court in Writ Petitions No.964(S/B) of 2004 and 1184 (S/B) of 2004.

21. He further submitted that the decision to enter into a review exercise by the Executive Council is completely without jurisdiction and in fact is null and void for the simple reason that U.P. State Universities Act, 1973 does not permit or vest any power in the Executive Council to review its earlier decision. Thus, the exercise being conducted under the decision of the Executive Council dated 26.08.2015 is nothing but an exercise in futility.

22. He next submitted that the impugned decision has been taken in absolutely illegal and arbitrary manner and by the impugned decision, the Executive Council is attempting to review the earlier decision which is impermissible under the law.

23. His further submission is that the stand taken by the University before taking the impugned decision dated 26.08.2015 have all along been that in pursuance of the orders passed by this Court and Hon'ble Supreme Court the matter has been reconsidered and finally decided in its meeting held on 30.04.2008 that appointment of all the petitioners on substantive posts is valid.

24. He next submitted that the agenda for the meeting of the Executive council, whereon the impugned decision has been taken was absolutely not related to the reviewing the cases of the petitioners and as such, the Executive Council vide its impugned decision has acted arbitrarily.

25. He further submitted that vide impugned decision dated 26.08.2015, the Executive Council has appointed a committee to re-examine the matter relating to substantive appointment of the petitioners/ Teachers unlawfully and without there being any occasion for the same.

26. He next submitted that once the decision is taken by the Executive Council on a particular issue or matter, the same becomes final and in absence of any statutory authority or power vested in the Executive Council, it is not open to them to review the matter.

27. He further submitted that the impugned decision of the Executive Committee could not have been taken as the aforesaid committee of Prof. Roop Rekha Verma was already constituted under the directions of this Court as well as the Hon'ble Supreme Court.

28. He next submitted that in case any decision was to be taken by the Executive Committee, the same should have been taken only after seeking kind permission of this Court in pending Writ Petition Nos.964 (S/B) of 2004 and 1184 (S/B) of 2004.

29. He further submitted that the impugned decision of the Executive Committee is in violation of the directions of this Hon'ble Court dated 28.07.2004 and the Hon'ble Supreme Court dated 30.10.2005.

30. He next submitted that it is settled law as propounded by the Hon'ble Supreme Court in the case reported in **2011(9) SCC Page 541: Rajeev Hitendra v. Achyut Kashinath** that in absence of any specific power vested in an authority to review its decision, the authority concerned is not empowered to exercise the power of review.

31. He further submitted that ignoring the aforesaid settled propositions of law, the Executive Council by means of its impugned decision taken in its meeting dated 26.08.2015 is attempting to re-open and re-consider the matter relating to substantive appointment of the petitioners.

32. He next submitted that even otherwise, the entire exercise being undertaken by the Executive Council for reviewing its earlier decision taken in its meeting held on 30.04.2008 cannot be justified and cannot withstand the scrutiny of reasonableness or any rationality for the reason that the Executive Council in its meeting held on 20.08.2007 had constituted the sub-committee delegating all its authority under Section 21(8) of the Act to ensure compliance of the orders passed by the Hon'ble Supreme Court wherein the Executive Council was mandated to take a decision afresh acting with expedition.

33. He further submitted that there being no occasion to review the decision, the attempt of the Executive Council to review and reopen the entire issue is causing not only prejudice to the petitioners but is also legally not permissible in view of the law laid down by the Hon'ble Supreme Court as well as this Court. In support of his submissions, he placed reliance upon following judgments:

a) S. Nagaraj and others Vs. State of Karnataka and another; 1993 Supp (4) SCC 595.

b) Lily Thomas and others Vs. Union of India and others;(2000) 6 SCC 224.

c) Ram Deo Chauhan vs. State of State of Assam; 2001 AIR SCW 2159.

d) Rajeev Hitendra Pathak and others Vs. Achyut Kashinath Karekar and another; (2011) 9 SCC 541.

34. Sri Jaideep Mathur, learned Senior Counsel assisted by Sri Dhruv Mathur, learned counsel for the petitioners in connected matter also adopted the arguments advanced by Sri S.K. Kalia, learned Senior Counsel for the petitioners.

35. Per contra, learned counsel for the respondents-University submits that the case of part-time Lecturers, who were regularized in 2004 by the University pursuant to the Ordinance of the State Government, which has now become part of U.P. State Universities Act, 1973 was challenged in the present writ petition wherein this Court passed the order dated 28.07.2004 and stayed and kept in abeyance the regularization of all such teachers and directed the University / Executive Council to reconsider the cases of part time teachers under the existing

Ordinance, as per norms and parameters laid down by this Court in its order as under:

(i) There should have existed a provision for appointment of part-time Lecturer at the time of making such appointment of the incumbent because if there was no such power to make any such appointment of part-time Lecturers then no appointment could have been made at all under the Act or Statute;

(ii) Such appointment should have been made by the authority competent to make such appointment at the relevant time;

(iii) Such candidate should be possessed of the qualification prescribed for the post under the provisions in force at that time, namely, as given in the Statute at the time of initial appointment as part-time Lecturer. The Act and the Statute do not make any distinction in the qualifications for the two posts except that the part-time Lecturer would get lesser salary in terms of Statute 10.2;

(iv) He should have been appointed prior to the cut of date and should be continuously working on the date of the issuance of the Ordinance;

(v) The Ordinance does not say that break in service can be condoned;

(vi) On the date of consideration, there should be substantive vacancy in the same cadre and grade in the same Department in which the incumbent was appointed as part time Lecturer;

(vii) On the date of consideration of regularization/ substantive appointment, such part-time Lecturer should possess requisite prescribed qualification for the post on the date when he is being considered for substantive appointment, This provision appears to have been made in Ordinance being conscious of the fact that there may be cases where at the time of initial appointment, the qualification prescribed for the particular post may be different as against the qualification which have undergone frequent change (may be on the recommendation of the University Grands Commission or Otherwise), may be different at the time of consideration of substantive appointment and therefore, such an incumbent should be possessed of the prescribed qualification both i.e. at the time of entry into the Department as part time Lecturer and also such qualification which are in force at the time of consideration of his substantive appointment.

(viii) Reservation applicable in the recruitment to the University has also to be followed as neither ad-hoc nor appointment of part time Lecturers could have been made against reserved category posts/ vacancies nor any such substantive appointment could be made against reserved posts/ vacancies from amongest the general category candidates or the candidates who do not belong to the category specified therein. Reservation is undisputedly applicable in the University, which has to be given effect to as per the provisions of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994.

(ix) The regularization shall be considered only after existing substantive vacancies, as in the absence of a substantive vacancy neither the candidate

can be considered for regularization for giving substantive appointment nor regular pay scale can be given unless the incumbent is regularized. The only protection which has been given to such Lecturers/part time Lecturers in the Ordinance is that such a teacher who does not get a substantive appointment may be allowed to continue for such period till the Executive Council specifies a date for cessation of his office.

36. He next submitted that the petitioner (Shri Rajendra Bahadur Singh) preferred a Special Leave Petition before the Hon'ble Supreme Court against the interim order dated 28.07.2004 wherein the Hon'ble Supreme Court allowed the appeal in part and set aside only that portion of interim order, whereby it was directed by the High Court that the orders regularizing private respondents or allowing them regular pay scale pending availability of substantive vacancies shall remain in abeyance. Operative part of this Judgement reads as under:

"The appeals are allowed in part accordingly. This order however will not in any manner affect cases of any of the parties either before the Executive Council or the High Court in the writ petition. We may, however, clarify that this order shall be subject to decision of the Executive Council and consequently by the High Court in the pending writ petitions. The Executive Council will dispose of the matter with utmost expedition. It is further clarified that we have not examined correctness of observations or findings in the impugned order passed by the High Court."

37. He next submitted that in view of the aforesaid order passed by this Court and the Hon'ble Supreme Court, it is incumbent upon the University to consider the cases of regularization of part time teachers within the parameters fixed by this Court, which has not been interfered by the Hon'ble Supreme Court, much less the Hon'ble Supreme Court directed that the Executive Council will dispose of the matter with utmost expedition.

38. He further submitted that Prof. Roop Rekha Verma committee was constituted by the Executive Council to consider the regularization of part time teachers in view of the order passed by this Court and by the Hon'ble Supreme Court. The Prof. Roop Rekha Verma Committee submitted its report, which was placed before the Executive Council in its meeting dated 30.04.2008, wherein the Council considered the report and resolved to place the matter before this Court. The Executive Council further in its next meeting dated 30.08.2008 while confirming the minutes of last meeting dated 30.04.2008 again resolved to place entire facts before this Court.

39. He further submitted that the matter was pending since long and no decision with regard to the regularization of part time teachers was pending and as such, the Lucknow University reconsidered the matter in its meeting dated 26.08.2015 and it was decided to consider the regularization of all the part time teachers in accordance with the order passed by this Court and a new committee was constituted. However, the said decision of Executive Council was challenged before this Court in Writ Petition No.1432 (SB) of 2015 and this Court passed the following order:

"....

Regard being had to the aforesaid submission, we are, prima facie of the view that once the committee constituted by the Executive Council in terms of the order passed by this Court had examined the petitioners matter and shown his satisfaction over their eligibility and further recommended for regularization which has also been given effect to, there may not be any reason to reopen the matter by the Executive Council, nevertheless we feel it appropriate to call upon the University to place the material before the Court as to what are the evidences before the authorities concerned which had created doubt in their mind to question the petitioners eligibility."

40. He next submitted that in view of the aforesaid circumstances, the record of all teachers appointed on part time basis have been scrutinized and it has been found that the part time teachers have been appointed on different dates from year 1991 onward.

41. He further submitted that under the Ist Statute of Lucknow University, Statute 10.2 provides for appointment of part time Lecturers in the subjects in which the opinion of Academic Council to appoint such part time lecturers is required in the interest of teaching or for other reasons. Statute 10.02 of Ist Statute of Lucknow University is being reproduced as under:

"Statute 10.02. Teachers of the University shall be appointed in the subjects on the whole time basis in the scales of pay approved by the State Government.

Provided that part time lecturers may be appointed in subjects in which, in the opinion of Academic Council, such lecturers are required in the interest of teaching or for other reasons. Such part time lecturers may receive salary ordinarily not exceeding one half of the initial salary of the scale for the post to which they are appointed. Persons working as Research fellows or as Research Assistants may be called upon to act as part time lecturers.

42. He next submitted that none of the appointments have been made from year 1991 onward as part-time Lecturers made on the basis of recommendation / opinion of Academic Council. Moreover, under Section 13 (6) of U.P. State Universities Act, 1973, the Vice Chancellor was competent to make appointment of a teacher of a University. However, vide U.P. Act No.1/1992, the principal Act was amended wherein "other than the appointment of teacher of the University" was inserted and as such the powers of Vice Chancellor also seized in the matter of appointment of a teacher of the University w.e.f. 22.11.1991.

43. He next submitted that the factual position and details of each and every part time teacher has been scrutinized, as per observation made by this Court.

44. Sri Alok Sharma, learned ACSC also adopted the arguments advanced by learned counsel for the respondent - University.

45. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as the law reports cited by learned counsel for the petitioners.

46. To resolve the controversy involved in the present writ petition, the judgments relied upon by learned Senior Counsel for the petitioners are being quoted below:

a) S. Nagaraj and others Vs. State of Karnataka and another (Supra) :

"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 and others, AIR 1941 Federal Court 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, 1 Moo PC 117 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 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 40 had been framed empowering this Court to review an

order in civil proceedings on grounds analogous to Order 47 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 40 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 the 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."

b) Lily Thomas and others Vs. Union of India and others (Supra):

"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 Thakersh and Ors. v. Pradyunman singh ji Arjun singh ji 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. If 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 and Ors etc. v. State of Karnataka and Anr. etc. 1993 Supp.(4) SCC 595 held:

"19. Review literally and even judicially means re-examination or reconsideration. 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 Prithwi Chand Law 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 (1836) 1 Moo PC 117 that an order made by the Court was final and could not be altered:

...neverthless, 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 the 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 XL VII 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.

The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength."

c) Ram Deo Chauhan Vs. State of Assam (Supra):

""28. This Court considered the scope of review and the limitations imposed on its exercise under Article 137 of the Constitution of India in Lily Thomas Vs. Union of India and others(2000) 5 JT (SC) 617 : (2000 AIR SCW 1760 : AIR 2000 SC 1650 : 2000 Cir LJ 2433) and held (paras 52, 53, 54, 55):

"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 & Ors. Vs. Pradyunmansinghji 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 & Ors.etc. Vs. State of Karnataka & Anr.etc. [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 Raja Prithwi Chand Law 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 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 the 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 137 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."

The mere fact that two views on the same subject are possible is no ground to review the earlier judgment passed by a Bench of the same strength.

This Court in M/s.Northern India Caterers (India) Ltd. Vs. Lt.Governor of Delhi [AIR 1980 SC 674] considered the powers of this Court under Article 137 of the Constitution read with Order 47 Rule 1 CPC and Order 40 Rule 1 of the Supreme Court Rules and held (para 8):

"It is well settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. Sajjan Singh Vs. State of Rajasthan, (1965) 1 SCR 933 at p.948. For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing. G.L. Gupta v. D.N. Mehta, (1971) 3 SCR 748 at p.760. The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. ON Mohindroo v. Dist. Judge, Delhi, (1971) 2 SCR 11 at p.27. Power to review its judgments has been conferred on the Supreme Court by Article 137 of the Constitution, and that power is subject to the provisions of any law made by Parliament or the rules made under Article 145. In a civil proceeding, an application for review is entertained only on a ground mentioned in O. XLVII, Rule 1 of the Code of Civil Procedure and in a criminal proceeding on the ground of an error apparent on the face of the record. (Order XL, R.1, Supreme Court Rules, 1966). But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. Chandra Kanta v. Sheikh Habib, (1975) 3 SCR 935 : AIR 1975 SC 1500.

Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Supreme Court Rules

made in exercise of the powers under Article 145 of the Constitution prescribe that in civil cases, review lies on any of the ground specified in Order 47 Rule 1 of the code of Civil Procedure which provides:

"Application for review of judgment -(1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which, no appeal has been preferred.

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the 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, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

Under Order 40 Rule 1 of the Supreme Court Rules no review lies except on the ground of error apparent on the face of the record in criminal cases. Order 40 Rule 5 of the Supreme Court Rules provides that after an application for review has been disposed of no further application shall be entertained in the same matter.

In A.R. Antulays case (supra) this Court held that the principle of English Law that the size of the Bench did not matter has not been accepted in this country. In this country there is a hierarchy within the Court itself where larger Benches overrule smaller Benches. This practice followed by the Court was declared to have been crystalised as a rule of law. Reference in that behalf was made to the judgments in Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra [1985 (2) SCR 8], State of Orissa v. Titaghur Paper Mills [AIR 1985 SC 1293], Union of India v. Godfrey Philips India Ltd. [1985 Supp. (3) SCR 123. In that case the Bench comprising seven judges was called upon to decide as to whether the directions given by the Bench of this Court comprising five judges in the case of R.S. Nayak v. A.R. Antulay [AIR 1984 SC 684] were legally proper or not and whether the action and the trial proceedings pursuant to those directions were legal and valid. In that behalf reference was made to the hierarchy of Benches and practice prevalent in the country. It was observed that Court was not debarred from reopening the question of giving proper directions and correcting the error in appeal if the direction issued in the earlier case on 16th February, 1984 were found to be violative of limits of jurisdiction and that those directions had resulted in deprivation of fundamental rights of a citizen granted by Articles 14 and 21 of the Constitution of India. The Court referred to its earlier judgment in Prem Chand Garg vs. Excise Commissioner U.P., Allahabad [AIR 1963 SC 996], Naresh Shridhar Mirajkar v. State of Maharashtra [1966 (3) SCR 744 = AIR 1967 SC 1], Smt. Ujjam Bai v. State of U.P. [1963 (1) SCR 778 = AIR 1962 SC 1621] and concluded that the citizens should not suffer on account of directions of the Court based upon error leading to conferment of jurisdiction. The directions issued by the

Court were found on facts to be violative of the limits of jurisdiction resulting in the deprivation of the fundamental rights guaranteed to the appellant therein. It was further found that the impugned directions had been issued without observing the principle of audi alteram partem.

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 Article 136 or Article 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."

In the instant case, the review is sought on the ground that the petitioner was juvenile on the date of commission of the offence. According to the learned counsel appearing for the petitioner it is contended that as per school records the date of birth of the petitioner was 1.2.1977. He was 15 years 1 month and 7 days old on the date of occurrence. According to him the medical examination conducted on 23rd December, 1997 revealed that the accused was 15 years two months and 15 days old on the relevant date. It is contended that the petitioner could not have been tried by a court other than the juvenile court as per Sections 23 and 24 of the Juvenile Justice Act, 1986 (hereinafter referred to as "the Act"). As the trial was concededly not conducted by a juvenile court, the whole proceedings were liable to be quashed. It is further contended that the trial court wrongly held the petitioner to be more than 20 years of age and the High Court erred in not deciding the question of age despite concession made by the counsel appearing for the petitioner. It is submitted that the counsel of the accused could not have sacrificed the interest of the accused and should have insisted for a finding from the court regarding his being a child or a juvenile. It is further submitted that the evidence on record requires re-examination as allegedly there are numerous inconsistencies and contradictions, the benefit of which is to go to the accused. Though not pleaded, yet the learned counsel argued that as the judgment was pronounced on the same day when the conviction was recorded, the mandate of Section 235 of the Code of Criminal Procedure (hereinafter referred to as "the Code") stood violated."

d) Rajeev Hitendra Pathak and others Vs. Achyut Kashinath Karekar and another (Supra):

"28. According to the counsel for the appellants, in New India Assurance Co. Ltd., this Court did not notice the earlier decision in Jyotsana's case. He submitted that the Tribunals constituted under the Consumer Protection Act, 1986 exercise only such powers as are expressly

conferred by the provisions of the said Act and Rules framed thereunder. Since no power of review and recall was conferred on the District Forums and the State Commissions, they can exercise no such power.

33. We have carefully scrutinized the provisions of the Consumer Protection Act, 1986. We have also carefully analyzed the submissions and the cases cited by the learned counsel for the parties.

34. On careful analysis of the provisions of the Act, it is abundantly clear that the Tribunals are creatures of the Statute and derive their power from the express provisions of the Statute. The District Forums and the State Commissions have not been given any power to set aside ex parte orders and power of review and the powers which have not been expressly given by the Statute cannot be exercised.

47) On perusal of aforesaid judgments, it is evident that review literally and even judicially means re-examination or reconsideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice.

48) On perusal, it is further transpired that rectification of an order 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, the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. 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.

49) In the present case, the petitioners were granted substantive appointment on 10.06.2004 by the Executive Council in its meeting by finding them suitable, which was challenged in Writ Petition No.964 (S/B) of 2004 before this Court, wherein an interim order was passed, which was stayed by way of special leave petition filed before Hon'ble Supreme Court in its interim order dated 27.08.2004 and leave to appeal was granted and matter was finally decided by Hon'ble Apex Court, whereby the appeal filed by the petitioners was allowed with the observation that the order of Hon'ble Supreme Court will not affect the case of the parties before the Executive Council or before the High Court.

50) Subsequently, the Executive Council in its meeting dated 20.08.2007 decided to constitute a sub-committee headed by Prof. Roop Rekha Verma to consider the case of part time teachers and decided the case of 24 part time teachers, who have been given benefit of pay scale and their case has been considered by the Executive Council for substantive appointment. On 23.02.2008, the matter pertaining to 26 left over part time teachers was considered by Prof. Roop Rekha Verma Committee and it was found that except one; Sri B.N. Mishra, all other part time teachers fulfill the statutory qualification and on 30.04.2008, the Executive Council considered the decision taken by Prof. Roop Rekha Verma Committee and categorically approved the recommendations made and decision taken by the said committee in its meetings dated 21.08.2007 and 23.02.2008, however, vide impugned decision dated 26.08.2015, the Executive Council appointed another committee to re-examine the matter relating to substantive appointment of the petitioners.

51) In the opinion of this Court, the power, which has not been expressly given by the Statute, cannot be exercised. After granting substantive appointment to the petitioners, the Executive Committee again proceeded to constitute another committee to re-examine the matter regarding substantive appointment to the petitioners, therefore, two views on the same subject are not possible to review the earlier decision taken by the committee in its meeting dated 30.04.2008.

52) The Executive Council as per provisions contained under the Act enacted with the signature of Hon'ble Governor considered the claim of the petitioners and thereafter approval was granted by the Executive Council as well as by the Academic Council. The objection from the side of respondent - University to re-examine the act done in accordance with Act and Statute of the University is not permissible in the eyes of law.

53) In view of the above, the submission advanced by learned Senior Counsel for the petitioners appears to have substance in the matter and the submissions advanced by learned counsel for the respondents in this regard are not acceptable in the eyes of law.

54) On over all consideration of submissions advanced by learned counsel for the parties, material available on record as well as the judgments relied upon by learned counsel for the petitioners and in view of the fact that U.P. State Universities Act, 1973 does not permit or vest any power in the Executive Council to review its earlier decision, the impugned order passed by the respondent dated 26.08.2015 being illegal and un-reasoned cannot be sustained and is hereby set aside.

55) The bunch of writ petitions succeeds and is **allowed.**

56) The respondents are directed to treat the petitioners to be substantively appointed Assistant Professors / Lecturers and to pay all consequential benefits as admissible to their post within a period of three months from the date of production of a certified copy of this order.

(2021)07ILR A459
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.07.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Service Bench No. 2029 of 2015

Dr. Jagannath Prasad Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Y.S. Lohit, R.S. Tomar

Counsel for the Respondents:
C.S.C.

A. Service Law – Seniority of Doctors – Notional promotion and Consequential service benefit – Claim thereof – Supreme Court's direction to fix the seniority of all doctors in the P.M.H.S. Cadre from the date of the order of their initial appointment – Similarly situated person's writ petition were allowed by the Division Bench with the direction to grant benefit of notional promotion to the writ petitioners to the post of Additional Director and Director as and when it fell due in accordance with rules as notified in

August, 2004 and the pay scale was to be refixed and the arrears of salary were to be recalculated – Held, the reasons given in the impugned order for rejecting the case of the petitioner for grant of notional promotion are arbitrary. (Para 4, 13, 14, 15 and 16)

Writ Petition allowed. (E-1)

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

1. Heard learned counsel for the petitioner and Sri Shatrughan Chaudhary, learned Additional Chief Standing Counsel for the State-Respondents.

2. This petition has been filed by the petitioner challenging the order dated 05.05.2015 passed by respondent no.2 and praying for issuance of mandamus to the respondents to grant notional promotion to the petitioner to the post of Additional Director w.e.f. 21.06.1990 and to the post of Director w.e.f.22.05.1996 respectively alongwith consequential benefits including arrears of salary coupled with interest at the market rate i.e. from the respective date of such promotion;since the persons junior to the petitioner, namely, Dr. Sumati Sheel Sharma has been granted such benefit in furtherance of general directions issued by Supreme Court as well as by this Court in various other writ petitions.

3. It appears that petitioner was appointed on the post of Medical Officer In-chargeon 21.02.1969. He appeared before U.P. Public Services Commission on 31.08.1970. Dr. Sumati Sheel Sharma was appointed to the post of Medical Officer in March,1971 and and was placed in the Seniority List at Sl. no.768 .Petitioner was appointed more than two years before Dr. Sumati Sheel Sharma but was placed at Sl.no. 1189 because of discrepancy in fixation of seniority.Dr. Sumati Sheel Sharma was given promotion to the post of Joint Director, Additional Director and Director but the petitioner who was senior to her was deprived such benefits. The petitioner retired from service 31.07.1998 from the post of Nagar Swasthya Adhikari, Lucknow in Joint Director's pay scale. In the meantime, on the recommendation of Equivalence Committee Report, 1982 by an order dated 11.01.1991, the State Government had taken a decision to grant personal pay scale of 3700-5000 to those doctors who came into Senior Grade Officer Category on 01.01.1986 and then completed two years continuous services in Senior Grade Officer scale. The seniority of the petitioner was again wrongly mentioned in the order granting senior grade.

4. In pursuance of seniority dispute raise in Dr. Chandra Prakash case, (Writ Petition No. 43 of 1998), Hon'ble the Supreme Curt delivered the judgment and order dated 04.12.2002 directing the State Government to fix the seniority of all doctors in the P.M.H.S. Cadre from the date of the order of their initial appointment within a period of six weeks and to give all consequential benefits including promotion and position on the basis of such seniority. In pursuance of the order passed by Hon'ble Supreme Court in Dr. Chandra Prakash's case, the State Government prepared a seniority list according to the date of initial appointment of the doctors in P.M.H.S. cadre by a Government Order. On 20.02.2003, placing the petitioner at Sl. No.535 in the seniority list but the consequential benefits including promotion and arrears of salary were not given to him.

5. Petitioner submitted a representation before the State Government

on 16.10.2003 praying that one Dr. Sumati Sheel Sharma, who had been wrongly given seniority above him earlier had been promoted on the post of Joint Director on 01.01.1986 and Additional Director on 21.06.1990 and prayed for notional promotion and consequential service benefits from the date his junior was given the said benefit.Dr. Sumati Sheel Sharma has been shown at Sl. No.1099 in the corrected seniority list dated 20.02.2003.She had been given all consequential benefits showing her in the personal pay scale of Joint Director and Additional Director and then in the personal pay scale of the post of Director w.e.f. 22.05.1996.The petitioner was senior placed at 535 in the seniority list, but he was denied the said benefits and when the petitioner's representation was not decided, he filed Writ Petition No. 04(S/B) of 2004 which was disposed of by this Court by its judgment and order dated 25.04.2005 recording the statement of learned Chief Standing Counsel that the notional promotion and consequential benefits etc. would be given as per petitioner's seniority as had already given to all similarly situated persons within a period of three months .

6. The petitioner filed Contempt Petition No. 726 of 2006 when his case was not duly considered. The said contempt petition was disposed on 18.07.2013 recording therein the stand taken by Dr. Devendra Kumar Srivastava, Director General, Medical Health , U.P. that seniority can be given and also notional promotion only upto the post of Joint Director, the post of Additional Director and Director and Director General being selection posts where merit had to be considered, no notional promotion can be given to the petitioner as he had already retired in 1998.The contempt court in its order dated 18.07.2013 directed the petitioner to file a fresh representation. The petitioner filed such representation on 09.10.2013 and again on 21.04.2014 raising his grievance before the opposite party no.2 The opposite party no.2 passed an order dated 07.10.2014 rejecting the case of the petitioner.

7. Learned counsel for the petitioner says that although the representation of the petitioner was rejected, the representations of the similarly situated doctors for example Dr. Virendra Singh Pachara and others were accepted subject to decision in S.L.P. No.29234 of 1998 (renumbered as Civil Appeal No. 3041 of 2010)It is a case of the petitioner that direction of Hon'ble Supreme Court have been complied with by the Authorities in a pick and choose manner . Civil Appeal no. 3042 of 2010 was filed by one of the doctor who was granted the benefit of judgment rendered in Dr. Candra Prakash's case has been allowed by the Supreme Court by observing that the High Court had wrongly failed to grant the arrears of salary payable to the appellant therein,and directing that the appellant be given consequential benefit of arrears of pay also in view of the notional promotion granted to him within three months from the date of order. with interest @ 6 % from the date judgment of the court.

8. Learned counsel for the petitioner had also drawn the attention of this Court to averments made in para-30 of the writ petition, which states in the form of Table/Chart the names of Medical Officers who had been given benefit of Selection Grade of the post of Joint Director and promotion upto the rank of Additional

Director/ Director/ Director General on the basis of seniority prepared after judgment rendered in the case of Dr. Chandra Prakash .

9. Learned Standing Counsel appearing on behalf of State-Respondents has pointed out the contents of para-4 from the counter affidavit sworn by one Sri Satya Prakash Singh Sengar, Deputy Secretary, Medical & Health Department Government of U.P. In paragraph-4 , in reply to the contents of para 9 to 24 to the writ petiotn , it has been stated that seniory list was prepared in compliance of Hon'ble Supreme Court's order in Dr. Chandra Prakash case on 05.06.2003 and the petitioner has been placed at sl. no. 535 in the seniority list on the basis of this seniority notional promotion was granted on senior grade and Joint Director Grade by orders dated 20.05.2005 and 02.02.2005. However, there was no basis for granting notional promotion to the post higher than that of Joint Director i.e. Additional Director and Director Grade as there were selection posts and the petitioner had retired on 31.07.1998 It has been submitted that all the Medical Officers were granted pay scale up to the post of Joint Director only including the petitioner.The petitioner was granted senior grade w.e.f. 16.03.1979 and Joint Director Grande w.e.f. 01.04.1986 i.e. from the date of promotion of his junior. Consequential order for revision of pension was also issued thereafter. The representation of the petitioner dated 16.01.2015 was disposed of on 05.05.2015 and such order dated 05.05.2015 is valid and justified.

10. There is no denial in the counter affidavit of the allegation made by the petitioner that Dr. Sumati Sheel Sharma, who was his junior and several other doctors, whose names have been mentioned in para-30 to the counter affidavit have not been given the benefit of pay scale of Additional Director/ Director/ Director General .There is also no denial of Civil Appwal no. 3042 of 2010 having been allowed on 24.07.2014 directing payment of arrears in pursuance of notional promotion alongwith interest of 6% from the date of judgement of Hon'ble Supreme Coourt to the appellant therein.

11. During the course of arguments, learned counsel for the petitioners has read out the judgment and order dated 25.04.2005 passed in Writ Petition no. 4 of 2004, and the order passed in Contempt Petition no.726 of 2006 and also the judgement and order dated 31.08.2017 passed in Writ-A no. 3334 of 2009 (Ramji Pandey Vs. State of U.P.) filed as annexure no.1 to the Supplementary affidavit. filed by the petitioner on24.04.2018 as also the judgement rendered in the case of Dr. Gulab Chandra Civil Writ Petition no.42421 of 2006 dated 09.11. 2016 referred in the judgment of Division Bench of Dr. RamJi Pandey (supra) . It has been submitted that S.L.P. with Diary No. 33951 of 2018 was filed by the State of U.P. against the judgment rendered in the case of Ramji Pandey. Hon'ble the Supreme Court while issuing notice on the application on 20.10.2018 has observed that such entertaining of S.L.P. is limited to the question of payment of arrears of salary.

12. This Court having considered the two jdugments passed by Division Benches in the case of Gulab Chandra and Dr Ramji Pandey, the arguments as raised by learned counsel for the petitioner through video conferencing, finds that the same reason for rejecting the case of the petitioner have

been mentioned in the impugned order dated 05.08.2018 as have been mentioned in the counter affidavit filed by the respondents he impugned order also considers the case of Dr. Sumati Sheel Sharma and mentions that Dr. Sumati Sheel Sharma was placed at Sl. no. 1099 of the seniority list and 21 other doctors, who were senior to her including those who had retired from service or died had been given notional promotion as Additional Director w.e.f. 21.06.2009 and the notional promotion on the post of Director in the pay scale of 5900-6300 w.e.f. the date that Dr. Sumati Sheel Sharma was given such promotion. This fact mentioned in the order dated 05.05.2015, as also the fact that petitioner was placed at Sl. no.535 of the seniority list has convinced the Court that the impugned order is liable to be set aside.The case of the petitioner has been rejected only on the ground that Dr. Sumati Sheel Sharma had been given promotion on 21.06.1990 and 22.05.1996 on the basis of earlier seniority list and the petitioner was at that time junior to Dr. Sumati Sheel Sharma, therefore, he cannot claim the same benefit. Additionally, a reference has been made of pension, re-fixation having been done by the Government Order dated 30.12.2005 and 13.06.2006 and of Writ Petition No.2877 of 2004 (Dr. Rajendra and others Vs. State of U.P. and others) having been decided by High Court on 10.1`1.2005 with the observation that only notional promotin can be given and pension re fixation can be done alongwith other retiral benefits but arrears of salary cannot be given on the principle of " No Work No Pay".

13. The reasons given in the impugned order for rejecting the case of the petitioner for grant of notional promotion are arbitrary in the face of observations made by Division Benches of this Court in the case of Gulab Chandra and Dr. Ramji Pandey as mentioned herein above.

14. The Division Benches of this Court in the aforesaid two judgments have allowed the writ petitions with the direction to the respondents to grant benefit of notional promotion to the writ petitioners to the post of Additional Director and Director as and when it fell due in accordance with rules as notified in August, 2004 and the pay scale was to be refixed and the arrears of salary were to be recalculated and to be paid within three months from the date of passing of the order. Consequential benefits of re-fixation of pension, gratuity and other post retiral benefits were also to be made available to the writ petitioners and if such payment was delayed beyond three months the same was to accrue 6% simple interest from the date of jdugment to the date of payment.

15. Similar orders have been passed by Hon'ble the Supreme Court in Civil Appeal no.3041 of 2010 as have been mentioned in para-26 to the writ petition which has not been specifically denied by the respondents in the counter affidavit.

16. This writ petition is allowed in the same terms as the decision by this Court on 31.08.2017 in Writ -A N. 3334 of 2009 (Ramji Panday Vs. State of U.P.).

17. Let appropriate order be passed by opposite party no.2 making them subject to decision in SLP with Diary no. 33951 of 2018 (State of U.P. Vs. RamJi Pandey.

18. A direction is issued to the respondents to grant notional benefits of promotion to the petitioner as Additional Director and Director as and when it falls due in accordance with the Rules as notified on 11th August, 2004 and the pay shall be re-fixed and payment of arrears of salary on such re-calculation shall be made as expeditiously as possible, preferably within three months from today. The consequential benefits of pension, gratuity and other retiral dues shall also be available to the petitioner. In the event the payment is delayed beyond three months, the same shall carry 6% simple interest from the date of this judgment to the date of payment.

(2021)07ILR A464
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.07.2021

BEFORE

THE HON'BLE CHANDRA DHARI SINGH, J.

Service Bench No. 2562 of 2016
With
Service Bench No. 7624 of 2017

Wing Commander Rajesh Kumar Nagar ...Petitioner

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
Dineysh Agrawaal, Anupriya Agarwal, Hari Mohan Mathur, Rajani B Bajpai

Counsel for the Respondent:
C.S.C., Upendra Nath Mishra

A. Service Law - U.P. Government Servant (Discipline and Appeal) Rules 1999 – Rule 3 & 7 – Aircraft (Investigation of Accidents and Incidents) Rule, 2012 – Rules 3(1) & 3 (2) – Departmental enquiry – Petitioner was on deputation from Indian Air Force – Termination by the borrowing department on the allegation of misconduct or negligence during service – Validity – Held, Services of an employee on deputation cannot be terminated by the borrowing department – In case of any negligence or misconduct, he can only be repatriated to his parent department along with the report about his conduct – Principle laid down by Apex Court in Kunal Nanda's case followed. (Para 12, 34 and 42)

B. Service Law – Termination – Charge sheet at a belated stage – No explanation of inordinate delay – Effect – Delayed initiation of proceedings is bound to give room for allegations of bias, mala-fides and misuse of power – Such delay is likely to cause prejudice to the delinquent officer in defending himself – Held, the delay and laches on the part of the employer in conducting departmental enquiry without any satisfactory explanation for the inordinate delay are sufficient to vitiate the entire disciplinary proceeding. (Para 12, 34 and 47)

C. Service Law – Departmental enquiry – Principle of Natural Justice –Application thereof – Frequent changes of Inquiry Officer – No supply of relevant documents for the preparation of the reply – No proper opportunity to submit the reply of the show cause notice – No case of ignorance of any warning about the wake turbulence given by Air Traffic Controller – Held, the enquiry is vitiated and is not sustainable in the eyes of law; further held, not only the proceedings are bad on account of placing of reliance upon the report of preliminary investigating authority but it also appears that authorities had already made up their mind to dismiss the petitioner from service. (Para 52, 60 and 61)

Writ Petition allowed. (E-1)

Cases relied on :-

1. S.B.I. & ors. Vs Narendra Kumar Pandey; (2013) 2 SCC 740

2. Chairman L.I.C. & ors. Vs A. Masilamani; (2013) 6 SCC 530

3. St. of U.P. Vs Ram Naresh Lal; (1970) 3 SCC 173

4. Kunal Nanda Vs U.O.I.; (2000) 5 SCC 362

5. K. Kanagasabapathy Vs City Supply Officer, Civil; (1978)1 MLJ 184

6. B.L. Satyarthi Vs St. of M.P.; 2014 SCC OnLine MP 5735

7. St. of M.P. Vs Bani Singh & anr.; 1990 (Supp) SCC 738

8. St. of Punj. & ors. Vs Chaman Lal Goyal; (1995) 2 SCC 570

9. U.O.I. Vs Ashok Kacker; 1995 Supp (1) S.C.C. 180

10. Civil Appeal No. 10913 of 2016; H.P. State Electricity Board Ltd. Vs Mahesh Dahiya decided by Supreme Court

11. M. V. Bijlani Vs U.O.I. & ors.; (2006) 5 SCC 88

12. St. of U.P. Vs Shatrughan Lal & anr.; (1998) 6 SCC 651

13. Writ Petition No. 55836 of 2005; Chandrika Yadav Vs St. of Uttar Pradesh & ors. decided by Allahabad High Court

14. Philip Silverman, Vortex Cases : At a Turbulent Crossroads; 39 J. Air L. & Com. 325 (1973)

15. Sanbutch Properties Vs United States; 343 F. Supp. 611 (ND Cal 1972)

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Since both the petitions involve common questions of law and fact and co-relate to same person, therefore, both were connected with each other vide order dated 12.04.2017 rendered in Writ Petition No.7624 (SB) of 2017, hence both have been heard together and are being decided by this common order.

2. The writ petition No.2562 (SB) of 2016 has been filed with the following main prayer(s) :

(a) Issue a writ, order, or direction in the nature of certiorari to quash the order dated 05.02.2016 passed by the respondent as contained in Annexure 10 to the writ petition.

(b) issue a writ order or direction in the nature of PROHIBITION commanding the respondent from passing any order of Major Penalty under second Part of Rule 3 of the U.P. Government Servant (Discipline and Appeal) Rules 1999 and issue a writ order or direction in the nature of certiorari to quash the charge-sheets dated 31.03.2014 and 16.05.2014 as contained in Annexure 1 and 2 to the writ petition along with any adverse order which may be intended to be passed by the respondent.

(c) issue a writ order or direction in the nature of mandamus commanding the respondent not to impose any penalty whatsoever in the light of the averments made in the writ petition.

(d) issue a writ order or direction in the nature of mandamus commanding the respondent to provide full salary, allowances and other emoluments with retrospective effect for the suspension period w.e.f. 04.08.2014 to 13.01.2016 with all consequential benefits and provide full salary for the subsequent period.

Subsequently, the writ petition no. 7624 (SB) of 2017 has been filed with the following main prayers :

i. issue a writ, order or direction in the nature of mandamus declaring the office memorandum dated 24.04.2014 issued by the State of U.P. as firstly ultra-vires to Rule 3(1) and 3 (2) of the 'Aircraft (Investigation of Accidents and Incidents) Rule 2012 secondly, ultra-vires to the U.P. Government Servant (Discipline and Appeal) Rules, 1999 and thirdly ultra vires to the Constitution of India.

ii. issue a writ, order or direction in the nature of mandamus commanding the respondent to quash the impugned order dated 25.04.2016 contained at Annexure 1 of the instant writ petition and honourably reinstate the petitioner.

iii. issue a writ, order or direction in the nature of mandamus commanding the respondent to provide full salary, allowances and other emoluments with all consequential benefits i.e. seniority and safeguard of promotional avenues etc.

iv. to award an exemplary cost of five crore rupees on the respondent State of U.P. on account of inflicting mental pain, agony, humiliation, loss of honour, pride, opportunity to the petitioner besides also causing shrinkage of his piloting skill and denting his future prospects of employment in the aviation industry by a farce and misconceived inquiry instituted against him by the respondent.

3. Brief facts of the case are that the petitioner joined the Air Force through N.D.A. as Pilot in Transport Stream. On 14.01.2008, the petitioner was sent on to fly Aircrafts of the State of U.P. on deputation for a period of three years. which was extended for one year more. Later, after premature retirement from Indian Force, the petitioner was given the post of Pilot (Fixed Wing) on contract basis w.e.f. 01.08.2011 and subsequently, he was appointed on the same post on regular basis w.e.f. 22.12.2011.

4. The backdrop of filing the writ petition No.2562 of 2016 (SB) is that on 22.02.2008, the State Plane King Air C-90A V.T.-UPZ being flown by the petitioner met with an accident at Airstrip of Air Force Station Allahabad. After the investigation the DGCA New Delhi permitted the resumption of flight duties after imparting corrective/additional training.

5. On 31.03.2014, the respondents issued a charge-sheet against the petitioner for the incident dated 22.02.2008. The petitioner challenged the said charge-sheet by filing the W.P. No. 2562 (S/B) of 2016 (supra). After the inquiry proceedings, the petitioner has been terminated from the services vide order dated 05.02.2016 which has been challenged in the aforesaid W.P. No. 2562 (S/B) of 2016 (supra) by way of amendment.

6. The backdrop of filing the writ petition No.7624 (SB) of 2017 is that on 22.09.2012 the petitioner along with co-pilot Sri G.P. Singh were tasked to fly Premier 1A aircraft to Indira Gandhi International Airport Delhi from Lucknow. The aircraft met with an accident on Runway 27 at Indira Gandhi International Airport Delhi. At the time of the said accident, it is admitted fact that the said Aircraft was operated by the petitioner as Pilot in command. A technical investigation/enquiry of the said accident was conducted by the Aircraft Accident Investigation Bureau (for short 'A.A.I.B.'), Ministry of Civil Aviation, New Delhi and after the approval of the Central

Government, the said investigation of the enquiry report dated 13.11.2013 was made available to the State Government by 'A.A.I.B.' and on the basis thereof, the D.G.C.A. New Delhi vide letter dated 08.01.2014 directed the State of U.P. to permit the flying duties to the petitioner after refresher/corrective training to the petitioner and allow normal flight duties to the petitioner.

7. The respondents have instituted the enquiry of both the incidents/accidents against the petitioner and they are running concurrently.

8. The respondent - State Government communicated the petitioner an office memorandum dated 24.04.2014 issued by Civil Aviation Department regarding institution of departmental enquiry under Rule 7 of the U.P. Government Servant (Discipline and Appeal) Rules 1999 which was received by the petitioner on 29.04.2014. On 16.05.2014, the Inquiry Officer served a charge-sheet on the petitioner . The petitioner sent a preliminary objection to the tenability and viability of the charge-sheet dated 16.05.2014 to the inquiry officer.

9. The petitioner received a letter dated 11.07.2014 regarding the change of the Inquiry Officer and one Sri Manoj Kumar Singh was appointed as Inquiry Officer in place of Sri Rahul Bhatnagar. On 04.08.2014, the petitioner was suspended. On 03.11.2014, again the Inquiry Officer has been changed and Mr. Anant Kumar Singh was appointed as Inquiry Officer. The Inquiry Officer asked the petitioner to file his reply within fifteen days vide notice dated 02.12.2014. The petitioner submitted his detailed reply to the Inquiry Officer vide his letter dated 08.12.2014.

10. The Inquiry Officer Sri Anant Kumar Singh has again been changed and another inquiry officer namely Sri K. S. Atoria was appointed. Vide letter dated 19.01.2015, he also asked the petitioner to file his reply. The Inquiry Officer Sri K.S. Atoria submitted the report to the respondent. The respondent issued the show cause notice dated 26.11.2015 along with the inquiry report to the petitioner. The petitioner submitted detailed reply dated 21.12.2015/ 06.01.2016 to the show cause notice dated 26.11.2015. The competent authority passed the impugned order dated 25.04.2016 removing the petitioner from the services with the consultation/consent of the U.P. Public Service Commission. The impugned order was served on the petitioner on 26.04.2016.

11 . In Writ Petition No. 2562 (S/B) of 2016, both the charge-sheets dated 31.03.2014 & 16.05.2014 (related to aircraft accident of 2008 and of 2012) as well as the termination order dated 05.02.2016 (related to aircraft accident of 2008) has been challenged.

In Writ Petition No. 7624 (S/B) of 2017, the termination order dated 25.04.2016 (related to aircraft accident of 2012) has been challenged.

12. With the aforesaid background, Sri Prashant Chandra, learned Senior Counsel assisted by Ms. Radhika Singh, learned Counsel for the petitioner has submitted that the respondents have abruptly issued a charge sheet at a belated stage against the petitioner for the incident dated 22.02.2008 on 31.03.2014 ignoring the fact that the petitioner was not in employment of the State Government at the relevant date but he was on deputation from

Indian Air Force. It also ignored the fact that on 22.12.2011, the State Government has permanently appointed the petitioner, thus nothing remained against him.

13. It is also submitted that a deputationist continues to be governed by the rules of his/her parent department and is deemed to be under disciplinary control of his/her parent department unless absorbed permanently in the transferee department, therefore, the borrowing department i.e. State Government had no jurisdiction to take any disciplinary action against him.

14. It is also submitted that the charge-sheet dated 31.03.2014 is highly belated by six years. The petitioner was neither repatriated nor any recommendation for any action was made against the petitioner to the I.A.F. (the parent department) from the State of U.P. (the borrowing department) but on the other hand, vide order dated 22.12.2011, the petitioner was permanently appointed by the State of U.P. on the post of Pilot (Fixed Wing). After the appointment there, remained nothing to be investigated against the petitioner. Thus, the disciplinary action taken against the petitioner in respect to aircraft accident of 2008 is illegal, arbitrary and an abuse of the process of law.

15. It is submitted that in the instant case, there is delay of six years in serving the charge-sheet. It is trite to say that such disciplinary proceeding must be conducted soon after the irregularities are committed or soon after discovering the irregularities. They cannot be initiated after lapse of considerable time.

16. It is also submitted that the incident of the year 2008 was investigated by the DGCA, New Delhi and instead of recommending any action against the petitioner, he was allowed to resume flight duties after certain refresher/corrective training. The law does not permit to inquire the matter again, hence the entire action of respondents deserves to be quashed.

17. Sri Chandra, learned Senior Counsel has further submitted that the petitioner, in the year 2012, was on the duties as Pilot in Command of the Premier 1-A Aircraft and the second Pilot of the said Aircraft was Captain G.P. Singh. The Aircraft took off from Lucknow for Delhi IGI Airport on 22.09.2012 at around 10:30 a.m. It is submitted that the entire flight was under command of the petitioner but at the time of landing, when it was around 30-35 ft from ground, the Aircraft got caught in an unusual phenomena of 'Wake Turbulence' and as a consequence impacted the runway with unusual rate of descent and attitude. The inevitable impact happened in a flash of seconds and the petitioner could do nothing to safely maneuver the aircraft thereupon but post impact on the runway displayed an exceptional skill and expertise in preventing the aircraft from losing direction and balance thereby preventing it from becoming a ball of fire.

18. It is submitted that the impugned order of removal dated 25.04.2016 of the petitioner from services on the post of Pilot has been passed at the first instance making apportionment of blame and fixing of liability on the petitioner on account of negligence solely having based it on the investigation report of 'AAIB' dated 13.11.2013 which had no such finding by the Ministry of Civil Aviation (for short 'MCA') through 'AAIB' as per Rule 11 of the Aircraft (Investigation of Accidents and Incidents) Rules 2012 (for short 'Rules 2012).

19. It has been submitted by the learned Senior Counsel that Rules 3(1) of 'Rules 2012' provides that the sole objective of such an investigation of accidents and incidents shall be prevention of accidents or incidents and not to apportion blame and liability. Therefore, the respondents prima-facie misconceived the investigation report and passed the impugned order in colourable exercise of power specially when Rule 3(2) unequivocally provides that such an investigation, as aforesaid, shall be separate from any judicial or administrative proceedings to apportion blame or liability. Learned Senior Counsel submits that the impugned order is thus, void ab-initio and nullity. It is submitted that the office memorandum dated 24.04.2014 is manifestly ultra virus on the ground that it is contrary to Rules 3(1) and 3(2) of the Rules 2012 and also contrary to the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (for short 'Rules 1999')

20. It is further submitted that after receiving the impugned charge-sheet, the petitioner had requested the first Inquiry Officer for supply of the necessary records but the same has not been supplied to the petitioner for submitting the reply to the show cause notice issued to the petitioner. The inquiry officer has also not obtained the records of the 'AAIB' report. It is submitted that the respondent decided to hold inquiry in the accident of Premier 1A Aircraft without taking the contents of the 'AAIB' Report in correct prospective and he has made out the case against the petitioner taking the selective observations from the 'AAIB' report. It is also submitted that while awarding the major penalty of removal from services to the petitioner, another co-pilot Sri G.P. Singh and Sri Pragyesh Mishra were completely let off from the responsibility of the said alleged accident. It is also vehemently submitted that the entire inquiry against the petitioner is illegal, arbitrary and violative of the principal of natural justice. It is also submitted that for conducting the inquiry, the single inquiry officer was appointed under the said office memorandum who was neither a technically qualified person nor trained to conduct any inquiry of technical nature related to the field of aviation and also he did not include any member having expertise of holding such an inquiry. Learned senior counsel also submitted that four inquiry officers have been changed, which is clear cut abuse of the process of the law and the reply which has been submitted by the petitioner was also arbitrarily ignored and not properly deliberated before passing the impugned order.

21. Learned Senior Counsel Sri Prashant Chandra also submitted that the respondents in the incident of 2012 passed an order of removal of the petitioner from the services of Pilot (Fixed Wing) on 25.04.2016 after allegedly taking approval of the UPPSC on 24.02.2016. It is submitted that in this order, the respondent awarded the same punishment, which was awarded in the first incident of 2008 without application of mind in a mechanical and stereo type manner. It has also been submitted that the 'AAIB' is the authorized agency which concludes its inquiry on 13.11.2013 in which the real cause of the incident/accident has been given, which has been totally ignored by the inquiry officer with the malafide intention. It is submitted that in the said inquiry of 'AAIB' no role was attributed to the petitioner for causing of the accident on

22.09.2012. Learned Senior Counsel submitted that the departmental inquiry conducted by the respondent is ultra vires not based on any proper evidence and discriminatory in nature. It is submitted that the petitioner ought not to have awarded any punishment instead he should have rewarded for saving six human lives due to his sheer and skill and expertise on the Aircraft in the event of unavoidable circumstances. It is submitted that as regards the huge financial loss of the State of U.P., if any, it was due to sheer negligence on the part of the State itself inasmuch as it did not insure the Aircraft with a authorized insurer as the aircraft was involved in a high risk activity of flying. Learned Senior Counsel submits that in view of the facts and circumstances, the impugned order passed by the respondent is bad in law and contrary to the provisions as established by the Hon'ble Apex Court as well as by this Hon'ble Court. Thus, the same is liable to be quashed and the writ petition is liable to be allowed.

22. Per contra, Sri Pratyush Tripathi learned Standing Counsel vehemently opposed the submissions of petitioner for the State has vehemently opposed the submissions of counsel for petitioner and submitted that the DGCA has conducted the detailed inquiry into the accident of 2008 in which the aircraft "King Air C- 90" got completely destroyed at Allahabad. In the inquiry report of DGCA dated 16.11.2009, it was found that the mistake of pilot was the main cause of accident and categorically recommended "*action as deemed appropriate be taken against the Pilot for the lapses as indicated in the findings"*

23. Learned Standing Counsel for the State also submitted that when petitioner was appointed by the State Government, the matter regarding the Allahabad accident of 2008 was under consideration and the same was not finalized prior to his induction in the State Government. Subsequently, after rejection of his objection to the DGCA's report and submission of a three member committee of the State Government regarding implementation of said report of DGCA, he was charge-sheeted. Therefore, it is not permissible for him to escape from his responsibility of facing the inquiry by raising the objection in respect of delay or being a deputant at the time of accident because in the technical inquiry carried out by the DGCA, he was found primarily responsible for causing complete damage to the State Aircraft due to negligence and lapses caused by him.

24. It is submitted that the petitioner has neither disowned the occurrence of the aviation accident nor refused to admit the fact that at the time of accident it was the petitioner who was flying the aircraft. The petitioner also did not challenge the technical inquiry report submitted by the Air Safety Expert of DGCA wherein lapses of the Pilot were reported to be the main cause of accident.

25. It is also submitted that Hon'ble Apex Court in case of **State Bank of India and others Vs Narendra Kumar Pandey (2013) 2 SCC 740 (relevant paragraph 22 and 23**) has held that if the charges born out from the documents, kept in normal course of business, no oral enquiry is necessary to prove those charges.

26. It is also submitted that the petitioner failed to prove the procedural irregularity or violation of principals of natural justice in the enquiry; however, if at

any stage if it is found by the Hon'ble Court that any procedural irregularity is there, the respondents submits that the matter is liable to be remanded back for the completion of the enquiry from the stage of such defect and the petitioner has no right to be reinstated in service; as per the law settled on the subject matter, in case of **Chairman Life Insurance Corporation of India and others Vs A. Masilamani, reported in (2013) 6 SCC 530 (relevant paragraph 16).**

27. Learned counsel for the State has further argued that on 22.09.2012, the Plane/Aircraft of the State Government Premier1-A (B.T.-U.P.N.) met with an accident during the course of landing at Indira Gandhi Airport, New Delhi. It is submitted that at that time of the said accident, the said Plane/Aircraft was operated by the petitioner as a Pilot in Command. The technical investigation/enquiry of the aforesaid accident was conducted by the "A.A.I.B." Ministry of Civil Aviation, New Delhi and after the approval of the Central Government, the said investigation/enquiry report dated 13.11.2013 was made available to the State Government by the 'A.A.1.B.'

28. Learned counsel appearing on behalf of the State has submitted that after examination of the aforesaid investigation/enquiry by the 'A.A.I.B.', the petitioner was prima-facie found guilty for the aforesaid accident of the State Plane, hence a departmental enquiry was constituted against the petitioner under Rule 7 of Uttar Pradesh Government Servant (Discipline and Appeal) Rules 1999, vide office memorandum dated 24.04.2014 in which Mr. Rahul Bhatnagar, the then Principal Secretary, department of Sugar Industries and Cane Development was appointed as inquiry officer and after the transfer of Mr. Rahul Bhatnagar, Mr. Manoj Kumar Singh, the then Principal Secretary, Secondary Education was appointed as inquiry officer vide office order dated 11.07.2014. Later, Mr. Manoj Kumar Singh joined in the Central Government on deputation then Mr. Anant Kumar Singh, the then Principal Secretary, Pashudhan, Matsya Evam Dugdh Vikas was appointed as inquiry officer vide office order dated 03.11.2014. After sometime, Mr. Anant Kumar Singh also went on deputation in the Central Government then, Mr. K. S. Atoria was appointed as inquiry officer vide office order dated 19.01.2015. The charge-sheet was prepared against the petitioner vide office order dated 16.05.2014, which was served upon the petitioner along with the report of 'A.A.I.B.' dated 13.11.2013.

29. Learned counsel for the State has also submitted that there were two departmental proceedings running against the petitioner due to which the petitioner was kept under suspension vide order dated 04.08.2014. The petitioner submitted his defence by means of letter dated 29.04.2014 and the petitioner had also submitted his reply to the charge-sheet dated 16.05.2014 vide letters dated 29.04.2014, 23.06.2014, 27.06.2014 and 08.12.2014. The main contentions in the said reply was that the unusual condition of weather was the responsible factor for the said accident and he is not at fault for the same. It is submitted that the Inquiry Officer vide letter dated 11.08.2015 has given an opportunity of personal hearing to the petitioner and fixed a date on 25.08.2015. It is also asked by the Inquiry

Officer to the petitioner that the petitioner may submit the additional reply or the additional documents in addition to his earlier reply, if he wants so. The petitioner has written a letter to the inquiry officer in which he has requested that he may be given an opportunity of personal hearing on 14.08.2015 in place of 28.05.2014 and on his request, the date of personal hearing was fixed on 14.08.2015. It is submitted that the petitioner appeared before the inquiry officer and submitted the additional reply, which was taken into consideration by the Inquiry Officer. It is also submitted that during the course of inquiry proceedings, all the papers/documents available with the department were made available to the petitioner and the inquiry was completed by the inquiry officer in accordance with law and submitted the inquiry report dated 10.11.2015 to the State Government.

30. Learned counsel for the State has submitted that as per the inquiry report, the charges levelled against the petitioner were found to be proved and he was found guilty. Therefore, a show cause notice dated 26.11.2015 was issued to the petitioner, which was served upon the petitioner on 01.12.2015 and the petitioner was given three weeks time to submit his reply to the show cause notice. The petitioner submitted his reply to the show cause notice vide letter dated 21.12.2015 and also he has given a representation dated 23.12.2015 to the State Government. The petitioner has again submitted another representation dated 05.01.2016 to the State Government and the same was forwarded to the disciplinary authority for consideration and taking decision.

31. Learned counsel for the State has submitted that the reply and representations submitted by the petitioner were not within the time as prescribed in the show cause notice. It is submitted that on 14.01.2016, the entire file of the petitioner was submitted before the Hon'ble Chief Minister as he was the then Minister of the Department for taking the necessary approval. The matter was also sent to the U.P. Public Service Commission vide letter dated 04.02.2016 for necessary consultation/consent as required under the provisions of the U.P. Public Service Commission (Limitation of Function) Regulation 1954 as amended from time to time and also required under Rule 16 of the 'Rules 1999'. The consent from the U.P. Public Service Commission was received to the State Government by letter of U.P. Public Service Commission dated 24.02.2016 after which the decision was taken for the removal of the petitioner from the service which does not disqualify for further employment vide order dated 25.04.2016.

32. Learned counsel for the State has vehemently submitted that earlier a disciplinary inquiry was also conducted against the petitioner with respect to an accident took place at Allahabad, which resulted into major penalty against the petitioner. It is also submitted that at the time of passing of the aforesaid punishment order dated 25.04.2016, the petitioner was not in service. Learned counsel for the State has submitted that the inquiry conducted by the 'A.A.I.B.' was not for deciding the liability of anybody or to punish anybody but it was for searching the reasons behind the particular accident so that the occurrence may not be repeated in future. It is also submitted that in the technical inquiry conducted by the 'A.A.I.B', it was found that the handling of the Aircraft by the Pilot was a contributory

factor to the accident. Further, after examination of the investigation/inquiry report of the 'A.A.I.B.', the petitioner was prima-facie found guilty for the aforesaid accident of the State Plane, hence the enquiry was conducted against the petitioner under the 'Rules 1999' and after conducting the enquiry against the petitioner in accordance with law, the petitioner was found guilty for the accident of the State Plane, therefore, the punishment order dated 25.04.2016 was passed and the petitioner was removed from the services. It is submitted that there are no illegality in the enquiry and the enquiry was conducted as per the prescribed procedure established in the statute as well as in accordance with the law settled by the Hon'ble Apex Court and also of this Hon'ble Court. During the enquiry, the principle of natural justice has been followed and all the documents/materials which were necessary for submitting the reply by the petitioner were served upon the petitioner. There were no lacuna in the enquiry conducted by the State under the Rules 1999. Finding was very clear that the petitioner was found guilty and due to his negligence, the said accident had taken place. Learned counsel for the State has submitted that the instant petition being devoid of merit is liable to be dismissed.

33 . Counter and Rejoinder Affidavits have been exchanged between the parties and I have heard both the parties at length and gone through the pleadings/materials on record.

34. Two issues are involved in Writ Petition No.2562 (S/B now S/S) of 2016 which are as under :-

1. Whether the services of an employee on deputation can be terminated by the borrowing department on the allegation of misconduct or negligence during service ?

2. Whether unexplained inordinate delay in framing charges would amount to violation of principles of Natural Justice and vitiate the entire disciplinary proceedings ?

The third issue is involved in both the Writ Petition No.2562 (S/B now S/S) of 2016 and 7624 (S/B now S/S) of 2017 which is as under : -

3. Whether the preliminary inquiry report/fact finding report can be relied upon by the disciplinary authority to terminate the services of the delinquent employee on the ground of the misconduct or negligence ?

35. For adjudication of the aforesaid issues, the Rules and orders relevant to the instant case are as follows:

36. Under the 'Rules 2012' the objective of investigating an accident or incident has been provided. The relevant rules germane to the issue are being extracted here in below:-

"3. Objective of the investigation of accidents and incidents.

(1) The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents and not to apportion blame or liability.

(2) Any investigation conducted in accordance with the provisions of these rules shall be separate from any judicial or administrative proceedings to apportion blame or liability.

8. Aircraft Accident Investigation Bureau.—

(1) For the purposes of carrying out investigation into accidents, serious incidents and incidents referred to in sub-rules (1), (2) and (4) of rule, the Central Government shall set up a Bureau in the Ministry of Civil Aviation known as the Aircraft Accident Investigation Bureau of India and appoint such number of officers familiar with aircraft accident investigation procedures and other persons, as it deems fit from time to time.

(2) The Aircraft Accident Investigation Bureau shall function under overall supervision and control of Government of India, Ministry of Civil Aviation.

(3) The Aircraft Accident Investigation Bureau shall discharge the following functions, namely: –

(a) obtaining preliminary report under rule 9 from any person or persons authorised either under sub rule (1) of rule 9 or under sub rule(2) of rule 7;

(b) assisting the Central Government in setting up of Committee of Inquiry and formal investigation under these rules;

(c) to facilitate the investigation and administrative work of the Committees and Courts, whenever necessary.

(d) processing of the reports of Courts and Committees of Inquiry received by the Central Government, which includes –

(i) forwarding of the reports to the States for consultation under sub-rule (1) of rule 14;

(ii) forwarding the report made public by the Central Government under sub- rule (2) of rule 14 to the States as required under Annex 13;

(iii) forwarding the report made public by the Central Government under sub- rule (2) of rule 14 to ICAO if the mass of the aircraft involved in accident or incident is more than 5,700 kg;

(e) follow-up the recommendations made by Courts and Committees of inquiry and to ensure that are implemented by the concerned agencies;

(f) to process cases for a resolution by the Central Government of disputes between the Bureau and any agency regarding implementation of a recommendation;

(g) to formulate safety recommendation on the basis of safety studies, including induction of new technology to enhance safety, conducted from time to time.

(h) establish and maintain an accident and incident database to facilitate the effective analysis of information on actual or potential safety deficiencies obtained, including that from its incident reporting systems, and to determine any preventive actions required;

(i) to process obligations of the Central Government under Annex 13 to the Convention relating to International Civil Aviation signed at Chicago on the 7th day of December, 1944 as amended from time to time; and

(j) any other functions, which the Central Government may ask the Bureau to perform from time to time under these rules.

(4) The Aircraft Accident Investigation Bureau may, by notification in the Official Gazette, and with the previous approval of the Central Government, make procedures, not inconsistent with the provisions of the Act to carry out the purposes of these rules and the functions referred to in sub-rule (3).

(5) In particular, and without prejudice to the generality of the foregoing power, such procedures may provide for all or any of the following matters, namely:--

(a) the persons required to notify the accidents and incidents;

(b) the notifications of accidents and serious incidents to International Civil Aviation Organisation and the States for participation in the investigation;

(c) the investigation of aircraft accident and incidents;

(d) the format of preliminary and reports of Committee of Inquiry and Formal Investigation conducted under these rules;

(e) the consolidation and follow-up of safety recommendations made by the Committee of Inquiry and Formal Investigation with the agencies required to Page 9 of 15 implement the recommend-ations and require action taken reports from these agencies; and

(f) Any other matter subsidiary or incidental to aircraft accident and incident investigation. "

37. The objectives as are contained in Rule 3 of the Rules is to provide only for prevention of accidents and incidents and no enquiry or investigation is done to apportion blame or liability. In fact, it is specifically provided under Rule 3(2) of the Rules that any investigation conducted in accordance with the Rules shall be separate from any judicial or administrative proceedings to apportion blame or liability. It is thus clear that an investigation made for analysis by 'AAIB' is not for ascertaining the fault, blame or liability but only for the purposes of using the report for utilizing it for safety purposes and to prevent a re-occurrence.

38. The 'AAIB' is attached to the government of India, Ministry of Civil Aviation and discharges the function as have been prescribed under Rule 8(3), which indicates that it does not conduct any investigation or inquiry for ascertaining delinquency of any person.

Issue No. 1 is dealt as follows :

39. A 'deputationist' is an employee who has been assigned to another department from his/her parent department. The law regarding employees on deputation is well settled. As regards the matter of disciplinary control, **the Hon'ble Apex Court in State of U.P. v. Ram Naresh**

Lal, (1970) 3 SCC 173 has observed that a deputationist continues to be governed by the rules of his/her parent department and is deemed to be under the disciplinary control of his/her parent department unless absorbed permanently in the transferee department.

40. In **Kunal Nanda v. Union of India, (2000) 5 SCC 362**, it was further observed by Hon'ble Supreme Court that the basic principle underlying deputation is that the person concerned can always and at any time be repatriated back to his parent department. Therefore, a deputationist stands on an altogether different footing than a direct recruit of the Organisation/ Department. A deputationist can be repatriated back to his/her parent department and in cases of misconduct, necessary action can also be initiated against him/her as per the conditions of service governing his/her parent department.

41. In the case of **K. Kanagasabapathy Vs. City Supply Officer, Civil - (1978)1 MLJ 184** the Madras High Court observed that the disciplinary proceedings were initiated by the borrowing department after the employee was repatriated to the parent department and it was held that after the employee had left the borrowing department and had gone back to the parent department, officers of the borrowing department had no jurisdiction to take any disciplinary proceeding against him. It is held that the power is made available to the borrowing department only so long as the concerned officer is serving in the said department but not after he gone back to the parent department.

42. In the case of **B.L. Satyarthi v. State of M.P., 2014 SCC OnLine MP 5735**, Madhya Pradesh High Court held the action taken by the borrowing department i.e. Madhya Pradesh Rajya Van Vikas Nigam for initiating departmental enquiry in the matter is unsustainable once the employee was repatriated back to the parent department.

Thus, in the light of the aforesaid discussions, the issue no.1 is answered accordingly to the effect that the services of an employee on deputation cannot be terminated by the borrowing department, in case of any negligence or misconduct, he can only be repatriated to his parent department along with the report about his conduct.

Issue No. 2 is dealt as follows :

43. In **State of Madhya Pradesh v. Bani Singh and another reported in 1990 (Supp) SCC 738**, the Supreme Court had comedown heavily against the laches on the part of the employer in conducting departmental enquiry and after finding out that there was no satisfactory explanation for the inordinate delay, held that it would be unfair to order departmental enquiry to proceed further.

44. In **State of Punjab and others Vs. Chaman Lal Goyal, reported in 1995 (2) SCC 570,** the Hon'ble Supreme Court held as follows:

"9.Now remains the question of delay. There is undoubtedly a delay of five and a half years in serving the charges. The question is whether the said delay warranted the quashing of charges in this case. It is trite to say that such disciplinary proceeding must be conducted soon after the irregularities are committed or soon after discovering the irregularities. They cannot be initiated after lapse of

considerable time. It would not be fair to the delinquent officer. Such delay also makes the task of proving the charges difficult and is thus not also in the interest of administration. Delayed initiation of proceedings is bound to give room for allegations of bias, mala fides and misuse of power. If the delay is too long and is unexplained, the court may well interfere and quash the charges. But how long a delay is too long always depends upon the facts of the given case. Moreover, if such delay is likely to cause prejudice to the delinquent officer in defending himself, the enquiry has to be interdicted. Wherever such a plea is raised, the court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances. In other words, the court has to indulge in a process of balancing... "

45. In the case of **Union of India vs. Ashok Kacker, 1995 Supp (1) S.C.C. 180,** no doubt, their Lordships have observed that it is open to the delinquent to file his reply to charge-sheet and raise all objections and also invite the decision of the disciplinary authority thereon. In this case also, no other details have been furnished such the date of occurrence, steps taken by the Government etc. In such circumstances, I am of the view that both the decisions relied on by the Government Pleader are not helpful to their case. I have already stated that even according to the 2nd respondent, the alleged irregularities had taken place in the year 1982 and even after receipt of the report from the Vigilance and Anti- Corruption, Pondicherry Government in the year 1993 the impugned charge memo was issued only on 5.11.97. The inordinate and unexplained delay vitiates the impugned charge memo and the same is liable to be quashed. As observed by Their Lordships of the Supreme Court in State of Punjab and others v. Chaman Lal Goyal, 1995 (2) S.C.C. 570, the disciplinary proceedings cannot be initiated after a lapse of considerable time. It would not be fair to the delinquent officer. Such delay also makes the task of proving the charges difficult and is thus not also in the interest of administration. Delayed initiation of proceedings is bound to give room for allegations of bias, mala fides and misuse of power. If the delay is too long and is unexplained, the Court may well interfere and quash the charges. Here, in our case, the petitioner has raised a plea that the delay is likely to cause prejudice to him in defending himself. If such plea is raised, the court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances. I have already stated that the first charge states that the petitioner did not disburse cash from January, 1982 and, as rightly contended by the learned counsel for the petitioner, not even the period is mentioned clearly and like-wise, the statement that cash book was not maintained properly is a bald statement. Further, the nature of the charges relate to day-to-day activities of disbursement of cash and maintenance of registers, which are routine affairs, hence the unexplained delay of 15 years cannot be accepted. It would be impossible for the petitioner to remember the identity of witnesses whom he could summon to appear before the enquiring authority to support his case. Even If he could summon their presence, it would be a doubtful proposition whether they would be in a position to remember that happened more than 15 years back and help him in his defence. Further more, the petitioner may

not be in a position to effectively cross-examine the witnesses to be examined on the side of the second respondent in support of the charges. Practically, it would be a doubtful proposition that either the prosecution witnesses or the defence witnesses would be in a position to remember the facts of the case and advance the case of either the department or the petitioner. Under these circumstances and on the facts and circumstances disclosed, I hold that the un-explained inordinate delay will constitute denial of reasonable opportunity to the petitioner to defend himself that it would amount to violation of principles of natural justice and as such, the impugned charge memo must be struck down on this ground alone. By weighing all the factors both for and against the petitioner/delinquent officer quashing the charge memo is just and proper in the circumstances".

46. In the instant case, the aircraft accident took place on 22.02.2008 and the respondents issued charge sheet on 31.03.2014, which is highly belated by six years. At the time of accident petitioner was the employee of Indian Air Force and was working in services of State Government on deputation. After the accident, the petitioner was neither repatriated nor any recommendation for any action was made against the petitioner to the IAF (the parent department) from the State of U.P. (the borrowing department) but on the other hand, the D.G.C.A. permitted the resumption of flight duties to petitioner after corrective training and also vide order dated 22.12.2011, the petitioner was permanently appointed by the State of U.P. on the post of Pilot (Fixed Wing). Therefore, after the appointment/ absorption, there remained nothing to be investigated.

47. The submission of the learned Counsel for State is that when petitioner was appointed by the State Government, the matter regarding the Allahabad accident of 2008 was under consideration and the same was not finalized prior to his induction in the State Government. I have gone through the record and do not find the explanation satisfactory to condone the gross delay of 6 years in issuing charge sheet as it makes the task of proving the charges difficult and is thus not also in the interest of justice. Delayed initiation of proceedings is bound to give room for allegations of bias, mala-fides and misuse of power. Such delay is likely to cause prejudice to the delinquent officer in defending himself. Therefore, the delay and laches on the part of the employer in conducting departmental enquiry without any satisfactory explanation for the inordinate delay are sufficient to vitiate the entire disciplinary proceeding. Thus, the disciplinary proceeding against the petitioner in respect to aircraft accident of 2008 is illegal, arbitrary and an abuse of the process of law. Thus, the issue no. 2 is answered accordingly.

Issue No. 3 is dealt as follows.

48. The incident in question was thoroughly inquired and analyzed by the 'AAIB' and a preponderance report was prepared for the purposes as provided in the Rules. After the preparation of the report dated 13.11.2013, an order dated 24.04.2014 was passed setting up a departmental inquiry against the petitioner by the State of U.P. and a charge-sheet dated 16.05.2014 was served upon the petitioner on 18.06.2014. The charge-sheet contains charges against the petitioner is the reproduction of the various portions of the report of the 'AIIB'. The Inquiry Officer

Sri K.S. Atoria, Principal Secretary, P.W.D. reached on the conclusion, as recorded in para 7 of the impugned order, which reads as under :

''7– जॉच अधिकारी की जॉच आख्या एवं श्री नागर द्वारा दिये गये अभ्यावेदन का गहन परीक्षण किया गया। परीक्षणोपरान्त यह पाया गया कि :–

(1) देश में हुई विमान दुर्घटनाओं की तकनीकी जॉच हेतु प्राधिकृत भारत सरकार की जॉच एजेन्सी ए0ए0आई0बी0 द्वारा दिनांक 22.9.2012 को हुई राज्य सरकार के विमान की दुर्घटना की जॉच रिपोर्ट दिनांक 13.11.2013 के प्रारम्भ में अंकित प्रस्तावना में कहा गया है कि "This document has been prepared based upon evidences collected during the investigation, opinion obtained from the experts and laboratory examination of various components. The investigation has been carried out in accordance with Annex. 13 to the Convention on International Civil Aviation and under the Rule 11 of Aircraft (Investigation of Accidents and Incidents), Rules 2012 of India. The investigation is conducted not to apportion blame or to assess individual or collective responsibility. The sole objective is to draw lessons from this accident which may help to prevent such future accidents or incidentsष्ण उक्त से स्पष्ट है कि यह तकनीकी जॉच ए0ए0आई0बी0 द्वारा दुर्घटना के लिए दोषी पायलट आदि के दायित्व निर्धारण या दुर्घटना के दायित्व हेतु अनुशासनिक/दण्डात्मक कार्यवाही के उद्देश्य से नहीं की गयी हे अपितु इस दृष्टि से की गयी है कि दुर्घटना के कारणों को खोजा जाय ताकि इन कारणों का समाधान करके इस प्रकार की दुर्घटनाओं की भविष्य में पुनरावृत्ति रोकी जा सके।

(2) उक्त तकनीकी जॉच दिनांक 13.11.2013 में यह कहा गया है कि प्रतिकूल मौसम आदि के कारण प्रश्नगत दुर्घटना घटित नहीं हुई थी। यह भी कहा गया है कि उड़ान से पूर्व जो विभिन्न प्रकार की औपचारिकताएं एवं परीक्षण नियमानुसार आवश्यक होते हैं, वे भी विधिवत पूर्ण किये गये। जॉच के प्रस्तर 2.4 पृष्ठ–31 पर ष्प्सवज ींदकसपदह वि जीम ंपतबतंजिष शीर्षक के अन्तर्गत कहा गया है कि ष्ण्ण्ण् From the above it is evident that after crossing the runway threshold and prior to flaring the aircraft, the pilot in the process of aligning the aircraft on the center line of the runway made last minutes erections and in the process could not adequately flare the aircraft, which resulted into a heavy touchdown. Hence handling of the aircraft by the Pilot is a contributory factor to the accident." tkWp ds izLrj&3-2 i`"B&33 "Probable cause of the accident" 'kh"kZd ds vUrxZr dgk x;k gS fd After crossing the runway threshold, the pilot made corrections to control the drift and in the process of aligning the aircraft to the centre line of the runway could not flare out the aircraft adequately, which resulted into a heavy touchdown.

(3) इस प्रकार उक्त तकनीकी जॉच में विमान दुर्घटना दिनांक 22.9.2012 के लिए पायलट की असावधानियों को ब्वदजतपइनजवतल बिजवत पाया गया है।

(4) उक्त तकनीकी जॉच के परिप्रेक्ष्य में पायलट द्वारा लैण्डिंग के समय बरती गयी असावधानियॉ, जो विमान दुर्घटना का कारण बनी, के लिए पायलट के विरूद्ध अनुशासनिक/विभागीय कार्यवाही का दायित्व एवं एक मात्र प्राधिकार राज्य सरकार का है, जिसके अधीन अपचारी अधिकारी श्री आर0के0 नागर द्वारा पायलट के रूप में अपनी सेवाएं दी जा रही है और जो दुर्घटना के समय विमान का पायलट–इन–कमाण्ड के रूप में परिचालन कर रहे थे और जिन्हें राजकोष से वेतन प्राप्त हो रहा है।

(5) तद्नुसार राज्य सरकार ने उ0प्र0 सरकारी सेवा (अनुशासन एवं अपील) नियमावली, 1999 के नियम–7 के अन्तर्गत कार्यालय–ज्ञाप दिनांक 24.4.2014 के द्वारा श्री नागर के विरूद्ध विभागीय कार्यवाही संस्थित की है, जो पूर्णतया नियम संगत और विधिसम्मत है।

(6) उक्त विभागीय कार्यवाही हेतु कार्यालय ज्ञाप दिनांक 16.4.2014 द्वारा गठित आरोप–पत्र में विभिन्न आरोप उन निष्कर्षों के आधार पर निरूपित किये

गये हैं जिन्हें ए0ए0आई0बी0 की जॉच रिपोर्ट दिनांक 13.11.2013 में स्थापित किया गया है। इसी लिए उक्त रिपोर्ट दिनांक 13.11.2013 को आरोप–पत्र के साथ मुख्य साक्ष्य के रूप में स्थान दिया गया है और आरोप–पत्र के साथ अपचारी अधिकारी को उपलब्ध कराया गया है।

(7) अपचारी अधिकारी ने अपने अभ्यावेदन में ए0ए0आई0बी0 की जॉच रिपोर्ट दिनॉक 13.11.2013 के कई निष्कर्षों के विरूद्ध तर्क देते हुए इन्हें चुनौती दी है और जॉच समिति के अध्यक्ष श्री जोसेफ की भूमिका पर प्रश्न चिन्ह लगाये हैं, के सम्बन्ध में स्पष्ट करना है कि उक्त जॉच ए0ए0आई0बी0 भारत सरकार द्वारा सम्पन्न करायी गई है और इसके निष्कर्षों की स्थापना के सम्बन्ध में राज्य सरकार के स्तर से करायी जा रही विभागीय अनुशासनिक जॉच में स्थिति स्पष्ट किये जाने की प्रासंगिकता नहीं है। इस सम्बन्ध में ए0ए0आई0बी0 द्वारा की जा रही जॉच के समय ही अपचारी अधिकारी को अपनी बात उनके सम्मुख रखनी चाहिए थी।

(8) राज्य सरकार द्वारा अपचारी अधिकारी श्री आर0के0 नागर के विरूद्ध जो विभागीय/अनुशासनिक कार्यवाही की जा रही है वह भारत सरकार की एजेन्सी ए0ए0आई0बी0 द्वारा की गई तकनीकी जॉच दिनांक 13.11.2013 का पुनरावलोकन नहीं है। अपितु उक्त जॉच दिनांक 13.11.2013 के विभिन्न आधारों पर पुष्ट निष्कर्षों के परिप्रेक्ष्य में दुर्घटना के लिए उत्तरदायी पायलट के विरूद्ध अनुशासनिक कार्यवाही किया जाना है। अपचारी पायलट राज्य सरकार के कार्मिक हैं। नियमानुसार एवं निर्धारित प्रक्रिया के अन्तर्गत भारत सरकार की जॉच रिपोर्ट प्राप्त करके राज्य सरकार अपने कार्मिक के विरूद्ध नियमानुसार किसी दोष/आरोप के लिए कार्यवाही हेतु स्वतंत्र एवं अधिकृत है।

(9) प्रतिकूल मौसमी परिस्थितियों के कारण विमान के दुर्घटनाग्रस्त होने के सम्बन्ध में अपचारी अधिकारी का तर्क न तो ए0ए0आई0बी0 की रिपोर्ट दिनांक 13.11.2013 से पुष्ट होता है और न ही मौसम सम्बन्धी इस प्रतिकूलता के दृश्यमान होने के सम्बन्ध में काई अन्य प्रकार का प्रमाण सामने आया है।

(10) प्रश्नगत जॉच में जो भी उपलब्ध कागजात अपचारी अधिकारी द्वारा मांगे गये उन्हें उपलब्ध कराया गया है।

(11) राज्य सरकार द्वारा प्रश्नगत विभागीय जाूच ए0ए0आई0बी0 की जांच आख्या दिनांक 13.11.2013 में प्राप्त तकनीकी निष्कर्षों के परिप्रेक्ष्य में संस्थित की गयी थी। आरोप पत्र का गठन भी उक्त तकनीकी निष्कर्षों के आधार पर हुआ है। जॉच अधिकारी द्वारा प्रश्नगत जांच में उक्त तकनीकी निष्कर्षों के आधार पर गठित आरोपों की सत्यता/प्रमाणिकता का समुचित परीक्षण किया गया है और इन आरोपों को सिद्ध/प्रमाणित पाया गया है। इस प्रकार अपचारी अधिकारी का यह कथन स्वीकार्य नहीं है कि प्रश्नगत जांच के लिए नामित जांच अधिकारी को वायुयान संबंधी जांच के लिए तकनीकी ज्ञान से युक्त/प्रशिक्षित होना चाहिए।

(12) वायुयान के दुर्घटना की ए0ए0आई0बी0 की जांच आख्या दिनांक 13.11.2013 में संबंधित साक्षीगण का समुचित बयान और उसका परीक्षण किया गया था। राज्य सरकार द्वारा की गई विभागीय जांच में पुनः इसकी आवश्यकता नहीं थी।

(13) जहॉ तक भारत सरकार द्वारा की गयी विभागीय जांच की पोषणीयता का प्रश्न है, राज्य सरकार यथा आवश्यकता अपने नियंत्रणाधीन कार्मिकों के विरूद्ध विभागीय कार्यवाही हेतु पूरी तरह अधिकृत है। विभागीय जॉच के समय अपचारी अधिकारी राज्य सरकार के नियंत्रणाधीन कार्मिक थे।

(14) ए0ए0आई0बी0 की जांच रिपोर्ट दिनांक 13.11.2013 भारत सरकार द्वारा राज्य सरकार को किसी कार्यवाही हेतु अग्रसारित नहीं की गयी है अपितु राज्य सरकार ने डी0जीसी0ए0 से खरीदा है अतः राज्य सरकार इस रिपोर्ट के परिप्रेक्ष्य में कोई कार्यवाही नहीं कर सकती। अभ्यावेदन में अपचारी अधिकारी द्वारा उठाये गये इस बिन्दु के संदर्भ में स्पष्ट करना है कि राज्य सरकार ने निर्धारित प्रक्रिया के अनुसार उक्त जांच रिपोर्ट प्राप्त की है। रिपोर्ट प्राप्त करने के लिए निर्धारित प्रक्रिया का अनुपालन करने के कारण राज्य सरकार का अपने नियंत्रणाधीन कार्मिक के विरूद्ध कार्यवाही करने का अधिकार समाप्त नहीं हो जाता अपितु नियमानुसार राज्य सरकार अपने कार्मिक के विरूद्ध कार्यवाही हेतु स्वतंत्र एवं अधिकृत है।

(15) राज्य सरकार द्वारा की जा रही जांच में जांच अधिकारी ने अपचारी अधिकारी को अपने बचाव का पर्याप्त अवसर दिया है। उनके द्वारा प्रश्नगत जांच विधिवत सम्पन्न की गयी है। उन्होंने बचाव में दिये गये अपचारी अधिकारी के उत्तरों, अन्य साक्ष्यों, बयानों, आरोपों और अन्य संबंधित अभिलेखों का तथ्यपरक विश्लेषण करके अपने निष्कर्ष निष्पादित किये हैं। अतः यह कहना कि उनमें ज्ञान और विशेषज्ञता का अभाव है तथा उन्होंने पक्षपात पूर्ण

(16) देश में हुयी मुख्य विमान दुर्घटनाओं में डी0जी0सी0ए0 द्वारा की गयी तकनीकी जांच के उपरान्त किसी प्रकार की विभागीय अनुशासनिक कार्यवाही न

किये जाने का दृष्टांत देकर यह तर्क देना कि प्रश्नगत विमान दुर्घटना के संदर्भ में राज्य सरकार दोषी पायलट के विरूद्ध अनुशासनिक कार्यवाही नहीं कर सकती, स्वीकार्य नहीं है। राज्य सरकार अपने कार्मिक के विरूद्ध नियमानुसार किसी दोष/आरोप के लिए कार्यवाही हेतु स्वतंत्र एवं अधिकृत है।

(17) राज्य सरकार द्वारा अपने कार्मिकों के मध्य पक्षपात किये जाने का आरोप असंगत एवं अप्रासंगिक है।

(18) अपचारी अधिकारी द्वारा उठाये गये बिन्दु कि ए0ए0आई0बी0 की जांच आख्या दिनांक 13.11.2013 में निहित निष्कर्षों में अंकित शब्दावली ष्म्ततवत व िरनकहउमदजष आदि को राज्य सरकार के स्तर से की जा रही जांच में ''लापरवाही और असावधानी'' के आरोप के रूप में किस आधार पर अभिकथित किया गया है, के संबंध में स्पष्ट करना है कि ए0ए0आई0बी0 की जांच आख्या दिनांक 13.11.2013 के निष्कर्षों के समग्र आकलन/परीक्षण करने के उपरान्त राज्य सरकार द्वारा की जा रही जांच में आरोपों का गठन किया गया है।

(19) दुर्घटना ग्रस्त विमान के बीमा आदि के संबंध में उठाये गये बिन्दुओं में अपचारी अधिकारी द्वारा ऐसा कोई कथन नहीं है, जिससे उनका दोष कम होता हो।

(20) यह भी स्पष्ट करना है कि राज्य सरकार द्वारा प्रश्नगत विमान दुर्घटना में दोषी पायलट श्री नागर के विरूद्ध संस्थित विभागीय जांच में आरोप पत्र के गठन का मुख्य आधार ए0ए0आई0बी0 की जांच आख्या दिनांक 13.11.2013 के निष्कर्ष है और आरोप पत्र के साथ मुख्य साक्ष्य के रूप में उक्त रिपोर्ट दिनांक 16.1102009 को मान्यता दी गयी है। अपचारी अधिकारी द्वारा ए0ए0आई0बी0 की जांच के निष्कर्षों पर प्रश्न चिन्ह लगाना और यह कहना कि राज्य सरकार द्वारा की जा रही विभागीय जांच में नामित जांच अधिकारी द्वारा ए0ए0आई0बी0 की जांच के निष्कर्षों को यथावत् स्वीकार करना उचित नहीं है, आधारपूर्ण एवं संगत प्रतीत नहीं होता है। यदि ए0ए0आई0बी0 की जांच के किसी निष्कर्ष पर अपचारी अधिकारी को आपत्ति थी तो उन्हें उक्त जांच के दौरान ही अपनी बात ए0ए0आई0बी0 के जांच अधिकारी के सम्मुख रखनी चाहिए थीं।

(21) इस प्रकार अपचारी अधिकारी द्वारा अपने अभ्यावेदन में उठाये गये बिन्दुओं में ऐसा कोई कथन नहीं हे, जिससे उनका दोष कम होता हो।''

49. From the material placed, this Court finds that from the very initial stage, the authorities were influenced by the findings returned in preliminary enquiry. Law is settled that the employer can always conduct preliminary enquiry in order to ascertain correct facts and in case the allegations against the employees are found to have substance, then a regular disciplinary enquiry has to be instituted. Since the preliminary enquiry is merely a fact finding report, therefore, its object is merely to form an opinion as to whether a formal enquiry in the matter is required to be conducted or not.

50. Once the decision is taken by the authorities to institute regular disciplinary proceedings then findings in the preliminary enquiry report ordinarily is not to be relied upon. In case such a report is to be relied upon then the delinquent employees has to be confronted with such materials, and only after hearing their version in the matter that such a report could be relied upon. Any other course followed would clearly be a violation of principles of natural justice.

51. In the facts of the present case, once the decision was taken to institute regular disciplinary proceedings against the petitioner and charge-sheet was issued, the enquiry officer was expected to have independently examined the evidence collected during the course of disciplinary proceedings and return its finding as to whether charges against the employees are made out.

52. In the instant case, it appears that the State Government is pre meditated and malafide, which is substantiated by a frequent change of the inquiry officers,

who could align with the wishes of the authorities. The petitioner has not been given proper opportunity to submit the reply of the show cause notice as he has not been supplied the relevant documents for the preparation of the reply.

53. A recent decision of the Apex Court in **H.P. State Electricity Board Ltd. Vs. Mahesh Dahiya, passed in Civil Appeal No.10913 of 2016**, has been pleased to refer to and rely upon a previous decision of the Apex Court in **M.V. Bijlani Vs. Union of India and others, (2006) 5 SCC 88** to observe as under:-

"24. ..... On the scope of judicial review, the Division Bench itself has referred to judgment of this Court reported in M.V. BIJLANI VERSUS UNION OF INDIA AND OTHERS (2006) 5 SCC 88. This Court, noticing the scope of judicial review in context of disciplinary proceeding made following observations in para 25: "It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

25. The three Judge Bench of this Court in B.C. CHATURVEDI VERSUS UNION OF INDIA AND OTHERS 1995 (6) SCC 749 had noticed the scope of judicial review with regard to disciplinary proceeding. Following observations have been made in paras 12 and 13:

"12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may

interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case." "13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to re- appreciate the evidence or the nature of punishment. In a disciplinary inquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In Union of India V. H.C. Goel this Court held at p. 728 that if the conclusion, upon consideration of the evidence reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could issued."

26. Both the learned Single Judge and the Division Bench have heavily relied on the fact that before forwarding the copy of the report by letter dated 02.04.2008 the Disciplinary Authority-cum-Whole Time Members have already formed an opinion on 25.02.2008 to punish the writ petitioner with major penalty which is a clear violation of principle of natural justice. We are of the view that before making opinion with regard to punishment which is to be imposed on a delinquent, the delinquent has to be given an opportunity to submit the representation/ reply on the inquiry report which finds a charge proved against the delinquent. The opinion formed by the Disciplinary Authority-cum-Whole Time Members on 25.02.2008 was formed without there being benefit of comments of the writ petitioner on the inquiry report. The writ petitioner in his representation to the inquiry report is entitled to point out any defect in the procedure, a defect of substantial nature in appreciation of evidence, any misleading of evidence both oral or documentary. In his representation any inputs and explanation given by the delinquent are also entitled to be considered by the Disciplinary Authority before it embarks with further proceedings as per statutory rules. We are, thus, of the view that there was violation of principle of natural justice at the level of Disciplinary Authority when opinion was formed to punish the writ petitioner with dismissal without forwarding the inquiry report to the delinquent and before obtaining his comments on the inquiry report. We are, thus, of the view that the order of the High Court setting aside the punishment order as well as the Appellate order has to be maintained.

27. In view of the above discussion, we are of the view that present is the case where the High Court while quashing the punishment order as well as Appellate order ought to have permitted the Disciplinary Authority to have proceeded with the inquiry from the stage in which fault was noticed i.e. the Stage under Rule 15 of Rules. We are conscious that sufficient time has elapsed during the pendency of the writ petition before learned Single Judge, Division Bench and before this Court, however, in view of the interim order passed by this Court dated

31.08.2015 no further steps have been taken regarding implementation of the order of the High Court. The ends of justice be served in disposing of this appeal by fixing a time frame for completing the proceeding from the stage of Rule 15.

28. We having found that principles of natural justice have been violated after submission of the inquiry report dated 29.12.2007 all proceedings taken by the Disciplinary Authority after 29.12.2007 have to be set aside and the Disciplinary Authority is to be directed to forward the copy of the inquiry report in accordance with Rule 15(2) of Rules 1965 and further proceedings, if any, are to be taken thereafter. "

54. In **State of U.P. Vs. Shatrughan Lal and Another, (1998) 6 SCC 651**. The relevant paragraphs of the judgment is reproduced as under:-

"It has also been found that during the course of the preliminary enquiry, a number of witnesses were examined against the respondent in his absence, and rightly so, as the delinquents are not associated in the preliminary enquiry, and thereafter the charge sheet was drawn up. The copies of those statements, though asked for by the respondent, were not supplied to him. Since there was a failure on the part of the appellant in this regard too, the principles of natural justice were violated and the respondent was not afforded an effective opportunity of hearing, particularly as the appellant failed to establish that non-supply of the copies of statements recorded during preliminary enquiry had not caused any prejudice to the respondent in defending himself."

55. Reliance is also placed upon a decision of this Court in **Chandrika Yadav Vs. State of Uttar Pradesh and others, passed in Writ Petition No.55836 of 2005**, in which following observations have been made:-

"From the order of disciplinary authority and the pleadings of the counter affidavit, it is evident that the preliminary enquiry was conducted in the matter and various materials as well as the findings of the preliminary enquiry have been relied upon by the disciplinary authority. It is well settled law that findings and materials of the preliminary enquiry cannot be relied upon in the disciplinary proceeding if the delinquent was not associated with preliminary enquiry. Admittedly, in the present case, petitioner was not given any such opportunity. It is a trite law that object of the preliminary enquiry is to satisfy the employer itself that a disciplinary proceeding can be conducted against an employee. Its purpose is to collect the facts. Once the employer is satisfied on the basis of the materials and report of the preliminary enquiry that disciplinary proceeding may be initiated in terms of the relevant service Rule, the delinquent is placed under suspension, and a copy of the charge-sheet and other documentary evidences relied upon in support of the charges are served upon him.

It is noteworthy that if in the disciplinary proceeding the department wants to rely on some materials of preliminary enquiry, it is necessary to supply a copy of said materials to the employee. Reference may be made to the judgement of the Supreme Court in the case of Employees of Firestone Tyre and Rubber Co. (Private) Ltd. v. The Workmen, AIR

1968 SC 236. In a recent judgement in the case of Nirmala J. Jhala v. State of Gujarat and another, (2013) 4 SCC 301, the Supreme Court had the occasion to deal with the scope of preliminary enquiry at length. The observations of the Supreme Court in Nirmala J. Jhala (supra), which are relevant to the present controversy, read as under:

"45. In view of the above, it is evident that the evidence recorded in preliminary inquiry cannot be used in regular inquiry as the delinquent is not associated with it, and opportunity to cross-examine the persons examined in such inquiry is not given. Using such evidence would be violative of the principles of natural justice."

"47. The preliminary enquiry may be useful only to take a prima facie view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry."

"51. There is nothing on record to show that either the preliminary enquiry report or the statements recorded therein, particularly, by the complainant-accused or Shri C.B. Gajjar, Advocate, had been exhibited in regular inquiry. In the absence of information in the charge-sheet that such report/statements would be relied upon against the appellant, it was not permissible for the enquiry officer or the High Court to rely upon the same. Natural justice is an inbuilt and inseparable ingredient of fairness and reasonableness. Strict adherence to the principle is required, whenever civil consequences follow up, as a result of the order passed. Natural justice is universal justice. In certain factual circumstances even non-observance of the rule will itself result in prejudice. Thus, this principle is of supreme importance. [Vide S.L. Kapoor v. Jagmohan, (1980) 4 SCC 379; D.K. Yadav v. J.M.A. Industries Ltd., (1993) 3 SCC 259; and Mohd. Yunus Khan v. State of U.P., (2010) 10 SCC 539)"

"52.2 The enquiry officer, the High Court on administrative side as well as on judicial side, committed a grave error in placing reliance on the statement of the complainant as well as of Shri C.B. Gajjar, Advocate, recorded in a preliminary enquiry. The preliminary enquiry and its report loses significance/importance, once the regular enquiry is initiated by issuing charge-sheet to the delinquent. Thus, it was all in violation of the principles of natural justice."

"52.4 The onus lies on the department to prove the charge and it failed to examine any of the employees of the court i.e. stenographer, Bench Secretary or peon attached to the office of the appellant for proving the entry of Shri Gajjar, Advocate in her chamber on 17-8-1993."

In the present case, no such procedure has been adopted by the respondents as the disciplinary authority has relied upon the preliminary enquiry but there is nothing on the record to indicate that said materials of the preliminary enquiry were supplied to the petitioner. Along with the counter affidavit the respondents have not filed the alleged statement of petitioner's wife Smt. Genda Devi or Smt. Seema Devi. Learned Standing Counsel also could not point out any material from the records produced by

him, from which it can be established that the petitioner has contracted second marriage with Smt. Seema Devi. There is no evidence on the record to the said effect. Merely some letters purportedly written by the petitioner to Smt. Seema Devi cannot establish the relationship of husband and wife. Petitioner has denied that those letters were written by him and the department has not established that those letters were written by the petitioner. Even if those letters are assumed to be correct and written by the petitioner, a perusal thereof do not establish that there was a relationship of husband and wife between them.

After careful consideration of the facts and circumstances of the case as well as the submissions advanced by the learned Counsel for the parties, I am of the view that the disciplinary proceeding conducted against the petitioner is vitiated on the ground of violation of principles of natural justice and as such, the orders passed by the disciplinary authority, appellate authority and revisional authority dated 07th May, 1997, 31st August, 2003 and 28th March, 2005 respectively (annexures-1, 5 and 7 respectively to the writ petition), impugned in this writ petition, cannot be sustained and are hereby quashed. The matter is remitted back to the disciplinary authority to conduct a fresh enquiry in the matter after serving a copy of the charge-sheet upon the petitioner. The enquiry may be conducted and completed in accordance with the law as expeditiously as possible preferably within a period of four months from the date of communication of this order. Petitioner is directed to cooperate in the enquiry and he will not take unnecessary adjournments."

56. A plain reading of the observation made by the Inquiry Officer in the impugned order, as quoted above, and relevant case laws, it is clear that the said observations were made on the basis of fact finding report of 'AAIB' in respect of the incident/accident. After plain reading of the finding of the report, it is also not clear as to what was the main factor for the said incident/accident of the Aircraft as no specification/specific detail has been given in the said report. It is also not clear from the report that the pilot erred in making last minute corrections or that there was any negligence in following the due procedure.

57. In the instant case, the Inquiry Officer has solely relied upon the preliminary enquiry report of the 'AAIB' and 'DGCA' and he has not applied his independent mind while preparing the charge-sheet. The sole objective of 'AAIB' report was to find the cause of Air accident and not to fix the liability of Pilot or any other crew member. The DGCA has also directed the State of U.P. to permit the flying duties to the petitioner after refresher/corrective training to the petitioner and allow normal flight duties to the petitioner but the State Government instead of providing additional/corrective training thereby violating the mandate of 'AAIB' report and defying the explicit order of DGCA of corrective training, terminated the services of the petitioner. The petitioner has also not been supplied the relevant documents for submitting the reply to the show cause, hence the adverse conclusion if drawn against the petitioner in absence of the supply of the relevant documents vitiate the entire disciplinary proceedings. Thus the issue no. 3 is answered accordingly.

58 . While adjudicating the case in hand, I have discussed some causes for the air accidents. One of the main causes of air accidents is 'wake turbulence'. The legal

aspects of the 'wake turbulence' problem are discussed in **Philip Silverman, Vortex Cases : At a Turbulent Crossroads, 39 J. Air L. & Com. 325 (1973)** which defines wake turbulence as a movement of air behind an aircraft. It is invisible to pilot and controller alike. It is not predictable since it is subject to ambient wind; its effect and strength will differ with the size, flap configuration, weight and speed of the aircraft producing it. It develops when air rolls up off the wingtips of an aircraft in flight due to the pressure differentials above and below the wing surface, forming two counter-rotating cylindrical vortices which are commonly called wake turbulence. It is much more severe than "prop wash,'" and can induce an aircraft to roll beyond its control capability. Some measurements have shown peak velocities of the tangential air movements surrounding a vortex core to be as high as 224 feet per second-or 133 knots.

59. In ***Sanbutch Properties v. United States, 343 F. Supp. 611 (ND Cal 1972)*** it has been observed that an experienced pilot flying into San Francisco International Airport crashed when he encountered wake turbulence. The controller had given no warning." The court, in finding for the Government, discussed the relative duties of the controller and the pilot: (a) Had a duty to be aware of the hazard of wake turbulence; (b) Had a duty to be aware of the procedures recommended for avoidance of wake turbulence, and was aware of them; (c) Had a duty to obtain all available information concerning the flight, including weather and wind information; (d) Had a duty to comply with authorizations, clearances and instructions of Air Traffic Control; and (e) Had a duty to operate the aircraft. If the controller has a reasonable basis to give an advisory, he should give it.

60. According to Journal of Air Law and Commerce, Volume 39 | Issue 3 wake turbulence is invisible to pilot and controller alike and is not predictable since it is subject to ambient wind. It develops when air rolls up off the wingtips of an aircraft in flight due to the pressure differentials above and below the wing surface, forming two counter-rotating cylindrical vortices which can induce an aircraft to roll beyond its control capability. It is also not a case of the respondent/ state that the petitioner has ignored any warning about the wake turbulence given by Air Traffic Controller. In fact, the controller did not give any warning to the petitioner about wake turbulence. Therefore, I do no find any negligence on the part of the petitioner.

61. In view of the above, it is apparent that the enquiry has not been conducted in accordance with law and the petitioner was not afforded with the proper opportunity to defend himself and refute the charges efficiently. The enquiry is vitiated and is not sustainable in the eyes of law. Not only the proceedings are bad on account of placing of reliance upon the report of preliminary investigating authority but it also appears that authorities had already made up their mind to dismiss the petitioner from service, even before any opportunity was given to petitioner to submit their reply against the conclusions and findings. In such circumstances, the proceedings are vitiated from the stage of submission of enquiry report and all subsequent proceedings including passing of the orders of dismissal from service, therefore, cannot be sustained and are liable to be quashed.

62. Accordingly, the impugned order dated 05.02.2016 contained at Annexure 10

of Writ Petition No. 2562 (S/B now S/S) of 2016 and order dated 25.04.2016 contained at Annexure 1 of Writ Petition No. 7624 (S/B now S/S) of 2017 are hereby quashed. A writ of mandamus is also issued directing the respondents to reinstate the petitioner in service with all consequential service benefits, however, the petitioner is not entitled for any back wages on the principle of "No Work No Pay". The entire exercise shall be completed within a period of six weeks from the date production of a copy of this order. However, the department is not precluded to initiate inquiry strictly as per the procedure prescribed in accordance with law.

63. The Writ Petition No. 2562 (S/B now S/S) of 2016 and Writ Petition No. 7624 (S/B now S/S) of 2017 are allowed. No costs. Pending applications, if any, stands disposed of.

(2021)07ILR A488
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.07.2021

BEFORE

THE HON'BLE ABDUL MOIN, J.

Service Single No. 3162 of 2010

Smt. Kamla Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Namit Sharma, Avinash Chandra, Ritesh Kumar Srivastava,

Counsel for the Respondents:
C.S.C, D.R. Misra, J.P. Maurya, Rahul Shukla

A. Service Law - UP Basic Education (Staff) Service Rules, 1973 – Rules 2 and 3 – Financial Handbook Part II – Rule 18 – Notification dated 12.09.1989 to amend Rule 18 – Permanent teacher – Automatic termination – Validity – Charge of absence beyond period of five years – Service has been dispensed with by only issuing a show cause notice – No Disciplinary proceeding – Effect – Held, disciplinary proceedings are sine-qua-non prior to imposition of any penalty against an employee for his absence from duty beyond five years with effect from 1989 – Impugned action on the part of respondents would run foul to the settled provision of law. (Para 10, 11, 15 and 16)

Writ Petition partly allowed. (E-1**)**

Cases relied on :-

1. Basic Shiksha Parishad Vs Ram Kishore 2014(10)ADJ153

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for petitioner, learned Standing Counsel for State as well as Shri Rahul Shukla, learned counsel appearing for respondent no. 4.

2. The short question of law which arises before the Court is whether the services of a permanent teacher can be dispensed with on the ground of being absent from duty for a sufficiently long time under the provisions of Rule 18 of Financial Handbook Part II (Volume 2 to 4) Chapter III without resorting to disciplinary proceedings under the disciplinary rule.

3. Admittedly, the services of the petitioner, an Assistant Teacher, are governed by the Uttar Pradesh Basic Education (Staff) Service Rules, 1973. As per the said rules in question, Rule 2 deals with appointing authority, declaring appointing authority of posts mentioned in Column 2 of the schedule. Rule 3 authorizes appointing authority to impose

penalties provided for, for good and sufficient reason. Penalties provided therein are as follows:

(i) Censure;

(ii) withholding of the increments including stoppage at an efficiency bar;

(iii) reduction to a lower post on time-scale, or to a lower stage in a time scale;

(iv) recovery from pay of the whole or part of any pecuniary loss caused to the Board by negligence or breach of orders;

(v) removal from the service of the Board which does not disqualify him from future employment;

(vi) dismissal from the service of the Board which ordinarily disqualifies him from future employment.

4. Rule 4 authorize appointing authority to place under suspension, such person against whose conduct an enquiry is contemplated or is proceeding, pending conclusion of enquiry, and such person is entitled for suspension allowance during his suspension period at the rate applicable to Government servant. Rule 5 provides for forum of appeal against the order of appointing authority.

5. Six categories of penalties have been specified in Rule 3, out of which three penalties specified in Rule 5(1) could be the subject-matter of an appeal. The remaining penalties could be challenged under Rule 5(2) by means of a statutory representation to the Director or the officer specified by him. Rule 5(2) empowers the employees to file a representation against those punishments which are not specified in Rule 5(1). Rule 5(3) clearly provides that procedure laid down in CCS Rules, as applicable to the servants of U.P. Government shall as far as possible, be followed in disciplinary proceedings, appeals and representation under these Rules.

6. The instant petition has been filed challenging the order dated 26.12.2007 passed by the respondent no. 4 i.e. District Basic Education Officer, Barabanki whereby the services of the petitioner, an Assistant Teacher, has been terminated on ground of being unauthorisedly absent for sufficiently long time. The period of absence may not detain the Court, the details of which have been given in paragraphs 11 to 13 of the counter afffidavit, however what is relevant is that the services of the petitioner have been dispensed with in terms of Rule 18 of Financial Handbook Part II (Volume 2 to 4) Chapter III (hereinafter referred to as 'Rule 18').

7. For the sake of convenience Rule 18 of Financial Handbook Part II (Volume 2 to 4) Chapter III is reproduced as under:

"18. Unless the Government, in view of the special circumstances of the case, otherwise determine, after five years' continuous absence from duty elsewhere than on foreign service in India, whether with or without leave, no Government servant shall be granted leave of any kind. Absence beyond five years will attract the provisions of rules relating to disciplinary proceedings."

8. A perusal of the aforesaid provision would indicate that no government servant

shall be granted leave of any kind except in special circumstances and absence beyond five years will attract the provisions of rules relating to disciplinary proceedings meaning thereby that in case the government servant is absent beyond five years the same would entail disciplinary proceedings against him.

9. In the instant case the services of the petitioner have been dispensed with on the ground of having been absent for a period beyond five years without informing the department and without any leave having been sanctioned.

10. Once 'Rule 18' specifically provides that where an employee is absent beyond a period of five years the absence would attract disciplinary proceedings thus merely because the petitioner was absent beyond the period of five years the same would not entail the automatic termination of the services rather prior to terminating the services of the petitioner disciplinary proceedings were required to be held.

11. Upon a pointed query made to Shri Rahul Shukla, learned counsel for respondent no. 2 as to whether any disciplinary proceedings have been initiated prior to dispensing with the services of the petitioner through the impugned order dated 26.12.2012, Shri Shukla candidly admits that no disciplinary proceedings were initiated although show cause notice had been issued to the petitioner which was also published in the daily newspaper.

12. Be that as it may, the fact of the matter remains that no disciplinary proceedings were initiated against the petitioner prior to terminating her services, which a sine-qua-non as per the provisions of 'Rule 2018'.

13. The question of law, as has arisen in the instant case, has already been answered by a Division Bench of this Court in the case of **Basic Shiksha Parishad vs Ram Kishore 2014(10)ADJ153** by a Bench presided by Justice D. Y. Chandrachud (as his Lordship then was) in which considering the unamended provision of Rule 18 of the Financial Handbook the Division Bench held as under:

"8. The service condition of claimant opposite party No. 1 was governed by U.P. Basic Education (Staff) Service Rules 1973 framed in exercise of powers conferred by Sub-section (1) of Section 19 of U.P. Basic Education Act, 1972. As per the said Rules in question, Rule 2 deals with appointing authority, declaring appointing authority of posts mentioned in Column 2 of the schedule. Rule 3 authorizes appointing authority to impose penalties provided for, for good and sufficient reason. Penalties provided therein are as follows:

(i) Censure;

(ii) withholding of the increments including stoppage at an efficiency bar;

(iii) reduction to a lower post on time-scale, or to a lower stage in a time scale;

(iv) recovery from pay of the whole or part of any pecuniary loss caused to the Board by negligence or breach of orders;

(v) removal from the service of the Board which does not disqualify him from future employment;

(vi) dismissal from the service of the Board which ordinarily disqualifies him from future employment.

9. Rule 4 authorize appointing authority to place under suspension, such person against whose conduct an enquiry is contemplated or is proceeding, pending conclusion of enquiry, and such person is entitled for suspension allowance during his suspension period at the rate applicable to Government servant. Rule 5 provides for forum of appeal against the order of appointing authority.

10. Six categories of penalties have been specified in Rule 3, out of which three penalties specified in Rule 5(1) could be the subject-matter of an appeal. The remaining penalties could be challenged under Rule 5(2) by means of a statutory representation to the Director or the officer specified by him. Rule 5(2) empowers the employees to file a representation against those punishments which are not specified in Rule 5(1). Rule 5(3) clearly provides that procedure laid down in CCS Rules, as applicable to the servants of U.P. Government shall as far as possible, be followed in disciplinary proceedings, appeals and representation under these Rules.

11. Once such are the statutory provisions holding the field in the matter of punishment to be awarded by appointing authority, for good and sufficient reason, after following the procedure laid down in CCS Rules, as applicable to the servants of Uttar Pradesh Government, and admittedly said procedure has not been adhered to, rather the route that has been taken for dispensing with the services of claimant opposite party No. 1 is that on account of absence from duty his service stands terminated, can the said action taken be justified in the facts of the present case.

12. There cannot be any doubt to this proposition that absence from duty/unauthorized absence/absenteeism constitutes misconduct in itself as same clearly tantamounts to failure of devotion to duty or behavior unbecoming of Government servant and, accordingly, on such misconduct being substantiated on the basis of evidence adduced, for good and sufficient reason, appropriate punishment commensurate to the charge can always be awarded. The authority at the point of time when it proceeds to take decision in such matter has to keep in mind as to whether absence has been willful or same has been because of compelling circumstances. Apex Court in the case of Krushnakant B. Parmar v. Union of India, MANU/SC/0118/2012MANU/SC/0118/2012 : 2012 (3) SCC 178, while dealing with the matter of absence from duty has held as follows:

"17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be willful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the

employee cannot be held guilty of failure of devotion to duty or behavior unbecoming of a Government servant.

18. In a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in absence of such finding, the absence will not amount to misconduct.

19. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is willful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty."

13. Apex Court in the case of Vijay S. Sathaye v. Indian Airlines Limited and others, MANU/SC/0923/2013MANU/SC/0923/2013 : 2013 (10) SCC 253, while considering the issue of termination of service vis-a-vis abandonment of service, stated that termination entails positive action on the part of employer, while abandonment is unilateral action of employee and in the said context, has held as follows:

"12. It is a settled law that an employee cannot be termed as a slave, he has a right to abandon the service any time voluntarily by submitting his resignation and alternatively, not joining the duty and remaining absent for long. Absence from duty in the beginning may be a misconduct but when absence is for a very long period, it may amount to voluntarily abandonment of service and in that eventuality, the bonds of service come to an end automatically without requiring any order to be passed by the employer.

13. In M/s. Jeewanlal (1929) Ltd., Calcutta v. Its Workmen, MANU/SC/0232/1961MANU/SC/0232/1961 : AIR 1961 SC 1557, this Court held as under:

".....there would be the class of cases where long unauthorised absence may reasonably give rise to an inference that such service is intended to be abandoned by the employee."

(See also: Shahoodul Haque v. The Registrar, Co-operative Societies, Bihar and another, MANU/SC/0444/1974MANU/SC/0444/1974 : AIR 1974 SC 1896).

14. For the purpose of termination, there has to be positive action on the part of the employer while abandonment of service is a consequence of unilateral action on behalf of the employee and the employer has no role in it. Such an act cannot be termed as 'retrenchment' from service. (See: State of Haryana v. Om Prakash and another, MANU/SC/1371/1998MANU/SC/1371/1998 : (1998) 8 SCC 733).

15. In Buckingham and Carnatic Co. Ltd. v. Venkatiah and another, MANU/SC/0163/1963MANU/SC/0163/1963 : AIR 1964 SC 1272, while dealing with a similar case, this Court observed:

"5.....Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf."

A similar view has been reiterated in G.T. Lad and others v. Chemicals and Fibres India Ltd., MANU/SC/0264/1978MANU/SC/0264/1978 : AIR 1979 SC 582.

16. In Syndicate Bank v. General Secretary, Syndicate Bank Staff Association and another, MANU/SC/0307/2000MANU/SC/0307/2000 : AIR 2000 SC 2198; and Aligarh Muslim. University and others v. Mansoor Ali Khan, MANU/SC/0533/2000MANU/SC/0533/2000 : AIR 2000 SC 2783, this Court ruled that if a person is absent beyond the prescribed period for which leave of any kind can be granted, he should be treated to have resigned and ceases to be in service. In such a case, there is no need to hold an enquiry or to give any notice as it would amount to useless formalities.

A similar view has been reiterated in V.C. Banaras Hindu University and others v. Shrikant, MANU/SC/8170/2006MANU/SC/8170/2006 : AIR 2006 SC 2304; Chief Engineer (Construction) v. Keshava Rao (dead) by Lrs., MANU/SC/0215/2005MANU/SC/0215/2005 : (2005) 11 SCC 229; and Regional Manager, Bank of Baroda v. Anita Nandrajog, MANU/SC/1587/2009MANU/SC/1587/2009 : (2009) 9 SCC 462."

14. Abandonment or relinquishment of service is always a question of intention, and such an intention can be attributed to employee when there is adequate evidence in that behalf. Absence from duty is a misconduct and if the authority chooses to initiate action for according punishment for the said misconduct then he would have to adhere to the provisions of CCS Rules as applicable in the State of U.P. by holding regular departmental enquiry and only in cases where an incumbent is absent beyond the prescribed period for which leave of any kind be granted, then he has to be accepted as having abandoned his service, and in such a situation there is no need to hold enquiry or to give any notice.

15. In the State of U.P. the Government servants in various matters such as abandonment of service and leave etc. are governed by Financial Handbook i.e. U.P. Fundamental Rules, and same set of Rules are applicable to the employees of Board also.

Fundamental Rule 18 runs as follows:

"18. Unless the Government in view of the special circumstances of the case, shall otherwise determine, after five years' continuous absence from duty elsewhere then on foreign service in India whether with or without leave, a Government servant ceases to be in Government employee"

16. The aforementioned Fundamental Rule provides for abandonment of service/cessation of service after five years continuous absence from duty, whether with or without leave. Once five year continuous absence from duty is there, then leave or no leave will not make any difference, the abandonment of service/cessation of employment has to be accepted and prior to expiry of period of five years, if there is absence from duty, the same has to be accepted as misconduct and

for the same disciplinary proceedings will have to be initiated by holding regular departmental enquiry. Here the shortcut method that has been adhered to cannot at all be subscribed by law. "

14. When the facts of the instant case are seen in the light of Division Bench judgement in the case of **Ram Kishore (Supra)** what is apparent that the Division Bench while considering the unamended Rule 18 of the Financial Handbook held that there cannot be any automatic termination of the services of an employee and in case of absence from duty, the same has to be treated as misconduct and for the said misconduct disciplinary proceedings will have to be initiated by holding regular departmental inquiry and the shortcut of Rule 18 cannot be subscribed by law.

15. Rule 18 has been amended vide notification dated 12.09.1989 wherein absence beyond 5 years has been indicated to attract the provisions of rules relating to disciplinary proceedings meaning thereby that with effect from 1989 disciplinary proceedings are sine-qua-non prior to imposition of any penalty against an employee for his absence from duty beyond five years.

16. Admittedly, in this case, the disciplinary proceedings have not been initiated against the petitioner rather her services have been dispensed with by only issuing a show cause notice and thus the impugned action on the part of respondents would run foul to the settled provision of law in this regard.

17. Accordingly, the writ petition is **partly allowed**. The impugned order dated 26.12.2007, a copy of which is annexure 1 to the petitioner, passed by respondent no. 4 is quashed.

18. The court is of the view that disciplinary proceedings should be initiated against the petitioner but learned counsel for petitioner contends that the petitioner is now aged about 71 years and would not be able to face disciplinary proceedings at her advanced age.

19. Considering the aforesaid it is provided that no back wages shall be payable to the petitioner on the principle of "no work no pay". However the period of service rendered by the petitioner shall be counted as service for all purposes so as to enable the petitioner to receive pension and other retiral dues. The arrears of pension would be payable to the petitioner with effect from the date of her retirement. The action in this regard will be taken by the respondents within three months.

(2021)07ILR A494
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.07.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 3458 of 2009

U.P. Senior Shiksha Sangh ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
C,B, Pandey, Dr. Lalta Prasad Mishra, Girish Chandra Verma, Rohit Tripathi

Counsel for the Respondent:
C.S.C.

A. Civil Law - UP Basic Education Act, 1972 – Pension – Entitlement thereof – Teachers and non-teaching staff in Basic Schools – Appointment made prior to enforcement of New Pension Scheme (NPS) i.e. 01.04.2005 – Applicability of Old

Pension Scheme (OPS) – Held, only on the ground that the institution was brought within purview of Payment of Salaries Act vide notification issued on 02.12.2006 after cut-off date of enforcement of applicability of NPS cannot be a ground for depriving the teachers and non teaching staff from OPS – No justification appears in not treating the petitioners to be teachers and non teaching staff for grant of benefit of OPS in case of taking of institutions on grant in aid list after 01.04.2005 – Held further, Right of the petitioners, who have been appointed much prior to enforcement of NPS, to be covered under OPS shall not be affected. (Para 60, 62 and 71)

Writ Petition allowed. (E-1)

Cases relied on :-

1. Special Appeal No.123 of 2013; U.P. Senior Basic Shikshak Sangh Sindhi Vidyalaya Vs St. of U.P. & ors.

2. Shailendra Daina & ors. Vs S.P. Dubey & ors.; (2007) \5 SCC 535

3. N. Suresh Nathan & anr. Vs U.O.I. & ors.; 1992 Supp. (1) Scc 584

4. Rajinder Singh (Dr.) Vs St. of Punj. & ors.; 2001 (2) UPLBEC 1502

5. Shyam Sadan Singh (Dr.) Vs Chancellor, Deen Dayal Upadyyay University of Gorakhpur & ors.; 2002 (1) UPLBEC 152

6. Girdhari Lal Shankwar Vs St. of U.P. & ors.; 2014 (1) UPLBEC 657

7. Narinder S. Chadha & ors. Vs Municipal Corporation of Greater Mumbai & ors.; 2015 (33) LCD 1743.

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

(C.M.A. No. 66745/2021-Correction Application)

Heard learned counsel for the parties.

The following corrections are being incorporated in the judgment and order dated 16.06.2021 :-

In second line of paragraph-4, "100" is deleted and in its place, **"1000"** is added.

In the last line of paragraph-17, "08.03.2020" is deleted and in its place, "**08.03.2002**" is added.

In the fourth line of paragraph-38, "1972" is deleted and in its place, "**1978**" is added.

In the fifth line of paragraph-39, "1970" is deleted and in its place, "**1978**" is added.

In the seventh line of paragraph-54, "100" is deleted and in its place, "**1000"** is added.

In the eleventh line of paragraph-54, "1972" is deleted and in its place, "**1978"** is added.

Accordingly, the correction application is allowed to the extent **mentioned above**.

For ready reference, the corrected order is being reproduced below :-

"(1) Heard Sri L.P. Misra, learned counsel assisted by Sri G.C. Verma, Sri Vinay Mishra, Sri Pt. S. Chandra, Sri Hari Prakash Yadav and Sri K.M. Shukla, learned counsel for the petitioner and Sri Alok Sharma, learned Additional Chief Standing Counsel for the respondent State, Sri Ajay Kumar, Sri Neeraj Chaurasiya, Sri Vindhyawasini Kumar, Sri Prashant Arora,

Sri J.B.S. Rathour and Sri P.K. Bishen, learned counsel for the respondents.

(2) This is a bunch of 66 writ petitions. Facts of all the connected writ petitions are same and is in regard to claim of Old Pension Scheme (OPS), therefore, this bunch of writ petitions is being decided by means of a common order treating Writ Petition No.3458 (S/S) of 2009 to be leading writ petition.

(3) Brief fact of the case is that several senior basic level institutions were established during year 1989-1998 in which teaching and non teaching staff were appointed. The Government has discontinued the monthly pension scheme vide order dated 28.03.2005 and w.e.f. 01.04.2005 placed a new contributory pension scheme to new recruits. The government order issued by the State Government on 28.03.2005 has laid down New Pension Scheme enforced w.e.f. 01.04.2005 and vide impugned order, the State Government refused to cover the claim of the teaching and non teaching staff from the zone of old pension scheme on the ground that the institutions where they have been appointed have been brought after the enforcement of NPS.

4) Vide order dated 02.12.2006, the Government of U.P. admitted those **1000** institutions, who were established between 1989-1998 in grant in aid list. However, teachers of those institutions are not being paid benefit of pension as per OPS, however they were appointed prior to 01.04.2005, therefore, the present bunch of writ petitions has been filed.

5) Bunch of writ petitions were filed before this Court claiming the relief sought in the present bunch of writ petitions claiming pensionary benefit under the Scheme of 1964 challenging certain orders, whereby members of the Association were ordered to be governed by New Pension Scheme (NPS) introduced vide notification dated 28.03.2005 ignoring the fact that the institution under which the members of the Association were working started receiving grant in aid after 01.04.2005.

6) The claim setup by the petitioners of the above referred writ petitions was not accepted by learned Single Judge and the writ petitions were dismissed.

7) Being aggrieved by the judgment passed by learned Single Judge, a special appeal was preferred by the petitioners, which was also dismissed vide judgment and order dated 04.12.2015. A review application was filed mainly on the ground that the Division Bench in dismissing the appeal has relied on the judgment passed by this court in the case of **Budhiram Vs. State of U.P. and others; Civil Misc. Writ Petition No.45217 of 2012** decided vide judgment and order dated 26.09.2012.

8) The judgment and order passed in the case of Budhiram (Supra) was subsequently set aside by the Division Bench with remission of the case to learned Single Judge for a fresh decision of the issue along with pending petitions.

9) In view of the judgment in the case of Budhiram (Supra), this bunch of writ petitions is being decided after hearing learned counsel for the parties.

10) In certain writ petitions connected to the bunch matter, by means of interim orders passed by this Court, G.P.F. from the salary of the teaching and non teaching staff have been deducted and after passing

the impugned orders challenged in the writ petitions, the claim of applicability of Old Pension Scheme (OPS) was rejected and the deduction of GPF amount was stopped.

11) In the writ petitions filed by U.P. Senior Basic Shikshak Sangh by enclosing copy of list of members, a direction was issued for deposit of court fee by the members. The members have paid the court fee, which has been filed before this court through supplementary affidavit.

12) Certain conditions of the teachers are governed by the rules known as U.P. Recognized Basic (Junior High School) (Recruitment and Condition of Service of Teachers) Rules, 1978 (for short "Rules of 1978") and certain condition of the non teaching staff are governed under the U.P. Recognised Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Ministerial Staff And Group 'D' Employees) Rules, 1984 (for short, "Rules of 1984").

13) Rule 19 of Rules of 1978 provides for payment of provident fund to the teachers and Head Masters employed in recognized schools in accordance with scheme applicable to the aided institutions.

14) Rule 19 of 1978 Rules has been amended through notification dated 04.12.2019 and proviso has been aided to the effect that Rule 19 shall not be effective for teaching and non teaching staff appointed after 01.04.2005.

15) A Tri Benefit Scheme was introduced to the teaching and non teaching staff who were getting G.P.F. but were not getting benefit of insurance and pension. Accordingly, a government order was issued on 10.08.1978, as per said scheme. Further government order has been issued on 23.05.1998 followed by government order dated 10.03.1978 by which it was directed that the Tri Benefit Scheme of 1965 would be available to the teachers of the aided schools.

16) At earlier point of time, to meet out the pensionary benefits to teachers appointed during course of non aided institution recognized under the relevant provisions, it was permitted to deposit amount of fund with interest upto 30.09.1998 for the service rendered of teaching and non teaching staff before providing grant in aid which will be counted for payment of pension.

17) The cut off date fixed was extended by the further government order issued on 17.02.1999. The State Government through a policy decision taken on 15.07.1999 directed the Director, All Regional Directors and All District Basic Education Officers (DBEO) for fixation of salary of teaching and non teaching staff to whom grant in aid was extended by counting their service from the date of approval granted by the DBEO for appointment. The government order for deposition of fund issued another government order dated **08.03.2002** fixing a cut of date.

18) Writ Petition No.75746 of 2005 was filed challenging the cut off date in the government order dated 26.07.2001 from 30.06.1999 to 31.03.2002. The writ petition was allowed vide judgment and order dated 08.09.2006 with a direction for extension of cut of date.

19) Another writ petition - Writ-A No.23525 / 2012 was filed before this Court, which was allowed vide judgment

and order dated 04.05.2012 against which Special Appeal No. 503 / 2014 was filed by the State, which was dismissed by the Division Bench of this Court considering that the payment was made prior to 01.04.2005 and approval was granted before the said date.

20) Vide notification issued on 28.03.2005, NPS was implemented w.e.f. 01.04.2005 to whom who were appointed on or after 01.04.2005. Applications were invited for taking the institution on grant in aid list on fulfilling requirement of scheme notified by the State Government. In regard to 1000 recognized junior high schools, 800 boys schools recognized upto 30.04.1988 and 200 girls schools recognized upto 24.03.1999 and accordingly, the institutions were brought within purview of Payment of Salaries Act, 1978.

21) The Director of Basic Education issued an order for deposition of salary to teaching and non teaching staff, to whom grant in aid was extended through government order dated 02.12.2006 as per provisions mentioned in government order dated 15.07.1999, wherein it has been provided that salary of teaching and non teaching staff shall be fixed from the date of approval granted by the DBEO.

22) Vide notification issued on 14.08.2008 by the State Government, it has been clarified that NPS implemented w.e.f. 01.04.2005 shall be applicable to employees, who were appointed on or after 01.04.2005.

23) Applications were filed by the petitioners before the State Government requesting therein for extension of date for depositing management's fund and payment of pension to the teachers and non teaching staff who have been appointed prior to 01.04.2005. The petitioners of Writ Petition No.8340 of 2009 and 1031 of 2009 submitted applications for extension of time but no decision was communicated even after recommendation made by respondent No.2 dated 26.10.2007.

24) Direction was issued by this Court to the State Government for giving information in regard to recommendation made by respondent No.2 for extension of date. Thereafter, the impugned order dated 08.04.2009 has been passed.

25) Assailing the impugned order, submission of learned Senior Counsel for the petitioners is that the impugned order is neither policy decision not government order, therefore, the rider imposed in regard to applicability of NPS upon the petitioners is arbitrary and contrary to applicable rules.

26) Their next submission is that vide impugned order the Special Secretary of State Government has tried to modify the NPS implemented upon the employees who entered in service on or after 01.04.2005. In case of petitioners, in bunch of matters, none of the petitioner has entered in service on or after 01.04.2005. Thus, his submission is that the impugned order is contrary to NPS and cannot be modified by an executive order passed by the respondents.

27) Their further submission is that the impugned order overlooked Rule 19 of Rules of 1978. Rule 19 does not carve out the distinction between aided and unaided institutions. The Special Secretary has also failed to appreciate the fact that the service rendered by the teachers and non teaching staff while the institution was not on grant in aid list has been made basis for taking the institution on the list of grant in aid.

28) The State Government issued government orders according to government order issued in year 1978 as per scheme of 1965 and decisions were taken for depositing the managerial fund in regard to adding the service of teachers and non teaching staff rendered by them before providing grant in aid for payment of pensionary benefits.

29) His further submission is that the Special Secretary was having no authority to add his own view by passing the impugned order in the notification dated 28.03.2005, whereby NPS was enforced.

30) In support of his submissions, he relied upon certain judgments, which are as under:

i) U.P. Senior Basic Shikshak Sangh Sindhi Vidyalaya Vs. State of U.P. and others; Special Appeal No.123 of 2013.

ii) Shailendra Daina and others Vs. S.P. Dubey and others; 2007 (5) SCC 535.

iii) N. Suresh Nathan and another Vs. Union of India and others; 1992 Supp. (1) Scc 584.

iv) Rajinder Singh (Dr.) Vs. State of Punjab and others; 2001 (2) UPLBEC 1502.

v) Shyam Sadan Singh (Dr.) Vs. Chancellor, Deen Dayal Upadyyay University of Gorakhpur and others; 2002 (1) UPLBEC 152.

vi) Girdhari Lal Shankwar Vs. State of U.P. and others; 2014 (1) UPLBEC 657.

vii) Narinder S. Chadha and others Vs. Municipal Corporation of Greater Mumbai and others; 2015 (33) LCD 1743.

31) Per contra, learned counsel for the respondents submitted that the Special Secretary by passing the impugned order has committed no error and the order impugned has been passed in consonance with provisions of NPS.

32) He next submitted that the impugned order challenged in bunch of writ petitions does not suffer from any illegality and is just and valid.

33) His further submission is that the provisions relied upon by learned Senior Counsel for the petitioners is not applicable, therefore, the submission advanced by learned Senior Counsel for the petitioners is misplaced and submitted that the writ petitions filed claiming applicability of OPS are liable to be dismissed.

34) I have considered the submissions advanced by learned counsels for the parties and perused the material on record.

35) To resolve the controversy involved in the present matter, the judgments relied upon by learned counsel for the petitioners are being quoted below:-

i) U.P. Senior Basic Shikshak Sangh Sindhi Vidyalaya Vs. State of U.P. and others; Special Appeal No.123 of 2013.

ii) Shailendra Daina and others (Supra):

"26. In N. Suresh Nathan v. Union of India a three Judge Bench was called upon to decided a similar question as involved in the present case, namely, whether the three years' service prior to obtaining teh degree or three years' service after obtaining the degree. The relevant Rule 11 provided for recruitment by promotion from the grade of Junior Engineers. Two categories weer provided therein viz. one of degree-holder Junior Engineers with three years' service in the grade and the other of diploma-holder Junior Engineers with six years; service in the grade, the provision being for 50% from each category. While interpreting the rule, this Court said that the entire scheme did indicate that the period of three years can commence only from the date of obtaining the degree and not earlier. The service in the grade as a diploma holder and, therefore, that period of three years service can commence only from the date of obtaining the degree and not earlier. The service in the grade as a diploma-holder prior to obtaining the degree cannot be counted as service in the grade with a degree for the purpose of three years' service as a degree-holder. The Court observed as follows: (SCC p.586 papa 4)

"4.In our opinion, this appeal has to be allowed. There is sufficient material including the admission of respondent diploma-holders that the practice followed in the department for a long time was that in the case of diploma-holder Junior Engineers who obtained the degree during service, the period of three years' service in the grade for eligibility for promotion as degree - holders commenced from the date of obtaining the degree and the earlier period of service as diploma-holders was not counted for this purpose. This earlier practice was clearly admitted by the respondent diploma -holders in para 5 of their application made to the Tribunal at p115 of the paper book. This also appears to be the view of the Union Public Service Commission contained in their letter dated December 6, 1968 extracted at pp. 99-100 of the paper book in the counter affidavit of Respondents 1 to 3. The real question, therefore, is whether the construction made of this provision in the rules on which the past practice extending over a long period is based is untenable to require upsetting it. If the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not be appropriate. It is in this perspective that the question raised has to be determined.

From a reading of the aforesaid judgment, it is apparent that after construing the relevant rule the Court has found that the past practice followed in the Department is consistent with the interpretation provided to the relevant Rule by the Court.

27. The same question once again came before another two Judge Bench of this Court in M.B. Joshi v. Satish Kumar Pandey. This time an interpretation was required with reference to a quota of 10% for the graduate Sub-Engineers completing eight years of service. The relevant Rule provided for Sub-Engineers to qualify for promotion to the post of Assistant Engineers and qualifying service provided was twelve years for diploma holders and eight years for such Sub Engineers who had obtained degree of graduation in the course of service. By an executive order, 50% quota by promotion was sub-divided prescribing 35% for diploma holders completing twelve years of service, 5% for Draftsmen and Head Draftsmen completing

twelve years of service and 10% for graduate Engineers completing eight years of service. The Court was called upon to consider whether the period of eight years can only be counted from the date when the diploma holder sub Engineers acquired the degree of Engineering and not prior to the said date. The controversy arose between the parties is summarised in para 5 of the judgment as under: (SCC pp 422-23)

"5. The short controversy arising in these cases relates to the determination of seniority amongst the diploma holder Sub Engineers who acquired the degree of graduation in Engineering during the period of service qualifying them for promotion in 8 years to the post of Assistant Engineer.

29. In para 11 of the judgment, the Court discussed the ratio and held: (M.B. Joshi Case, SCC p. 426)

"11. A perusal of the above observations made by this Court clearly show that the respondent diploma-holders in that case has admitted the practice followed in that department for a long time and the case was mainly decided on the basis of past practice followed in that department for a long time. It was clearly laid down in the above case that if the past practice is based on one of the possible constructions which can be made of the rules then upsetting the same now would not ber appropriate. It was clearly said 'it is in this perspective that the question raised has to be determined'. It was also observed as already quoted above that the Tribunal was not justified in taking the contrary view and unsettling the settled practice in the department. That apart the scheme of the rules in N. Suresh Nathan case was entirely different from the scheme of the rules before us. The rule in that case prescribed for appointment by promotion of Section Officers/Junior Engineers provided that 50 per cent quota shall be from Section Officers possessing a recognised degree in Civil Engineering was made equivalent with three years' service in the grade. Thus, in the scheme of such rules the period of three years' service was rightly counted from the date of obtaining such degree. In the cases in hand before us, the scheme of the rules is entirely different".

31. Similar issue once again came before a two-Judge Bench of this Court in D. Stephen Joseph v. Union of India. The exact question was as follows:(SCC p. 754, para 1)

"[W]hetehr for promotion to the post of Assistant Engineer in the 50% promotion quota reserved for the person possessive degree in Electrical Engineering from a recognized university or an equivalent with three years' regular service in the grade of Junior Engineers in the Electricity Department, Government of Pondicherry, three years' experience as Junior Engineer in the grade is to be counted from the date of acquisition of the degree in Electrical Engineering or the length of service in the grade of Junion Engineers is to be reckoned if the incumbent at the time of promotion to the 50% quota also possesses degree in Electrical Engineering.

32. The ambit of N. Suresh Nathan case is explained in D. Stephen Joseph wherein it is said in para 5 that the State Government is labouring under a wrong impression as to the applicability of

the past practice as indicated in N. Suresh Nathan case. This Court, in the said decision, has only indicated that the past practice should not be upset if such practice conforms to the Rule for promotion and consistently followed for some tiem past. The Rule has been interpreted in a particular manner and N. Suresh Nathan case only indicates that past practice must be referable to the applicability of the Rule as interpreted by the Court's order in a particular manner consistently for some time and would lend support to the interpretation of the Rule. The Court emphasises that any past practice dehors the Rule cannot be taken into consideration as past practice consistently followed for long by interpreting the Rule and N. Suresh Nathan case was distinguished in the facts of that case and the language of the Rule which came up for consideration. D. Stephen Joseph provides for promotion to 50% quota from Junior Engineers possessing degree in Electrical Engineering from a recognised university with three years' regular service in the grade of Junior Engineers. On the plain language of the rule, this Court has held that the requirement of the Rule is three years' experience as Junior Engineer in the grade and not the acquisition of degeee in Electrical Engineering. Thus, it cannot be said that in M.B. Joshi and D. Stephen Joseph the Court has taken a different view than what was taken by a three Judge Bench in N. Suresh Nathan Case. In N. Suresh Nathan case the Court has interpreted the Rule which provides for a particular length of service in the feeder post as qualifying service completed with educational qualification to enable the candidates to be considered for promotion and, thus the experience so obtained in the service would necessarily mean the experience obtained after the requisite qualification was acquired. Thus, the decision turns on the language of the Rule and has distinguished N. Suresh Nathan case on that basis.

33. In Anil Kumar Gupta v. Municipal Corporation of Delhi the relevant rules which came up for consideration provided for essential qualification for appointment viz (A) degree in civil engineering (b) two years professional experience. The age was not exceed 30 years (relaxable for government servant and MCD employees). The applications were received for appointment to the post of Assistant Engineer (Civil) in the engineering department of MCD. The applications were received from the departmental candidates as well as other. The selection board of MCD has prescribed the norms for awarding marks. So far as the experience part was concerned, break up was; upto two years'experience-'no marks" 3 to 12 years, and above experience @ 1/2 mark i.e. for ten years - 5 marks, and viva vice - 15 marks. The question for consideration was whether the pre degree experience of the candidate can be taken into consideration for awarding the marks or whether the candidate's experience being after obtaining the degree is to be taken into consideration for awarding the marks. In para 20 of the judgment, the Court has said that the provisions regarding experience speaks only of professional experience of two years and does not, in any manner, connect it with the degree qualification. Further, the Court has considered N. Suresh Nathan case and said in para 22 that N. Suresh Nathan case was based initially on the practice followed in the department over a long number of years and when the rules were understood as full

service of three years after obtaining the degree and on that basis it was held that the service was not include the service while holding a diploma. In para 23, the court cautioned that any practice which is dehors the rules can be no justification for the department to rely upon. Such past practice must relate to the interpretation of the rule in a particular manner and while interpreting the language of the notification, the court held that two years, professional experience need not entirely be the experience obtained after obtaining the degree. Requirement is only degree and two years, professional experience and not the experience as degree holder. We are afraid that the observation of the Court that N. Suresh Nathan case was decided mainly on the past practice followed in the department, would not be a correct reading of N. Suresh Nathan Case. This case was essentially decided on the interpretation of the rule and the Court found support to that interpretation from the past practice followed in the department. Thus, it appears from this judgment that essentially N. Suresh Nathan case was not followed on the interpretation of the Rule, which came in question for consideration before the Court and it was held that the professional experience required cannot be read to have any connection with the degree in civil engineering and, therefore, the professional experience in service irrespective of a degree in civil engineering would be considered for alloting marks by the selection board.

43. Taking into consideration the entire scheme of the relevant rules, it is obvious that diploma-holders will not be eligible for promotion to the post of Assistant Engineer in their quota unless they have eight years service, whereas the graduate engineers would be required to have three years service experience apart from their degree. If the effect and the intent of the rules were such to treat the diploma as equivalent to a degree for the purpose of promotion to the higher post, then induction to the cadre of Junior Engineers from two different channels would be required to be considered similar, without subjecting the diploma-holders to any further requirement of having a further qualification of two years service. At the time of induction in to the service to the post of Junior Engineers, degree in engineering is a sufficient qualification without there being any prior experience, whereas diploma-holders should have two years' experience apart from their diploma for induction in the service. As per the service rules, on the post of Assistant Engineer, 50% of total vacancies would be filled up by direct recruitment, whereas for the promotion specific quota is prescribed for a graduate Junior Engineer and a diploma-holder Junior Engineer. When the quota is prescribed under the rules, the promotion of graduate junior engineers to the higher post is restricted to 25% quota fixed. So far as the diploma holders are concerned, their promotion to higher post is confined to 25%. As an eligibility criterion, a degree is further qualified by three years service for the junior engineers, whereas eight years service is required for the diploma holders. Degree with three years service experience and diploma with eight years service experience itself indicates qualitative difference in the service rendered as degree-holder Junior Engineer and diploma-holder Junior Engineer. Three years' service experience as a graduate Junior Engineer and eight years' service experience as a diploma-holder Junior Engineer, which is the

eligibility cri terion for promotion, is an indication of different quality of service rendered. In the given case, can it be said that a diploma-holder who acqu ired a degree during the tenure of his service, has gained experience as an Engineer just because he has acquired a degree in Engineering. That would amount to say that the experience gained by him in his service as a diploma-holder is qualitatively the same as that of the experience of a graduate Engineer. The Rule specifically made difference of service rendered as a graduate Junior Engineer and a diploma-holder Junior Engineer. Degree-holder Engineer 's cxpcricnce cannot be substituted with diploma-holder's experience. The distnction between the experience of degree-holders and diploma-holders is maintained under the Rules in further promotion to the post of Executive Engineer also, wherein there is no separate quota assigned to degree-holders or to diploma-holders and the promotion is to be made from the cadre of Assistant Engineers. The Rules provide for different service experience for degree-holders and diploma holders. Degree-holder Assistant Engineers having eight years of service experience would be eligible for promotion to the post of Executive Engineer, whereas diploma-holder Assistant Engineers would be required to have ten years' service experience on the post of Assistant Engineer to become eligible for promotion to the higher post. This indicates that the Rule itself ·makes differentia in the qualifying service of eight years for degree holders and ten years' service experience for diploma-holders. The Rule itself makes qualitative difference in the service rendered on the same post. It is a clear indication of qualitative difference of the service on the same post by a graduate Engineer and a diploma-holder Engineer. It appears to us that different period of service attached to qualification as an essential criterion for promotion is based on administrative interest in the service. Different period of service experience for degree-holder Junior Engineers and diploma holder Junior Engineers for promotion to the higher post is conducive to the post manned by the Engineers. There can be no manner of doubt that higher technical knowledge would give better thrust to administrative efficiency and quality output. To carry out technical specialised job more efficiently, higher technical knowledge would be the requirement. Higher educational qualifications develop broader perspective and therefore service rendered on the same post by more qualifying person would be qualitatively different. Engineers to the higher post is restricted to 25% quota fixed. So far as the diploma-holders are concerned, their promot ion to t he higher post is confined to 25%. As an eligibility criterion, a degree is further qual iJied by three years' service for the Junior Engineers, whereas eight years' serv ice is required for the diploma-holders. Degree with three years' service experience and diploma with eight years' service experience itsel f indicates qualitative differencc in the service rendered as degree-holder Junior Engineer and diploma-holder Junior Engineer. Three years' service experience as a graduate Junior Engineer and eight years' service experience as a diploma-holder Junior Engineer, which is the eligibility cri terion for promotion, is an indication of different quality of service rendered. In the given case, can it be said that a diploma-holder who acqu ired a degree during the tenure of his service, has gained experience as an Engineer just because he has acquired a degree in Engineering. That would amount

to say that the experience gained by him in his service as a diploma-holder is qualitatively the same as that of the experience of a graduate Engineer. The Rule specifically made difference of service rendered as a graduate Junior Engineer and a diploma-holder Junior Engineer. Degree-holder Engineer 's cxpcricnce cannot be substituted with diploma-holder's experience. The distnction between the experience of degree-holders and diploma-holders is maintained under the Rules in further promotion to the post of Executive Engineer also, wherein there is no separate quota assigned to degree-holders or to diploma-holders and the promotion is to be made from the cadre of Assistant Engineers. The Rules provide for different service experience for degree-holders and diploma holders. Degree-holder Assistant Engineers having eight years of service experience would be eligible for promotion to the post of Executive Engineer, whereas diploma-holder Assistant Engineers would be required to have ten years' service experience on the post of Assistant Engineer to become eligible for promotion to the higher post. This indicates that the Rule itself ·makes differentia in the qualifying service of eight years for degree holders and ten years' service experience for diploma-holders. The Rule itself makes qualitative difference in the service rendered on the same post. It is a clear indication of qualitative difference of the service on the same post by a graduate Engineer and a diploma-holder Engineer. It appears to us that different period of service attached to qualification as an essential criterion for promotion is based on administrative interest in the service. Different period of service experience for degree-holder Junior Engineers and diploma -holder Junior Engineers for promotion to the higher post is conducive to the post manned by the Engineers. There can be no manner of doubt that higher technical knowledge would give better thrust to administrative efficiency and quality output. To carry out technical specialised job more efficiently, higher technical knowledge would be the requirement. Higher educational qualifications develop broader perspective and therefore service rendered on the same post by more qualifying person would be qualitatively different.

iii) N. Suresh Nathan and another (Supra) :-

"4. In our opinion, this appeal has to be allowed. There is sufficient material including the admission of respondents diploma holders that the practice followed in the department for a long time was that in the case of diploma-holder Junior Engineer who obtained the degree during service, the period of three years service in the grade for eligibility for promotion as degree holder commenced from the date of obtaining the degree and the earlier period of service as diploma holders was not counted for this purpose. This earlier practice was clearly admitted by the respondents diploma-holders in para 5 of their application made to the tribunal at page 115 of the paper book. This also appears to be the view of the UPSC in their letter dated December 6, 1968 extracted as pages 99-100 of the paper book in the counter affidavit of respondent 1 to 3. The real question, therefore, is whether the construction made of this provision in the rules on which the past practice extending over a long period is based is untenable to require of upsetting it. If the past practice is based on one of the possible construction

which can be made of the rule then upsetting the same now would not be appropriate. It is in this perspective that the question raised has to be determined.

5. The recruitment rules for the post of Assistant Engineers in the PWD (annexure C) are at pages 57 to 59 of the paper book. Rule 7 lays down the qualification for direct recruitment from the two sources, namely, degree holders and diploma-holders with three years professional experience. In other words, a degree is equitted to diploma with three years professional experience. Rule 11 provides for recruitment by promotion from the grade of section officer now called junior engineers. There are two categories provided therein - one is of degree-holder junior engineers with three years service in the grade and the other is of diploma-holder junior engineers with six years service in the grade, the provision being for 50% from each category. This matches with rule 7 wherein a degree is equitted with diploma with three years ' professional experience. In the first category meant for degree-holders, it is also provided that if degree holders with three years service in the grade are not available in sufficient number, then diploma-holders with six years 'service in the grade may be considered in the category of degree holders also for the 50% vacancies meant for them. The entire scheme, therefore, does indicate that the period of three years service in the grade required for degree holders according to rule 11 as a qualification for promotion in that category must mean three years 'service in the grade as a degree holder and, therefore, that period of three years can commence only from the date of obtaining the degree and not earlier. The service in the grade as a diploma holder prior to obtaining the degree cannot be counted as service in the grade with a degree for the purpose of three years 'service as a degree holders. The only question before us is of the construction of the provision and not of the validity thereof and, therefore, we are only required to construe the meaning of the provision. In our opinion, the contention of the appellants degree-holder that the rules must be construed to mean that the three years service in the grade of a degree holder for the purpose of Rule 11 is three years from the date of obtaining the degree is quite tenable and commends to us being in confirmity with the past practice followed consistently. It has also been so understood by all concerned till the raising of the present controversy recently that the respondents. The tribunal was, therefore, not justified in taking the contrary view and unsettling the settled practice in the department."

iv) Rajinder Singh (Dr.) (Supra) :

"7. The settled position of law is that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be a disastrous in as much as it would deprive the security of tenure and light of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far expected service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the rules, the class II of the service can be treated as class I only by way of notification. Following such a course in effect amounts to amending the rules by a government order and ignoring the mandate of article 309 of the Constitution.

8. As respondent No.3 was not eligible for consideration to the post of Deputy Director, Health Services, the departmental promotion committee committed a mistake in recommending him. Consequent promotion of respondent No.3 on the basis of recommendation of the departmental promotion committee being contrary to law is liable to be set aside."

v) Shyam Sadan Singh (Dr.) (Supra) :

"6. It would be pertinent to mention here that according to statute 18.10 of the first statutes of the Gorakhpur University made under the provisions of the U.P. State University Act, 1973 service in the capacity of Principal or Teachers, as the case may be, is to be counted from the date of taking charge persuant to substantive appointment. Appointment to old statute service is to be counted from the date of substantive appointment in the capacity of Principal or Teachers, as the case may be. It makes not distinction between the teachers of degree department and those of post graduate department belonging to the same cadre and same grade. Disqualification created by the government order dated 09.07.1968, in our mind is contrary to law for it has the effect ammending the statutes and the State Government has no authority to do so under Section 39 of the Gorakhpur University Act, 1956. In as much as classification of teachers of degree department and post graduate department for the purpose of seniority could have been done only by amending the statutes and not by government orders. Executive power of the State under Article 162 cannot be invoked in derrogation of statutory provisions."

vi) Girdhari Lal Shankwar Vs. State of U.P. and others; 2014 (1) UPLBEC 657.

vii) Narinder S. Chadha and others (Supra):

"3. Mr. C.U. Singh, learned Senior Advocate appearing on behalf of the appellants in the civil appeal arising out of SLP (C) No.30832 of 2011 made wide ranging arguments on the genesis of cigarettes act and the fact that it was legislation made under entry 52 list 1 read with entry 33 list III of the 7th Schedule to the Constitution of India. He cited Godawat Pan Masala Products I. P. Ltd. and another v. Union of India and others (2004) 7 SCC 68, particularly the concluding paragraph 77 (6) stating that the cigarettes act is a special act dealing only with tobacco and tobacco products, while the prevention of Food Adultration Act, 1954 is general and must therefore yield to the Cigarettes Act. He also cited Bajinath Kedia v. State of Bihar and others (1969) 3 SCC 838 for the preposition that once the requisite declaration under Section 2 of the Cigarettes Act is made, the State Government is denuded of any power to legislate in the field occupied by the Cigarette Act. He also cited Paluru Ramakrishnaiah and others v. Union of India and another (1989) 2 SCC 541 for the proposition that executive instructions and conditions cannot be contrary to statute or statutory rules. Ultimately, however, he contended that there were three features of the impugned circular which required to be shut down being ultra vires the Cigarettes Act and the rules made therein.

26. We are at a loss to understand the aforesaid reasoning. If Section 144 is to be invoked, the order

dated 14th July, 2011 would have expired two months thereafter. The High Court went on to state that while administering the law it is to be tempered with equity and if an equitable situation demands, the High Court would fail in its duty if it does not mould relief accordingly. It must never be forgotten that one of the maxims of equity is that 'equity follows the law'. If the law is clear, no notions of equity can substitute the same. We are clearly of the view that the Gujarat High Court judgment dated 2nd December, 2011 deserves to be set aside not only for the following the Bombay High Court judgment impugned in the appeals before us but for the reason stated herein above."

36) I have gone through the judgments relied upon by learned counsel for the petitioners, which are fully applicable to the facts and circumstances of the case and the submissions advanced taking shelter of the judgments are acceptable.

37) On going through the aforesaid judgments and the government order issued on 10.07.1978, wherein procedure has been prescribed in regard to fixation of salary to teachers of an institution which has been brought within purview of Payment of Salaries Act, 1978 whereby the benefit of Tri Benefit Scheme of 1965 was provided to institutions referred therein in Clause III of the government order.

38) On perusal of government orders issued from time to time in regard to fixation of salary of teachers in non aided schools to the effect that as soon as the institution is brought within purview of Payment of Salaries Act, **1978** past service rendered in the institution from the date of approval shall be counted in fixation of salary.

39) In case the theory framed under the impugned order is taken into consideration, there shall be great distinction in regard to teachers and non teaching staff, who have been appointed in the institution in accordance with service rules applicable in the year **1978** and the teachers who have been appointed in the year 1990. In case they are placed in regard to fixation of salary from the date the institution has been brought within the purview of Payment of Salaries Act, 1978 that will create great discrimination amongst the teachers who have been appointed in the institution.

40) The next point for consideration is very important to make applicable the pensionary rules in regard to teachers appointed in the institution recognized under the provisions of U.P. Basic Education Act, 1972.

41) This Court in examination of impugned order gone through the provisions of U.P. Recognized Basic Schools (Recruitment and Condition of Service of Teachers and other Conditions) Rules, 1975 and The U.P. Recognised Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Teachers) Rules, 1978.

42) On perusal of provisions of Rules of 1975, it is reflected that the rules have been framed in exercise of power under sub-section (1) of Section 19 of U.P. Basic Education Act, 1972. Rule 2 (b) of the rules clarifies that junior basic schools means an institution other than high school or intermediate colleges imparting education upto 5th class.

43) Meaning thereby, in case the institution is a primary school upto level of class 1st to class 5th, the Rules of 1975 is applicable, wherein under Rule 9 & 10, provisions of appointment of teachers has been provided as under :

*"**9. Appointment of teachers**:- No person shall be appointed as teacher or other employee in any recognised school unless he possesses such qualifications as are specified in this behalf by the Board and for whose appointment the previous approval of the Basic Shiksha Adhikari has been obtained in writing. In case of vacancy the applications for appointment shall be invited by the concerned management through advertisement in at least two newspapers (one of them will be daily newspaper), giving at least thirty days' time for submitting application. The date of interview may be given in the advertisement or the candidates be informed of the date fixed for interview by registered post, giving them at least 15 days time from the date of issue of the letter. The management shall not select any untrained teacher and if the selected candidate is a trained one, he will be approved by the Basic Shiksha Adhikari.*

***10. Salary of teachers :-** A recognised school shall undertake to pay with effect from July 1, 1975 to every teacher and employee the same scale of pay, dearness allowance and additional dearness allowance as are paid to the teachers and employees of the Board possessing similar qualification. Pay will be disbursed through cheque."*

44) On its perusal, it is evident that it does not carve out any distinction in regard to procedure of recruitment and appointment of a teacher in primary school, therefore, the distinction drawn under the impugned order that the teachers after taking the institution on the grant in aid list shall be treated to be appointed in the institution on the date when the institution is brought within the purview of grant in aid list / Payment of Salaries Act, 1972 is wholly erroneous and contrary to rules referred herein above.

45) Under the definition of Rule 2(E), junior high school means an institution other than high school or intermediate college imparting education to boys or girls from Class 6th to Class 8th (inclusive) and these rules have been framed under the provisions of U.P. Basic Education Act, 1972.

46) To resolve the controversy, relevant provisions of U.P. Recognized Basic (Junior High School) (Recruitment and Condition of Service of Teachers) Rules, 1978 are being quoted below:

***3. Appointment** - (1) It shall be the responsibility of the Management to fill a vacancy in the post of Headmaster or Assistant teacher, as the case may be, of a recognised school by 31st July every year.*

(2) If any vacancy occurs during an academic session, it shall be filled within two months from the date of occurrence of such vacancy.

***4. Minimum qualification**. - (1) The minimum qualifications for the post of Assistant Teacher of a recognised school shall be a Graduation Degree from a University recognised by U.G.C., and a teachers training course recognized by the State Government or U.G.C. or the Board as follows :-*

1. Basic Teaching Certificate.

2. A regular B.Ed. degree from a duly recognized institution.

3. Certificate of Teaching.

4. Junior Teaching Certificate.

5. Hindustani Teaching Certificate.

And

Teacher eligibility test passed conducted by the Government of Uttar Pradesh or by the Government of India.

(2) The minimum qualifications for the appointment to the post of head master of a recognized school shall be as follows –

(a) A degree from a recognized University or an equivalent examination recognized as such.

(b) A teacher's training course recognized by the State Government or U.G.C. or Board as follows :-

1. Basic Teaching Certificate.

2. A regular B.Ed. degree from a duly recognized Institution.

3. Certificate of Teaching;

4. Junior Teaching Certificate.

5. Hindustani Teaching Certificate.

(c) Five years teaching experience in a recognized school].

***5. Eligibility for appointment**. - No person shall be appointed as Headmaster or Assistant Teacher in substantive capacity in any recognised school, unless*

(a) he possesses the minimum qualifications prescribed for such post;

(b) he is recommended for such appointment by the Selection Committee.

***6. Disqualification**. - (1) No person who is related to any member of the Management shall be appointed as Headmaster or Assistant Teacher of a recognised school.*

(2) For the purposes of this rule, a person shall be deemed to be related if he is related to such member in any one of the following ways, namely –

(i) Father or mother;

(ii) Grandfather, grandmother;

(iii) Father-in-law, mother-in-law;

(iv) Uncle, aunt, maternal uncle, maternal aunt;

(v) Son, daughter, son-in-law, daughter-in-law;

(vi) Brother, sister;

(vii) Grandson, grand-daughter;

(viii) Husband, wife;

(ix) Nephew, niece;

(x) Cousin;

(xi) Wife's brother, or wife's sister, wife's brother's wife, sister's husband;

(xii) Husband's brother, husband's brother's wife;

(xiii) Brother's or cousin's wife.

***7. Advertisement of vacancy**. - (1) No vacancy shall be filled, except after its advertisement in at least two newspapers one of whom must have adequate circulation all over the State and the other in a locality the school is situated.*

(2) In every advertisement and intimation under clause (1), the Management shall give particulars as to the name of the post, the minimum qualifications and age-limit, if any, prescribed for such post and the last date for receipt of applications in pursuance of such advertisement.

(3) Management of the school after explaining the sanctioned posts of the institution shall send information of vacant post during the calendar year compulsorily to the District Basic Education Officer by the 30th April for permission of Advertisement to fill them.

(4) After scrutinizing the proposal within 15 days the District Basic Education Officer shall accord permission to advertise the post according to law. The District Basic Education Officer shall be duty bound to accord permission for advertisement or to reject the permission with reasoned speaking order during the stipulated time.

(6) An appeal may be preferred before the Regional Assistant Director of Education (Basic) against the decision of the District Basic Education Officer. The decision of the Regional Assistant Director of Education (Basic) shall be final.

***8. Age limit**. - The minimum age shall on the first day of July of the academic year following next after the year in which the advertisement of the vacancy is made under Rule 7 be :*

(1) In relation to the post of an Assistant Teacher, 18 years.

(2) In relation to the post of Head Master, 25 years.

***9. Selection Committee**. - For appointment of Headmaster and Assistant Teacher in institutions other than minority institutions and in the minority institutions, tire Management shall constitute a Selection Committee as follows :*

A - Institutions other than Minority Institutions :

(i) For the post of headmaster :

(1) Manager;

(2) a nominee of the District Basic Education Officer;

(3) a nominee of the Management;

(ii) For the post of Assistant Teacher;

(1) Manager;

(2) Headmaster of the recognised school in which appointment is to be made;

(3) a nominee of the District Basic Education Officer;

B - Minority Institutions :

(i) For the post of Headmaster;

(1) Manager;

(2) two nominees of Management;

(ii) For the post of Assistant Teacher;

(1) Manager;

(2) Headmaster of the recognised school in which the appointment is to be made;

[(3) A specialist in the subject nominee by the District Basic Education Officer.]

10. Procedure for selection. - *(1) The Selection Committee shall, after interviewing such candidates as appear before it on a date to be fixed by it in this behalf, of which due intimation shall be given to all the candidates, prepare a list containing as far as possible the names, in order of preference, of three candidates found to be suitable for appointment.*

(2) The list prepared under clause (1) shall also contain particulars regarding the date of birth, academic qualifications and teaching experience of the candidates and shall be signed by all the members of the Selection Committee.

(3) The Selection Committee shall, as soon as possible, forward such list, together with the minutes of the proceedings of the Committee to the management.

(4) The Manager shall within one week from the date of receipt of the papers under clause (3) send a copy of the list to the District Basic Education Officer.

(5) (i) If the District Basic Education Officer is satisfied that –

(a) the candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post;

(b) the procedure laid down in these rules for the selection of Headmaster or Assistant Teacher, as the case may be, has been followed he shall accord approval to the recommendations made by the Selection Committee and shall communicate his decision to the Management within two weeks from the date of receipt of the papers under clause (4).

(ii) If the District Basic Education Officer is not satisfied as aforesaid, he shall return the papers to the Management with the direction that the matter shall be reconsidered by the Selection Committee.

(iii) If the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under clause (4), he shall be deemed to have accorded approval to the recommendations made by the Selection Committee.

11. Appointment - Appointment by the Management. - *(1) On receipt of communication of approval or as the case*

may be, on the expiry of the period of one month under clause (iii) of sub-rule (5) of Rule 10, the Management shall, first offer appointment to the candidate given the first preference by the Selection Committee and on his failure to join the post, to the candidate next to him in the list prepared by the Selection Committee and on the failure of such candidate also, to the last candidate specified in such list.

(2) (a) The appointment letter shall be sent under the signature of the Manager by registered post to the selected candidate.

(b) The appointment letter shall clearly specify the name of post, the pay scale and the nature of appointment, whether permanent or temporary, and shall also specify that if the candidate does not join within 15 days from the date of receipt of the appointment letter his appointment shall be cancelled.

(c) a copy of the appointment letter shall also be sent to the District Basic Education Officer.

***19. Provident Fund**: Provident Fund shall be payable by the management of a recognised school to every Headmaster or teacher employed in such school in accordance with the scheme applicable to aided institutions as laid down in Appendix 8 of the Education Code (1958 Edition).*

47) On bare perusal of Rule 19, it is evident that provident fund shall be payable by the management of a recognized school to head master or teachers employed in such a school in accordance with scheme applicable to added institutions as laid down in Appendix-XIII of the Education Code.

48) It clearly demonstrates that the scheme in regard to provident fund shall be applicable to the institutions recognized under the provisions of Act of 1972 and no distinction has been carved out in regard to aided and non aided institutions.

49) On bare perusal of Rule 19 of 1978 Rules amended through notification dated 04.12.2019, it is apparent that by adding proviso, it shall not be effective for the teaching and non teaching staff appointed after 01.04.2005. Meaning thereby, all the teachers and non teaching staff of recognized junior high schools are entitled for provident fund.

50) The petitioners before this court were granted appointment in accordance with aforesaid rules and their appointments were duly approved by the competent authorities. At the time of taking the institutions on grant in aid list in the manager's return names of teaching and non teaching staff were also submitted and financial concurrence was also granted to them. At the time of enforcement of NPS, the rules referred herein above were same as was existing at the time of appointment of the petitioners. When the institutions were brought within purview of Payment of Salaries Act, the aforesaid rules were intact and no amendment was incorporated in the rules that after taking the institutions on grant in aid list their appointment shall be treated to be made after enforcement of NPS. Therefore, once this is the back ground, the petitioners before this court cannot be denied for grant of benefit of OPS being appointed in the institutions prior to enforcement of NPS.

51) The provisions in regard to appointment of teachers in primary school came into existence in the year 1975 and in regard to appointment and recruitment on the post of teachers in junior high schools came into existence in the year 1978.

52) The teachers of the bunch of writ petitions have been appointed in the institution in accordance with the rules of 1975 and 1978 respectively and approval was granted by the DBEO of the concerned districts.

53) Relevant point of consideration is that when the institution was brought within the purview of Payment of Salaries Act, 1978. There were same provisions in regard to recruitment and appointment of teachers in the institution. For consideration of this aspect of the matter, it is relevant to narrate the necessary facts.

54) In pursuance to notification issued, several senior basic level institutions established during year 1989-1998 in which teaching and non teaching staffs were appointed and the Government has discontinued the monthly pension scheme vide order dated 28.03.2005 and w.e.f. 01.04.2005 placed a new contributory pension scheme to new recruits and vide order dated 02.12.2006, the Government of U.P. admitted those 1000 institutions in grant in aid list. The management filed relevant documents along with details of teachers and non teaching staff of the institution and after due consideration the institutions were brought within the purview of Payment of Salaries Act, 1978 vide order dated 02.12.2006.

55) I have examined the relevant provisions of recruitment and appointment of teachers as referred above and there is no hesitation to hold that at the time of taking of institution on grant in aid list in the year 2006, same provision of recruitment and condition of service were applicable to the teachers who are liable to be paid salary from the State Exchequer after taking the institution on the grant in aid list.

56) In regard to non teaching staff of the institutions, the provisions of Rules of 1984 are applicable. Relevant provisions are being quoted below:

3. नियुक्ति – (1) किसी मान्यता प्राप्त स्कूल के प्रबन्धाधिकरण या यह उत्तरदायित्व होगा कि वह, यथास्थिति, लिपिक या समूह 'घ' के कर्मचारी के पद की रिक्ति को प्रत्येक वर्ष 31 जुलाई तक भरें,

(2) यदि कोई रिक्ति शिक्षा–सत्र के दौरान हो तो उसे ऐसी रिक्ति के दिनांक से दो मास के भीतर भरा जायेगा।

4. न्यूनतम अर्हता – (1) लिपिक के पद के लिए न्यूनतम अर्हता माध्यमिक शिक्षा परिषद, उत्तर प्रदेश की इण्टरमीडिएट परीक्षा या समकक्ष परीक्षा (हिन्दी के साथ) और हिन्दी टंकण मे 30 शब्द प्रति मिनट की न्यूनतम गति होगी।

(2) समूह 'घ' के कर्मचारी के पद के लिए न्यूनतम अर्हता उत्तर प्रदेश सरकार द्वारा मान्यता प्राप्त किसी संस्था से पॉचवी कक्षा या हिन्दी के साथ समकक्ष परीक्षा उत्तीर्ण करना होगा।

5. नियुक्ति के लिए पात्रता– कोई व्यक्ति किसी मान्यता प्राप्त स्कूलों मे मौलिक रूप मे लिपिक या समूह 'घ' मे कर्मचारी के रूप मे तब तक नियुक्त नही किया जायेगा जब तक कि–

(क) उसकी ऐसे पद के लिए विहित न्यूनतम अर्हतायें न हों।

(ख) चयन–समिति द्वारा ऐसी नियुक्ति के लिए उसके सम्बन्ध मे संस्तुति न की जाये।

6. आयु– इस नियमावली मे निर्दिष्ट लिपिक पद पर भर्ती के लिए अभ्यर्थी की आयु उस वर्ष की,

जिसमे रिक्ति अधिसूचित की जाये, अनुवर्ती पहली जुलाई को 18 वर्ष की हो जानी चाहिए और 40 वर्ष से अधिक नही होनी चाहिए।

परन्तु अनुसूचित जातियों, अनुसूचित जन–जातियों के एवं अन्य पिछड़ा वर्ग के अभ्यर्थियों की स्थिति में, उच्चतर आयु–सीमा 5 वर्ष अधिक होगी या उतनी होगी जितनी राज्य सरकार द्वारा समय≤ पर उपबन्धित की जाये।

7. राष्ट्रीयता नियम 5 मे उल्लिखित किसी पद पर भर्ती के लिए यह आवश्यक है कि अभ्यर्थी–

(क) भारत का नागरिक हो, या

(ख) तिब्बती शरणार्थी हो, जो भारत में स्थायी निवास के अभिप्राय से पहली जनवरी, 1962 के पूर्व भारत आया हो, या

(ग) भारतीय उद्भव का ऐसा व्यक्ति हो जिसने भारत मे स्थायी निवास के अभिप्राय से पाकिस्तान, बर्मा, श्रीलंका या किसी पूर्वी अफ्रीकी देश केन्या, उगान्डा और यूनाइटेड रिपब्लिक ऑफ तन्जानिया (पूर्ववर्ती तांगानिका और जंजीवार) से प्रवजन किया हो,

परन्तु उपर्युक्त श्रेणी (ख) या (ग) के अभ्यर्थी को ऐसा व्यक्ति होना चाहिए जिसके पक्ष मे राज्य सरकार द्वारा पात्रता का प्रमाण–पत्र जारी किया गया हो,

परन्तु यह और कि श्रेणी (ख) के अभ्यर्थी से यह भी अपेक्षा की जायेगी कि वह पुलिस उप–महानिरीक्षक, गुप्तचर शाखा, उत्तर प्रदेश से पात्रता का प्रमाण–पत्र प्राप्त कर ले।

परन्तु यह भी कि यदि कोई अभ्यर्थी उपर्युक्त श्रेणी (ग) का हो तो पात्रता का प्रमाण–पत्र एक वर्ष से अधिक अवधि के लिए जारी नही किया जायेगा और ऐसे अभ्यर्थी को एक वर्ष की अवधि की सेवा मे तभी रहने दिया जायेगा जब कि वह भारत की नागरिकता प्राप्त कर ले।

टिप्पणी – ऐसे अभ्यर्थी को जिसके मामले मे पात्रता का प्रमाण–पत्र आवश्यक हो किन्तु न तो वह जारी किया गया हो और न देने से इन्कार किया गया हो, किसी साक्षात्कार मे सम्मिलित किया जा सकता है और उसे इस शर्त पर अन्तिम रूप से नियुक्त भी किया जा सकता है कि आवश्यक प्रमाण–पत्र उसके द्वारा प्राप्त कर लिया जाये या उसके पक्ष मे जारी कर दिया जाये।

8. आरक्षण– अनुसूचित जातियों, अनुसूचित जन–जातियों और अन्य श्रेणियों के अभ्यर्थियों के लिए आरक्षण भर्ती के समय प्रवृत्त राज्य सरकार के आदेशों के अनुसार किया जायेगा।

9. चरित्र– सीधी भर्ती के लिए अभ्यर्थी का चरित्र ऐसा होना चाहिए कि वह सेवा में नियोजन के लिए सभी प्रकार से उपयुक्त हो सके और नियुक्ति–प्राधिकारी का यह कर्त्तव्य होगा कि वह इस सम्बन्ध मे अपना समाधान कर ले।

स्पष्टीकरण– केन्द्र सरकार या किसी राज्य सरकार द्वारा या केन्द्र सरकार या किसी राज्य सरकार के स्वामित्व मे या नियन्त्रणाधीन किसी निगम द्वारा पदच्युत व्यक्ति को इस नियम के प्रयोजनार्थ के लिए अनुपयुक्त समझा जायेगा।

10. वैवाहिक प्रास्थिति– सेवा मे नियुक्ति के लिए ऐसे पुरूष अभ्यर्थी पात्र न होगा जिसकी एक से अधिक पत्नियॉ जीवित हों और ऐसी महिला अभ्यर्थी पात्र न होगी जिसने ऐसे पुरूष से विवाह किया हो जिसकी पहले से कोई पत्नी जीवित रही हो।

परन्तु चयन–समिति किसी व्यक्ति को इस नियम के प्रवर्तन से छूट दे सकती है, यदि उसका समाधान हो जाये कि ऐसा करने के लिए विशेष कारण विद्यमान है।

11. शारीरिक स्वस्थता– (1) किसी अभ्यर्थी को तभी नियुक्त किया जायेगा जब मानसिक और शारीरिक दृष्टि से उसका स्वास्थ्य अच्छा हो और वह ऐसे सभी शारीरिक दोष से मुक्त हो जिनसे उसे अपने कर्तव्यों का दक्षतापूर्वक पालन करने मे बाधा पड़ने की सम्भावना हो।

(2) किसी अभ्यर्थी को सीधी भर्ती द्वारा नियुक्ति के लिए अन्तिम रूप से अनुमोदित किये जाने के पूर्व उससे यह अपेक्षा की जाएगी कि वह प्रान्तीय चिकित्सा और स्वास्थ्य सेवा के किसी चिकित्सा–अधिकारी से स्वस्थता प्रमाण–पत्र प्रस्तुत करे।

12. अनर्हता– (1) ऐसा कोई व्यक्ति जो प्रबन्धाधिकरण के किसी सदस्य का सम्बन्धी हो, किसी

मान्यताप्राप्त स्कूल के लिपिक या समूह 'घ' के कर्मचारी के रूप मे नियुक्त नही किया जायेगा।

(2) इस नियम के प्रयोजनार्थ किसी व्यक्ति को सम्बन्धी समझा जायेगा यदि वह निम्नलिखित किसी भी एक प्रकार से ऐसे सदस्य सम्बन्धित हो, अर्थात्–

(एक) पिता या माता,
(दो) पितामह, पितामही
(तीन) ससुर, सास,
(चार) चाचा, चाची, मामा, मामी
(पॉच) पुत्र, पुत्री, दामाद, वधू
(छः) भाई, बहिन
(सात) पौत्र, पौत्री
(आठ) पति, पत्नी
(नौ) भतीजा, भतीजी
(दस) सम्भ्राता (कजन)
(ग्यारह) पत्नी का भाई या पत्नी की बहिन, पत्नी का भाई की पत्नी, बहन का पति
(बारह) पति का भाई, पति के भाई की पत्नी
(तेरह) भाई या सम्भ्राता की पत्नी।

13. रिक्ति का विज्ञापन– (1) किसी रिक्ति को तब तक नही भरा जायेगा जब तक उसका विज्ञापन कम से कम एक ऐसे समाचारपत्र मे जिसका उस क्षेत्र मे पर्याप्त परिचलन न हो न किया जाये, और ऐसी रिक्ति की सूचना जिला बेसिक शिक्षा अधिकारी को न दी जाये।

(2) प्रबन्धाधिकरण खण्ड (1) के अधीन प्रत्येक विज्ञापन और सूचना मे पद का नाम, ऐसे पद के लिए विहित न्यूनतम अर्हता और आयु–सीमा, यदि कोई हो, और ऐसे विज्ञापन के अनुसरण मे आवेदन–पत्रों की प्राप्ति के अन्तिम दिनांक का विवरण देगा।

14. चयन समिति– प्रबन्धाधिकरण एक चयन–समिति का गठन करेगा जिसमे निम्नलिखित होंगे–

(1) प्रबन्धक

(2) मान्यताप्राप्त स्कूल का जिसमे नियुक्ति की जानी हो प्रधान अध्यापक।

(3) जिला बेसिक शिक्षा अधिकारी द्वारा नामनिर्दिष्ट एक विशेषज्ञ जो अल्पसंख्यक द्वारा स्थापित और प्रशासित स्कूल के सम्बन्ध मे अनुसूचित जातियों मे होगा।

15. चयन की प्रक्रिया– (1) चयन–समिति ऐसे अभ्यर्थियों का, जो समिति द्वारा इस निमित्त निर्धारित दिनांक को, जिसकी सम्यक सूचना समस्त अभ्यर्थियों को दी जायेगी, उसके समक्ष उपस्थित हों साक्षात्कार करने के पश्चात एक सूची तैयार करेगी जिसमे यथासंभव नियुक्ति के लिए उपयुक्त पाये गये तीन अभ्यर्थियों के नाम अधिमान क्रम मे होंगे।

(2) खण्ड (4) के अधीन तैयार की गयी सूची मे अभ्यर्थियों के जन्म दिनांक शैक्षिक अर्हता के सम्बन्ध मे विवरण होंगे और उस पर चयन–समिति के समस्त सदस्यों द्वारा हस्ताक्षर किये जायेंगे।

(3) चयन समिति ऐसी सूची को समिति की कार्यवाहियों के कार्यवृत्त के साथ

प्रबन्धाधिकरण को यथाशीघ्र अग्रसारित करेगी।

(4) प्रबन्धक खण्ड (3) के अधीन पत्रादि की प्राप्ति के दिनांक से एक सप्ताह के भीतर सूची की एक प्रति जिला बेसिक शिक्षा अधिकारी को भेजेगा।

(5) (एक) यदि जिला बेसिक शिक्षा अधिकारी का यह समाधान हो जाये कि–

(क) चयन समिति द्वारा संस्तुत किये गये अभ्यर्थी पद के लिए विहित न्यूनतम अर्हतायें रखते हैं

(ख) यथास्थिति लिपिक वर्ग कर्मचारियों और समूह 'ब' के कर्मचारियों के चयन के लिए इस नियमावली मे निर्धारित प्रक्रिया का अनुसरण किया गया है।

तो वह चयन–समिति द्वारा की गयी संस्तुतियों को अनुमोदित करेगा और खण्ड (4) के अधीन पत्रादि की प्राप्ति के दिनांक से दो सप्ताह के भीतर प्रबन्धाधिकरण को अपना विनिश्चय संसूचित करेगा।

(दो) यदि जिला बेसिक शिक्षा अधिकारी का यथापूर्वोक्त के सम्बन्ध मे समाधान न हो तो पत्रादि प्रबन्धाधिकरण को इस आदेश के साथ वापस कर देगा कि मामले पर चयन–समिति द्वारा पुनर्विचार किया जाये।

(तीन) यदि जिला बेसिक शिक्षा अधिकारी खण्ड (4) के अधीन पत्रादि की प्राप्ति के दिनांक से एक मास के भीतर अपने विनिश्चय की संसूचना न दे तो यह समझा जायेगा कि उसने चयन–समिति द्वारा की गयी संस्तुतियों को अनुमोदित कर दिया है।

16. नियुक्तिः प्रबन्धाधिकरण द्वारा नियुक्त–(1) यथास्थिति अनुमोदन की संसूचना प्राप्त होने पर या नियम 15 के उपनियम (5) के खण्ड (तीन) के अधीन एक मास की अवधि के समाप्त होने पर प्रबन्धाधिकरण सर्वप्रथम चयन–समिति द्वारा प्रथम अधिमान दिये गये अभ्यर्थी को नियुक्ति का प्रस्ताव करेगा, और उसके द्वारा पद का कार्यभार ग्रहण न करने पर वह चयन–समिति द्वारा तैयार की गयी सूची मे उससे अगले अभ्यर्थी को नियुक्ति का प्रस्ताव करेगा और ऐसे अभ्यर्थी के भी विफल होने पर ऐसी सूची में उल्लिखित अन्तिम अभ्यर्थी को नियुक्ति का प्रस्ताव करेगा।

(2) (क) नियुक्तिपत्र प्रबन्धक के हस्ताक्षर से चयन किये गये अभ्यर्थी को रजिस्ट्रीकृत डाक द्वारा भेजा जायेगा।

(ख) नियुक्तिपत्र मे पद का नाम, वेतनमान, और नियुक्ति का प्रकार, स्थायी है या अस्थायी, स्पष्ट रूप से विनिर्दिष्ट किया जायेगा, और यह भी विनिर्दिष्ट होगा कि यदि अभ्यर्थी नियुक्ति पत्र की प्राप्ति के दिनांक से 15 दिन के भीतर कार्यभार ग्रहण नही करता है तो उसकी नियुक्ति रद्द कर दी जायेगी।

(ग) नियुक्ति पत्र की एक प्रति जिला बेसिक शिक्षा अधिकारी को भी भेजी जायेगी।

57) On examination, it is found that from the date of recognition of the institution under the provisions of U.P. Basic Education Act, 1972 the service condition of non teaching staff of the institutions are governed under the provisions of 1984 Rules, wherein procedure for recruitment is provided.

58) It is case of the petitioners who are non teaching staff of the institutions that they were appointed in the institution in accordance with the provisions contained under the 1984 Rules and at the time of taking the institution on grant in aid list, same service condition shall be applicable in regard to recruitment of non teaching staff of the institutions. Therefore, the applicability of NPS treating the non teaching staff to be appointed on the date the institution was brought within the purview of payment of salaries act on 02.12.2006 is erroneous in nature. The service condition and recruitment process of non teaching staff of the institution were same as was existing at the time of appointment in the institution. Therefore, the analogy drawn by the respondents that they are not entitled to get covered under OPS as the same came into existence prior to taking of institution on grant in aid list on 01.04.2005 is not sustainable. Therefore, the order treating the petitioners to be covered under NPS cannot be sustained.

59) Once, this is the background of the case of the petitioners, the analogy drawn under the impugned order making applicable the NPS being the institutions brought within the purview of Payment of Salaries Act, 1978 after 01.04.2005 is wholly erroneous and contrary to the act and rules applicable to the petitioners.

60) It is admitted case of the parties that teachers and non teaching staff have been appointed much prior to enforcement of NPS the date of enforcement w.e.f. 01.04.2005, therefore, only on the ground that the institution was brought within purview of payment of salaries act vide notification issued on 02.12.2006 after cut off date of enforcement of applicability of NPS cannot be a ground for depriving the teachers and non teaching staff, who were appointed in accordance with applicable rules and on the date of taking the institution on grant in aid list the recruitment condition of appointment was same.

61) Once the service rendered by teachers and non teaching staff appointed in non aided institutions is counted from the

date of approval for the purpose of fixation of salary, the analogy drawn by the respondents in passing the impugned order treating the petitioners to be appointed after 01.04.2005 due to taking of institutions on grant in aid list vide government order dated 02.12.2006 appears to be not justifiable in law.

62) It is not disputed by the respondents that the petitioners were granted appointment on the post of Assistant Teachers and non teaching staff in the institutions recognized by following the procedure prescribed under law and approval has been granted to them by the competent authority and in pursuance thereof, they have discharged their duties in the institutions. Therefore, no justification appears in not treating them to be teachers and non teaching staff for grant of benefit of OPS in case of taking of institutions on grant in aid list after 01.04.2005.

63) It is also reflected that there is a scheme of the State Government in regard to teachers and non teaching staff appointed in recognized schools under U.P. Basic Education Act, 1972 to whom recruitment and condition Rules 1978 are applicable that the management shall deposit the manager's fund for the period they have discharged service in non aided institutions.

64) This Court is of the opinion that in case the management is directed to deposit the manager's contribution with interest for counting of service rendered in the institution prior to taking of institution on grant in aid list, the petitioners shall come under the ambit of OPS and there shall be no difficulty or burden on the State Government in endorsing the petitioners under OPS which was prevailing prior to enforcement of NPS.

65) I have also gone through the judgment relied upon in regard to fixing cut off date for deposit of manager's fund wherein this Court recorded that the State failed to justify the cut off date fixed and quashed the government order of July, 2001 fixing cut off date as 31.03.2002.

66) In the bunch of writ petitions, CPF and GPF have been deducted from salary of the teachers and non teaching staff and after passing of the impugned order, it has been stopped.

67) It is admitted case of the parties that the scheme of NPS has been introduced vide notification issued on 28.03.2005 fixing 01.04.2005 as cut off date.

68) All the petitioners appeared before this Court have been granted appointment much prior to cut off date and their appointment has been duly approved by the DBEO of concerned districts, therefore, there shall be no justification on the part of the respondents in ignoring their date of appointment duly approved by the competent authority for applicability of OPS, thus, the impugned order holding otherwise ignoring certain provisions of rules and act applicable cannot be held to be justified.

69) Rule 19 of Rules of 1978 does not carve out distinction in regard to applicability between institutions aided and non aided. It specifically prescribes that Rule 19 of Rules of 1978 is applicable for the payment of provident fund to teachers and head masters employed in recognized schools in accordance with scheme applicable to aided institutions, therefore, the otherwise finding recorded while

passing the impugned order cannot be sustained.

70) In view of the above, I am of the considered opinion that the Special Secretary has committed manifest error of law and has passed absurd order without taking into consideration the relevant provisions referred hereinabove in regard to recruitment and condition of service applicable to teaching and non teaching staff. The analogy drawn by the Special Secretary in passing the impugned order that NPS has been enforced vide order dated 28.03.2005 enforced w.e.f. 01.04.2005 is relevant date for applicability of claim of those teaching and non teaching staff whose institutions have been brought within purview of Payment of Salaries Act after the cut off date fixed for applicability of NPS is wholly erroneous to NPS, therefore, the order is liable to be set aside. Therefore, the impugned order dated 08.04.2009 being illegal and contrary to NPS cannot be sustained and is hereby set aside.

71) On over all consideration of facts and circumstances of the case, this Court is of the view that the Special Secretary has no-where considered while passing the impugned order that recruitment and condition of service of teaching and non teaching staff were same on the date of taking the institutions on grant in aid list vide order dated 02.12.2006. Therefore, the petitioners before this court who have been granted appointment much prior to enforcement of NPS vide notification issued on 28.03.2005 w.e.f 01.04.2005 shall not affect the right of the petitioners to be covered under OPS. The management has been empowered at earlier point of time by issuing government order to deposit the manager's contribution by calculating the service for grant of pension to teaching and non teaching staff, therefore, there shall be no burden upon the State Government in paying the pension treating the teaching and non teaching staff to be covered under OPS.

72) In view of the above, the bunch of writ petitions is liable to be allowed and is hereby **allowed.**

73) The respondents are directed to treat the petitioners of the connected writ petitions and members of association of leading writ petition to be covered under Old Pension Scheme and to pay pension to the retired teaching and non teaching staff accordingly. It is further directed to permit the managements to deposit manager's contribution with simple interest excluding the deducted amount from each of the petitioner within a period of two months from the date of production of a certified copy of this order and to reckon the service rendered by the petitioners in the institutions from the date of their approval to the appointment made on their respective posts and to pay pension under OPS within a further period of two months from the date of production of a certified copy of this order. In case the service required for reckoning the qualifying service for the payment of pension is insufficient, the service rendered prior to taking into consideration on grant in aid list shall be counted for the purpose after deposit of managers contribution and accordingly the pension shall be released in their favour."

(2021)07ILR A520
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.07.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE JASPREET SINGH, J.

Special Appeal No. 296 of 2020
along with
Spl. Appeal Nos. 302 of 2020 & 303 of 2020

Ashutosh Kumar Upadhyay & Ors.
...Appellants
Versus
Vijay Kishore Anand & Ors. ...Respondents

Counsel for the Appellants:
Shobhit Mohan Shukla, Surya Narain Mishra

Counsel for the Respondents:
Gaurav Mehrotra

A. Civil Law - UP Transportation Taxation (Subordinate Service Rules), 1980 – Rule 5 – Seniority list – Power of executive to temper it – Extent of – Seniority dispute occurring between the persons directly appointed as PTGTO and persons having been promoted from PTGTS to PTGTO on the strength of GO dated 03.05.2011 abolishing the post of PTGTS (Passenger Tax, Goods-Tax Superintendent) and upgrading it to the post of PTGTO (Passenger Tax, Goods-Tax Officer) – Dispute already settled by a Seniority list dated 17.11.2017 issued in compliance of Judgment dated 13.04.2017 of the Division Bench – Respondent again disturbed this seniority list and issued another seniority list dated 30.01.2019 placing the upgraded PTGTO above to the directly appointed PTGTO – Validity – Held, the seniority list dated 17.11.2017 was at no point of time challenged before any Court or Tribunal. It is now well settled that once a seniority list has been finalised by the Executive and not challenged before any Court or Tribunal, subsequently, it is not open for the Executive to tamper with such seniority. (Para 29, 31, 38 and 149)

B. Doctrine of Precedent – Rule of Stare-decisis – Exception – Per-incuriam – Scope and applicability – 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 sacrosanct 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' – Doctrine of per-incuriam merely takes away the precedent value of a decision but in no manner it dilutes or affects the binding nature of the aforesaid decision on the parties inter-se. (Para 84 and 87)

C. Civil Procedure Code,1908 – Section 11 – Explanation IV – Doctrine of res judicata and constructive res judicata – Applicability – Even an erroneous decision on a question of law attracts the doctrine of res-judicata in between the parties – S. 11 generally comes into play in relation to civil suits. But apart from the codified law, the doctrine of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries – The rule of constructive res judicata is engrafted in Explanation IV of S. 11 of the Code of Civil Procedure, and in many other situations also principles not only of direct res judicata but of constructive res judicata are applied. (Para 93 and 95)

D. Interpretation of Statute – 'Note' appended to any provision – Nature and effect – Marginal or Explanatory – 'Note' is only explanatory to the main provision – It cannot derogate from the explicit words of substantive provisions – It cannot have a larger effect than the Rule itself. (Para 120, 121, 128)

Special Appeal dismissed (E-1)

Cases relied on :-

1. Sundaram Pillai & ors. Vs V.R. Pattabiraman & ors.; 1985 (1) SCC 591

2. Satendra Kumar & ors. Vs Raj Nath Dubey & ors.; 2016 (14) SCC 49

3. Mathura Prasad Bajoo Jaiswal & ors. Vs Dossibai N.B. Jeejeebhoy; 1970 (1) SCC 613

4. Vinay Kunar Verma & ors. Vs St. of Bihar & ors.; 1990 (2) SCC 647

5. H.S. Vankani & ors. Vs St. of Guj. & ors.; 2010 (4) SCC 301

6. Ambika Prasad Mishra Vs State of U.P. & ors.; 1980 (3) SCC 719;

7. A.R. Antulay Vs R.S. Nayak & anr. ; 1988 (2) SCC 60

8. Dr. Subramaniam Swamy Vs St. of T.N. & ors.; 2014 (5) SCC 75

9. Madan Mohan Pathak & ors. Vs U.O.I. & ors.; 1978 (2) SCC 50

10. Chairman, Railway Board & ors. Vs C.R. Rangadhamaih & ors.; 1997 (6) SCC 623,

11. J.S. Yadav Vs St. of U.P.; 2011 (6) SCC 570

12. Central Board of Dawoodi Bohra Community & anr. Vs St. of Maharashtra & anr. ; 2005 (2) SCC 673.

13. St. of U.P. Vs Nawab Hussain; 1977 (2) SCC 806

14. Ferro Alloys Corporation Ltd. & anr. Vs U.O.I. & ors.; 1999 (4) SCC 149

15. Commissioner of Income Tax Vs M/s. Essar Teleholdings Ltd.; 2018 (3) SCC 253

16. United India Insurance Co. Ltd. Vs Orient Treasurers Pvt. Ltd.; 2016 (3) SCC 46

17. Rai Sudhir Prasad Vs St. of Bihar & ors.; 2004 (13) SCC 25

18. Chairman, Railway Board & ors. Vs C.R. Rangadhamaih & ors.; 1997 (6) SCC 623

19. Dr. B.S. Yadav Vs St. of Har. & ors.; 1980 (Supplementary) SCC 524

20. Chandrawathi P.K. & ors. Vs C.K. Saji & ors.; 2004 (3) SCC 734

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

Introduction:-

1. This is a batch of three intracourt appeals, preferred under Chapter VIII, Rule 5 of the Allahabad High Court Rules, 1952, calling in question the judgment and order dated 20.10.2020 passed by the learned Single Judge in W.P. No. 12438 (SS) of 2019 (Vijay Kishor Anand and Others Vs. State of U.P. and Others).

2. Since all the three intracourt appeals, challenge the same judgment dated 20.10.2020 and the issues both of facts and law raised herein are also common, hence, all the three appeals are being decided by this common judgment.

3. The appellants in all the three appeals were the private respondents before the Writ Court and were working as Passenger Tax/Goods Tax Superitendent (hereinafter referred to as "The P.T.G.T.S."), and their posts under the Uttar Pradesh Transportation Taxation (Subordinate Service Rules), 1980 (hereinafter referred to as the "Rules of 1980") have been upgraded and merged with the post of Passenger Tax/Goods Tax Officers (P.T.G.T.O.) by means of a Government Order dated 03.05.2011.

4. The writ petitioners, who are the private respondents in these appeals, are the persons who were directly recruited to the post of Passenger Tax, Goods Tax Officer, after due selection from the Uttar Pradesh

Public Service Commission and were inducted in service in the year 2013.

5. The tussle between the appellants and the respondents is in respect of their seniority. The learned Single Judge by means of the impugned judgment dated 20.10.2020 taking note of the Division Bench decision of this Court dated 13.04.2017 passed in W.P. No. 1802 (SB) of 2015 along with the effect of the Uttar Pradesh Transportation Taxation (Subordinate Service Rules, (1st Amendment) Rules, 2018 (hereinafter referred to as the 1st Amendment Rules of 2018) as well as the effect of the seniority list dated 17.11.2017 and noting the rival submissions, did not accept the version of the appellants herein and set aside the order dated 15.04.2019 passed by the Transport Commissioner and also set aside the seniority list circulated by the Transport Commissioner of the same date i.e. 15.04.2019 and affirmed the seniority list dated 17.11.2017 as a consequence the respondents are poised to be placed above the apppellants in the seniority list.

Factual matrix:-

6. In order to appreciate the cotroversy involved, the facts giving rise to these appeals is being noticed first. There has been several rounds of litigations, between the two class, one, i.e. the appellants belonging to the Class of Passenger Tax/Goods Tax Superintendants (P.T.G.T.S) and only by Govt. Order dated 03.05.2011 their post was merged with P.T.G.T.O. and the respondents belong to other class, who are the persons directly appointed as Passenger/Tax Goods Tax Officers (PTGTO), which shall be noticed in the subsequent paragraphs herein.

7. Admittedly, the Service Rules of 1980 which were applicable to the parties contemplated 3 class of posts, comprising the cadre of service, (i) P.T.G.T.O. (ii) Tax Superitendence & (iii) P.T.G.T.S.

The Rule 5 of the Service Rules of 1980 provides for source of recruitment which is being reproduced hereinafter for convenient perusal.

*"**5. Source of recruitment**--Recruitment to the various categories of posts in the service shall be made from the following sources--*

(I) Passenger Tax, Goods-Tax Officer- (i) By direct recruitment through the Commission.

(ii) By promotion through the Commission from amongst--

(a) the permanent Tax Superintendent/Passenger Tax/Goods Tax Syperintendents who have put in at least five years of continuous service as such:

(b) the permanent Assistant Public Prosecutors who have put in at least five years of continous service as such; and

(c) the permanent Head Assistants, Head Clerks of the Transport Commissioner's Office, who have put in at least five years of continuous service as such:

Provided that as far as possible the recruitment shall be so arranged that 50 per cent posts in the cadre are held by direct recruits and rest by promotion as follows:-

(a) Tax Superintendent/Goods Tax, Superintendents/Passenger Tax Superintendents--40 per cent;

(b) Assistant Public Prosecutors-5 per cent.

(c) Head Assistant/Head Clerks in Transport Commissioner's Office-5 per cent.

(2) Tax Superintendents.- By promotion through the Commission from amongst the permanent passenger Tax/Goods Tax Superintendents.

(3) Passenger/Goods Tax Superintendents.-- (i) By direct recruitment through the Commission.

(ii) By promotion through the Commission from amonst:-

(a) the permanent Section in Charges Noter and Drafters and Stenographers of Transport Commissioner's Office who have put in at least five years of continuous service as such; and

(b) the permanent Head Clerks, Head Clerk-cum-Accountants and Stenographers in the Regional Transport Offices, who have put in at least five years of continuous service as such;

Provided that, as far as possible, the recruitment shall be so arranged that 50 per cent posts in the cadre are held by direct recruits, and rest by the promotion as follows:-

(a) Section in charge and Noter and Drafters -15 per cent.

(b) Stenographers in Transport Commissioner's Officer- 14 per cent

(c) Stenographers in Regional Offics-14 per cent."

8. Rule 5 indicates that the P.T.G.T.O. has two source of recruitment (i) by direct recruitment through the Commission; (ii) by promotion through the Commission amongst the Permanent Tax Superitendent/Passenger Tax/ Goods Tax Superitendents who have put in five years of continous service, and also from amongst Permanent Assistant Public Prosecutor who have put in five years of continous service, Permanent Head Assistants, Head Clerks of the Transport Commissioners Office also who have put in five years of continous service.

9. The appellants herein were working as P.T.G.T.S. The record would indicate that on 18.03.2011 recommendations were made by the Pay Committee (2008) in respect of the Transport Department. Amongst other recommendations inter alia, it also recommended that the posts of P.T.G.T.S. be merged with the posts of P.T.G.T.O. while fixing the cadre post strength to 120.

10. It was also recommended that all the posts of P.T.G.T.S. be upgraded as P.T.G.T.O. The combined strength would be 120 and as and when the posts of P.T.G.T.O. would fall vacant, the said persons would be adjusted against the said posts fixing the final strength at 120. By the same recommendations, the payscales of P.T.G.T.S. was also upgraded to be at par with that of P.T.G.T.O.

11. It is in furtherance of the aforesaid recommendations that the Government Order dated 03.05.2011 was issued. By the said Government Order dated 03.05.2011, the posts of P.T.G.T.S. were abolished and all such persons working on the said post were upgraded to P.T.G.T.O. The said Government Order also provided that the Service Rules would be amended appropriately and that the Government Order dated 03.05.2011 shall take effect immediately.

12. The aforesaid Government Order dated 03.05.2011 was assailed by the Ministerial Service Association Transport Commissioner Office before a learned Single Judge of this Court in W.P. No.

2811 (S/S) of 2011 (Ministerial Service Association Transport Commissioner Office, Lucknow Vs. State of U.P. and Others).

The primary ground of challenge to the aforesaid Government Order dated 03.05.2011 was on the premise that the re-structuring of the cadre of P.T.G.T.O. has been done without amending in the Rules of 1980 and that the recommendations of the Pay Committee could not be implemented without a recommendation from the Government or the Transport Department and as such the abolition of the posts of P.T.G.T.S. has jeopardised the chance of promotion of the persons such as petitioners of the said writ petition.

Considering the submissions, an interim order, dated 27.05.2011, was passed in the said petition directing the parties to maintain status-quo as it existed on 27.05.2011. The relevant portion of the order dated 27.05.2011 is being noted hereinafter for convenient reference.

"Heard Sri S.K. Kalia, learned Sr. Advocate assisted by Sri Rajan Roy.

Learned counsel for the petitioner submits that the impugned order dated 3.5.2011, restructuring the cadre of Passengers/Goods Tax Officer has been done without amendment in the relevant rules and even without any recommendation from the Government or Transport Department.

Further submission is that the Pay Committee has no jurisdiction to make any such recommendation for restructuring of the cadre. The abolition of posts has jeopardized the chance of promotion of the petitioners.

Dr. L.P. Misra appearing for the opposite party no. 5 submits that restructuring of the cadre can be done even without amendment in the rules. He further submits that the Pay Committee has made deliberation with the concerning department as well as the State Government and the committee has jurisdiction to make such recommendation.

The learned Standing Counsel has to make submissions in this regard. The matter requires consideration.

Put up on Monday i.e. 30.5.2011, as fresh.

Till the next date of listing, status quo as is existing today shall be maintained by the parties."

13. While the aforesaid writ peititon remained pending, selections for the year 2009 to the vacant posts of P.T.G.T.O. had been advertised through the U.P. Public Service Commission and after due selection, the respondents herein were selected, however, they could not join on account of the fact that the interim order dated 27.05.2011 was operating in W.P. No. 2811 (S/S) of 2011.

14. The State Government in order to accommodate the respodents herein made an application for modification/clarification of the order dated 27.05.2011 in W.P. No. 2811 (SS) of 2011 wherein this Court considering the facts and circumstances modified the interim order dated 27.05.2011 vide order dated 22.02.2013. The relevant portion of the aforesaid order reads as under:-

"In this view of the matter, the order dated 27.5.2011 is modified to the extent that 15 selected incumbents selected against 50% direct recruitment quota shall be allowed to join on the post in question, however, their selection/joining shall be subject to further orders passed in the writ petition.

Subject to aforesaid modification, the order of status quo as directed earlier shall continue to operate."

15. It is in this manner that the respondents herein came to be inducted in the service as P.T.G.T.O. and have been performing their duties since the year 2013 onwards.

16. On 04.12.2014, an eligibility list was prepared which was forwarded to the Public Service Commission, Uttar Pradesh in respect of those persons who were initially appointed as Assistant Regional Inspectors (Technical) and were upgraded and merged in the cadre of Regional Inspector (Technical) and also the employees who were appointed as P.T.G.T.S. who were upgraded and merged on the post of P.T.G.T.O.

17. Certain Goods/Passengers Tax Superintendent who were promoted on the post of Goods/Passengers Officers on 12.11.2009 along with the direct recruits on the post of P.T.G.T.O. who were appointed in the year 2010 preferred a W.P. bearing No.A-60158 of 2014 (Sri Narain Tripathi & others Vs. State of U.P. & another) before a coordinate Bench of this Court at Allahabad seeking forwarding of their names to the Public Service Commission for being considered for promotion on the post of Assistant Regional Transport Officers.

18. The said writ petition bearing Writ No. A- 60158 of 2014 was disposed of finally by means of judgment and order dated 09.12.2014 with a direction to the State Government to forward the list of P.T.G.T.O. for consideration for promotion on the post of Assistant Regional Transport Officers. It was also clarified that the list of Regional Inspectors (Technical) which had already been forwarded by the State Government to the Commission shall be considered by the Commission together with the list of Goods/Passengers Tax Officers which shall be forwarded by the State Government in pursuance of the order/judgment passed by this Court dated 09.12.2014. The relevant portion of the said order is being reproduced for convenient reference.

"We, therefore, direct that the State Government shall also forward the list of Passenger/Goods Tax Officers to the Commission for consideration of the names of the Passenger/Goods Tax Officers for promotion to the post of Assistant Regional Transport Officers. It is also made clear that the list of the Regional Inspectors (Technical) which has already been forwarded by the State Government to the Commission shall be considered by the Commission together with the list of Passenger/Goods Tax Officers which shall now be forwarded by the State Government to the Commission.

The writ petition is allowed to the extent indicated above."

19. Significantly, few of such similarly situated persons also preferred another Writ Petition claiming similar relief bearing W.P. No. A 2135 of 2015 which also came to be decided by means of judgment and order dated 21.01.2015 in terms of the judgment and order dated passed in W.P. No. A 60158 of 2014.

20. It is in this backdrop, it is asserted by the respondents, herein, having learned that the State Government without examining the relevant issue was sending the names of such persons claiming to have merged in the cadre of P.T.G.T.O. on the

basis of the Government Order dated 03.05.2011, hence, the respondents herein preferred their objections. Since no heed was paid to the said objections, the respondents herein preferred W.P. No. 336 (S/B) of 2015 (Irshad Ali and Others Vs. State of U.P. and Others). During the course of hearing, it was informed to the respondents herein that the objections of the respondents had been rejected, hence, the respondents requested to not press the aforesaid writ petition with liberty to file afresh challenging the order of Transport Commissioner which was permitted by the Court by means of order dated 26.03.2015. The relevant portion of the order dated 26.03.2015 is being reproduced for convenient reference:-

"The petitioner has challenged the Government Order dated 3 May 2011, whereby the post of Passenger/Goods Tax Superintendent has been merged with the post of Passenger/Goods Tax Officer. However, at this stage learned counsel for the petitioner has submitted that the petitioners' had also made a representation to the Transport Commissioner for redressal of their grievance, which has been rejected. Therefore, they want to challenge the order passed by the Transport Commissioner by way of a fresh writ petition and thus he seeks permission to withdraw the writ petition with liberty to file a fresh writ petition.

In view of circumstances stated above, we hereby accept the petitioners' request and dismiss the writ petition as not pressed with liberty to file a fresh writ petition."

21. Significantly, the W.P. No. 21811 (S/S) of 2015 wherein the G.O. dated 03.05.2015 was also under challenge, the said writ petition was also dismissed as not pressed on 17.07.2011. The relevant portion of the order dated 17.07.2011 is being reproduced for convenent reference:-

"Sri Raj Kumar Upadhyaya, on the basis of the affidavit filed in support of the application for withdrawal of the petition, has submitted that part of the relief prayed for in this petition has already been given to the petitioners and the remaining is under consideration before appropriate authority, so the present petition may be dismissed as not pressed at this stage.

Learned Standing counsel has no objection to the aforesaid prayer.

In view of above, the application is allowed. The petition is dismissed as not pressed at this stage."

22. In the aforesaid backdrop, a tentative seniority list of P.T.G.T.O. was published on 13.08.2015 wherein the respondents herein were placed below the appellants and other such similarly situated persons who were initially appointed as P.T.G.T.S. and subsequently merged with the post of P.T.G.T.O. in pursuance of the Government Order dated 03.05.2011.

23. The respondents herein filed their detailed objections in respect of the tentative seniority list circulated on 13.08.2015, however, the same was rejected and the final seniority list dated 11.09.2015 was published wherein the respondents herein who were directly recruited to the post of P.T.G.T.O. were placed lower than the persons who had initially been appointed as P.T.G.T.S. and in pursuance of the Government Order dated 03.05.2011 and merged and upgraded to the higher post of P.T.G.T.O.

24. This final seniority list dated 11.09.2015 was challenged by the

respondents herein in W.P. No. 1802 (S/B) of 2015 (Vijay Kishore Anand and Others Vs. State of U.P. & Others).

25. After the exchange of pleadings, and upon hearing, the said W.P. No. 1802 (S/B) of 2015 was allowed by means of judgment and order dated 13.04.2017. The relevant portion of the said judgment is being reproduced for ready reference:-

".....10. Regard being had to the aforesaid decision, it is established that till day the provisions of Government Order dated 3.5.2011 have not become part of Rules, 1980. Rule 5 of the Rules, 1980 deals with the source of recruitment. Under the Rules, Permanent Tax Superintendents and Permanent Goods Superintendents are the feeding cadre of Passenger Tax, Goods Tax Officers. The Government Order dated 3.5.2011 has put them at par with the Passenger Tax, Goods Tax Officer, which amounts to amendment in the Rules.

11. The Government Order dated 3.5.2011 provides the provisions contrary to the Rules, therefore it cannot be said that by way of Government Order, the State Government has supplemented the Rules.

12. The State Government cannot be permitted to transgress the power of legislature by way of executive order.

13. Therefore, we are of the view that since the decision taken by the State Government for restructuring the post and placing the Passenger Tax Superintendent at per with the Tax Officer has not been inserted in the Rules, the private respondents, who are posted as Passenger Tax Officers, have no right to be placed in the seniority list of Passenger Tax and Goods Tax Officers amongst the petitioners.

14. In the result, the office order dated 11.9.2015 issued by the Transport Commissioner, State of U.P., is hereby quashed and a direction is issued to the State Government to prepare a seniority list of Passenger Tax, Goods Tax Officer afresh within two months from the date of communication of this order.

15. The writ petition stands allowed."

26. What is significant to note is that by means of judgment dated 13.04.2017 the Coordinate Bench of this Court had set aside the seniority list dated 11.09.2015 issued by the Transport Commissioner and the directed the State Government to prepare a fresh seniority list of Passenger/Tax Goods Tax Officer afresh. While issuing such directions, the coordinate Bench also noticed that the decision taken by the State Government for re-structuring the post and placing the P.T.G.T.S. at par with the P.T.G.T.O. was contrary to the Rules and not permissible, thus. the respondents in the said writ petition (who are the appellants before this Court) have no right to be placed over the P.T.G.T.O. who are the the petitioners of the writ petition (and the respondents herein). Against the aforesaid decision, a Review Petition was preferred which also came to be dismissed by means of order dated 18.12.2017. The relevant portion of the said order dated 18.12.2017 is being reproduced for convenient reference.

"We have not been able to find any apparent error on the face of record and also we do not find any good reason to entertain the review application along with application for condonation of delay.

Accordingly, both the aforesaid applications are hereby rejected. "

27. Thus, it would be seen that the judgment dated 13.04.2017 attained finality, inasmuch as, it was never assailed before the Apex Court.

28. Since the directions issued by the Division Bench of this Court was not being complied with, the respondents herein preferred a contempt petition bearing No. 1544 of 2017. By means of order dated 11.09.2017, 15.11.2017 and 16.11.2017, the Contempt Court finding that the order of the Division Bench was not being complied with in its letter and spirit, hence, in order dated 16.11.2017 it observed as under:-

"The government order dated 03.11.2011 being found in conflict with Rule 5 would nevertheless hold any field contrary to the statutory rules for the purposes of determining seniority of substantive members in service would be a serious misunderstanding of the judgment.

The above observations made in the judgment lead to no other conclusion but to a clear picture of the fact that substantive members of service appointed as per Rule-5 of the Service Rules, 1980 on the post of Passenger Tax and Goods Tax Officers have to be included in the final seniority list at their respective places in an ascending order.

The officer who is present in person has prayed that he may be permitted to carry out the mandate of law understood in the manner stated above within a further period of three days.

Let the necessary exercise be completed and action apprised to this Court on the next date of listing."

29. The Transport Commissioner taking note of the decision passed by a Division Bench as well the Contempt Court by means of order dated 17.11.2017 published a seniority list in respect of the present respondents. From the perusal of the said seniority list, it would indicate that 13 names were included. Amongst such 13 names persons at serial nos. 1 to 11 were such persons who had been directly recruited on the post of P.T.G.T.O. and the persons at serial Nos. 12 and 13 were the ones who had been promoted from the feeding cadre to the post of P.T.G.T.O. It will be relevant to note that the said seniority list dated 17.11.2017 was never assailed before any Court or Tribunal by the present appellants or similarly situated persons of the P.T.G.T.S. class which merged with P.T.G.T.O. vide Govt. Order dated 03.05.2011.

30. While the seniority list dated 17.11.2017 remained undisputed, in the meantime, the Uttar Pradesh Transport Taxation (Subordinate) Service (1st amenmdent) Rules 2018 was promulgated on 05.03.2018.

During this period, the selection process was initiated in respect of the post of Assistant Regional Transport Officer accruing against 8 vacancies for the selection year 2017-18 and 4 vacancies accruing in the selection year 2018-19.

31. Thereafter, the Transport Commissioner again circulated another tentative seniority list dated 30.01.2019 which in effect disturbed the seniority list dated 17.11.2017. The respondents herein raised their objections against the decision of the Transport Commissioner based on order dated 19.12.2018 passed by the State Government and being aggrieved, the

respondents herein again preferred W.P. No. 3654 (S/S) of 2019 wherein they sought a relief seeking quashing of the order dated 19.12.2018 as well as the impugned seniority list dated 30.01.2019.

32. In the aforesaid writ petition No. 3654 (S/S) of 2019, the learned Single Judge of this Court found that the issue involved could be resolved by directing the Competent Authority i.e. Transport Commissioner to pass appropriate order without being influenced with the order dated 19.12.2018 by means of which the State had issued certain directions to the Transport Commissioner. The relevant portion of the judgment/order dated 07.02.2019 passed in W.P. No. 3654 (S/S) of 2019 reads as under:-

"Accordingly, this writ petition is finally disposed of with the direction to the Transport Commissioner, Uttar Pradesh, Lucknow (respondent No.4) to pass appropriate order in regard to the controversy involved in the present writ petition for the placement of private respondents in the seniority list ignoring the order dated 19.12.2018 passed by the State Government, taking into consideration promulgation of Rules on 5.3.2018 in the light of the observation made in the judgment and order dated 13.4.2017 after affording an opportunity of hearing to the petitioners and to the private respondents within a period of 6 weeks from the date of production of certified copy of this order."

33. That in furtherance of the order passed by the learned Single Judge of this Court dated 07.02.2019 in W.P. No. 3654 (S/S) of 2019, the Transport Commissioner while rejecting the objections preferred by the respondents herein finalized the seniority list by means of order dated 15.04.2019. The result of which was that the appellants herein who were the P.T.G.T.S. and whose posts were upgraded as P.T.G.T.O. in pursuance of the Government Order dated 03.05.2011 were all placed above the respondents herein who were appointed as direct recruits to the post of P.T.G.T.O. These two orders; (i) dated 15.04.2019 by which the objections of the respondents herein regarding the seniority was rejected and (ii) the final seniority list issued by the Transport Commissioner of the same date i.e. 15.04.2019, were assailed by the respondents herein in W.P. No. 12438 (S/S) of 2019 which has been allowed by means of judgment dated 20.10.2020 which is under challenge in these instant, three, intracourt appeals.

34. The respondents herein, who were eligible to be considered for the post of Assistant Regional Transport Officer, despite lapse of substantial time and their case was not being considered, hence, the respondents herein prefererred a W.P. bearing No. 36294 (S/S) of 2018 (Vijay Kishore Anand and Others Vs. State of U.P. and Others).

35. In the aforesaid writ petition, two persons who belonged to the class of the appellants herein i.e. the persons who were initially appointed as P.T.G.T.S. and were upgraded to the post of P.T.G.T.O. vide Government Order dated 03.05.2011, were also impleaded as a party.

36. The Writ Court disposed of the aforesaid W.P. No. 36294 (S/S) of 2018 by

means of judgment dated 17.01.2019 with the following directions:-

".....13. On overall consideration of the material available on record, it is apparent on the face of record that the seniority list has been finalized in compliance of the judgment and order passed by this Court on 17.11.2017. It is also transpired that there are 12 vacancies of Assistant Regional Transport Officer existing in the department. The question that whether the respondent nos.5 and 6 are entitled to get promotion is also one of the issues to be determined by the competent authority in accordance with the amended service rules. This Court is not expressing any opinion in regard to absorption of the respondent nos.5 and 6 and other similarly situated Passenger/ Goods Tax Superintendents, who are also claiming seniority over and above the petitioners. As the rules was amended on 5.3.2018 and came into force at once meaning thereby on 5.3.2018. The respondent nos.5 and 6 and other similarly situated officers are entitled to get seniority over and above the petitioners can be subject matter of consideration in case they came to this Court to challenge the final seniority list dated 17.11.2017 on the ground that they are absorbed in service on the post of Passenger/ Goods Tax Officer in the department prior to the petitioners.

14. This is a writ petition filed by the petitioners claiming promotion on the basis of seniority finalized on 17.11.2017 which has not been set aside nor modified by this Court or by any other competent authority, therefore the petitioners have made out a case for issuance of a direction to the respondents to consider the case of the petitioner for promotion on the post of Assistant Regional Transport Officer in pursuance to the final seniority list dated 17.11.2017 and to pass an appropriate, reasoned and speaking order in regard to their promotion within a period of two months from the date of production of a certified copy of this order."

37. It will also be relevant to notice that few members of P.T.G.T.S. class such as the appellants herein had also preferred a writ petition before this Court at Allahabad bearing No. A-23347 of 2017 (Dr. Pratigya Srivastava and 6 Others Vs. State of U.P. and Others). In the aforesaid writ petition, the said petitioners had prayed for a writ of mandamus directing the State-respondents to take a final decision in respect of the amendment in the Uttar Pradesh Transport Taxation (Subordinate) Service Rules, 1980.

38. Before the Coordinate Bench at Allahabad, in the aforesaid writ petition, a plea was raised on behalf of the said petitioners that since the post of P.T.G.T.S. was upgraded and merged with the post of P.T.G.T.O. vide Government Order dated 03.05.2011, however, the Rules in respect thereto had not been amended, though, in respect of the post of Assistant Regional Inspector (Technical), the Rules had been amended, hence, in order to cure the aforesaid anomaly, a direction was sought for directing the State Government to take a decision regarding the amendment of Rules of 1980.

39. Ultimately, the said writ petition came to be dismissed as having become infructuous since it was informed to the Court that the Rules had been amended by the 1st Amendment Rules of 2018.

40. Now in this backdrop of factual narration and past litigation the submissions of the parties is being noted:-

Submissions on behalf of the appellants; (private respondents before learned Single Judge)

41. Heard **Sri Jaideep Narain Mathur**, learned Senior Advocate assisted by Sri Shobhit Mohan Shukla, learned counsel for the appellants in Special Appeal No. 296 (SB) of 2020. **Sri Sandeep Dixit**, learned Senior Advocate assisted by Sri Dipesh Dwivedi, learned counsel appearing for the appellants in Special Appeal No. 302 of 2020 and Sri Anil Tiwari, learned Senior Advocate assisted by Sri Apoorva Tiwari, learned counsel appearing for the appellants in Special Appeal No. 303 of 2020. Sri H.P. Srivastava, learned Additional Chief Standing Counsel along with Sri Upendra Singh, learned Standing Counsel for the State in all the three appeals as well as Sri Gaurav Mehrotra, learned counsel along with Sri Abhinav Singh and Ms. Maria Fatima learned counsel for the private respondents (writ petitioners) in all the above three appeals.

42. **Sri Sandeep Dixit**, learned Senior Counsel opened the arguments on behalf of the appellants and has primarily made the following submissions:-

(i) The learned Single Judge had misconstrued the controversy, inasmuch as, it failed to take note of Rule 4, 5 and 22 of the Rules of 1980. It is further urged that the decision taken by the Pay Committee which was given effect to vide Government Order dated 03.05.2011 by virtue of which the Payscales of P.T.G.T.S. was upgraded and brought at par with the Payscales applicable to the post of P.T.G.T.O. The aforesaid power was conferred upon the State Govrnments in terms of Rule 22 of the Rules of 1980. Similarly Rule 4 of the Rules of 1980 conferred power upon the State Government to change the strength and the number of posts in the Cadre including in respect of each category. This enabling provision empowered the State Government to carry out the re-structuring in the cadre, hence, there was actually no requirement to amend the Rules for the aforesaid purpose. Since, the aforesaid Rules empowered the State Government to undertake the aforesaid exercise which in terms of the Government Order dated 03.05.2011 was made effective immediately i.e. on 03.05.2011 consequently, from the said date, the appellants herein belonging to P.T.G.T.S. Class, were upgraded and their posts were re-designated as P.T.G.T.O., hence, the view taken by the learned Single Judge that the aforesaid exercise could not have been done without amendment in the Rules of 1980 is not quite correct.

(ii) It has also been urged by the learned Senior Counsel that the decision rendered by a Division Bench of this Court dated 13.04.2017 passed in W.P. No. 1802 (S/B) of 2015 (Vijay Kishore Anand and Others Vs. State of U.P. and Others) did not take note of the aforesaid Rules, hence, the aforesaid decision cannot be said to be a binding precedent, inasmuch as, it has been rendered *per incuriam.*

(iii) It is also urged by the learned Senior Counsel that though in the said writ petition bearing No. 1802 (S/B) of 2015, there was a direct challenge to the Government Order dated 03.05.2011 but the same did not find favour with the Court and though the Writ Petition was allowed but in effect it only set aside the seniority list dated 11.09.2015 and did not hold that the Government Order was bad nor it was quashed. Thus, once the Government Order though challenged, was maintained, now it is not open for the private respondents to urge that the Government Order was bad and that

without amending the Rules, the same could not be given effect to.

43. It has further been submitted by the learned Senior Counsel that the effect of the Division Bench Judgment in W.P. No. 1802 (S/B) of 2015 was only to the effect that the seniority list dated 11.09.2015 was set aside and the State Government was directed to prepare a fresh list within the time so prescribed. Emphasis being, that the creation or abolition of post was merely a policy decision of the Government which was referrable to the powers conferred upon the State Government in terms of Rule 4 read with Rule 5 and 22 and the view contrary taken by the learned Single Judge that the impugned order as well as the seniority list dated 11.09.2015 is in teeth of the order passed by the Division Bench in W.P. No. 1802 (SB) of 2015 is not correct, as the decision of this Court dated 13.04.2017 did not consider the aforesaid aspect of the matter.

44. **Sri Jaideep Narain Mathur**, learned Senior Counsel appearing for the appellants in Special Appeal No. 296 (S/B) of 2020 taking the aforesaid arguments further has urged that, if chronologically seen, upon the recommendations of the Pay Committee, the Government Order dated 03.05.2021 was issued. There perhaps cannot be any dispute that the State Government could have issued such a Government Order. The said Government Order required the merger and upgradation of posts from P.T.G.T.S. to P.T.G.T.O. along with enhancement in the Payscales to bring the same posts at par. The said Government Order was made effective from 03.05.2011. Thus, the present appellants who were upgraded to the post of P.T.G.T.O. had been working on the said Payscales and on the post of P.T.G.T.O. from 03.05.2011 whereas the present respondents (the original writ petitioners) were not even born in the said cadre as they came to be appointed only in the year 2013.

45. It is also urged by learned Senior Counsel that the Government Order dated 03.05.2011 was challenged initially in writ petition instituted by the Ministerial Service Association, Lucknow bearing W.P. No. 2811 (S/S) of 2011 where initially there was an interim order directing the parties to maintain status-quo, however, the aforesaid Writ Petition came to be dismissed as withdrawn. Subsequently, the present appellants also assailed the said Government Order by instituting a W.P. No. 336 (S/B) of 2015 which was withdrawn with liberty to file fresh and this further lead the private respondents herein to institute W.P. No. 1802 (S/B) of 2015 wherein again a challenge was raised to the Government Order dated 03.05.2011 but the same was not touched or set aside by the Court.

46. It is urged that this being the position, the necessary outcome was that in so far as the power of the Government to undertake the exercise of re-constructuring the cadre is concerned, the same was not found faulty. Once, the Government Order had been given effect to now it was merely an issue of seniority. Apparently, for the determination of seniority, it is the Uttar Pradesh Government Servants Seniority Rules, 1991 which are applicable. In terms of Rule 8 thereof, seniority is to be determined on the basis of the substantive appointment. Since the present appellants were appointed substantively w.e.f. 03.05.2011 whereas the present respondents were appointed only in the year 2013, hence they cannot be placed

higher in seniority to the present appellants and the private respondents cannot steal a march over the present appellants. This aspect of the matter has not been considered by the learned Single Judge in the correct perspective.

47. Sri Mathur has further urged that since the post of P.T.G.T.S. had been abolished in the year 2011 and as per the Government Order dated 03.05.2011 strength of the cadre had been fixed at 120, thus, in order to accomodate the present respondents, supernumerary posts were created. The appointment of the respondents on the supernumerary posts cannot be given the benefit of treating them as having been substantively appointed to enable them to avail the benefit of seniority over the present appellants.

48. It has also been urged by Sri Mathur that the learned Single Judge did not appreciate the fact that the alleged seniority list dated 17.11.2017 was only under pressure in light of the orders passed by the Contempt Court without considering the relevant aspect of the provisions and the learned Single Judge has also not noticed the effect of the subsequent orders passed by the Court in W.P. No. 3654 (S/S) of 2019 on 07.02.2019 whereby the direction was issued to the Transport Commissioner to pass appropriate orders in regard to the controversy involved in respect of the placement of the private respondents (who are the appellants herein) in the senority list taking into consideration the promulgamation of the 1st Amendment Rules on 05.03.2018 as well as the judgment and order dated 13.04.2017 after affording an opportunity of hearing to both the appellants and the respondents herein. It is actually in light of the aforesaid decision that the entire matter was open before the Transport Commissioner who considering the overall effect of the Rules 4 and 5 as well noticing the First Amendment Rules of 2018 as well as objections filed by the respective parties passed the order dated 15.04.2019 which did not require interference by the learned Single Judge.

49. Sri Mathur further urged that the effect of the seniority list dated 17.11.2017 which was in light of the orders passed by the Contempt Court is that the present appellants had been ousted from the zone of considerations for promotions for all times to come and this could never be the intention which works complete injustice to the present appellants who were working on the post of P.T.G.T.O. since 03.05.2011.

50. It is also urged by Sri Mathur that after the amendment in the 1st Amendment Rule, 2018, Rule 4 was amended and a 'Note' was appended thereto which was clearly explanatory and it gave retroactive effect to an occurrence which had already been implemented by the Government Order dated 03.05.2011. It is urged that the learned Single Judge has erred in treating the said explanatory note as a marginal note which has vitiated the outcome of the impugned judgment. In effect the Government Order dated 03.05.2011 had already been implemented in pursuance of powers referrable to Rule 4 and 22 and subsequent amendment brought in the year 2018 was only explanatory in nature as well as to remove the redundancy in the Rules of 1980 to bring it in conformity with the prevalent state of affairs.

51. It has also been pointed out that though the Rules could have been amended

earlier but in view of the order of status-quo operating in W.P. No. 2811 (SS) of 2011, the said exercise could not be undertaken and only when the aforesaid petition came to be dismissed as withdrawn that the exercise was undertaken and also in view of the order passed by the coordinate Bench at Allahabad in W.P. No. A-23374 of 2017, that Rules were amended but nevertheless it did not rob the Government Order of its sanctity or the power of the State Government to re-structure the cadre to bring it in confirmity with the recommendations of the Pay Committee.

52. Sri Jaideep Mathur, learned Senior Advocate has placed reliance on a decision of the Apex Court in the case of ***Sundaram Pillai and Others Vs. V.R. Pattabiraman and Others*** reported in ***1985 (1) SCC 591*** and upon dictionary meaning and principles of Statutory Interpretation and significance ascribed to a 'Note'.

53. **Sri Anil Tiwari,** learned Senior Advocate appearing for the appellants in Special Appeal No. 303 of 2020 has urged that the decision of the Pay Committee which is the genesis of the Government Order dated 03.05.2011 was never challenged by the private respondents at any stage. Once, this initial order/decision was not challenged the subsequent decisions were only consequential for the purposes of bringing into effect the decisions so taken and thus the consequential orders alone cannot be challenged.

54. Urging further it has been submitted that though the private respondents had merely challenged the Government Order dated 03.05.2011 without assailing the decision of the Pay Commission and even the aforesaid challenge to the Government Order dated 03.05.2011 failed now it was not open for the private respondents to urge that the Government Order was in excess or in conflict with the Rules of 1980 or that the exercise of re-structuring the cadre could not have been done without first amending the Rules.

55. It has also been urged by Sri Tiwari that the earlier decision of the Division Bench dated 13.04.2017 passed in W.P. No. 1804 (S/B) of 2015 cannot operate as *res-judicata* in the subsequent stage of the litigation especially when it is based on an erroneous interpretation of law. It is urged by Sri Tiwari that the said earlier decision of 13.04.2017 was in ignorance of Rule 4 of the 1980 Rules, hence, the decision rendered could not operate as *res-judicata* and for the said reason heavy reliance placed, on the decision of the Division Bench dated 13.04.2017, by the learned Single Judge which is the basis of the impugned order in three appeals is not quite correct and requires judicial interference.

56. It is also urged by Sri Tiwari that it is always within the ambit and powers of the State Goverment to increase the number of posts in the cadre without affecting the conditions of service. Merger being along with the post and enlarging the cadre was merely an exercise of supplementing the Rules and it was not in derogation thereof and this aspect of the matter has also not been considered in the correct perspective by the learned Single Judge.

57. In support of his submissions the learned Senior Counsel has relied upon a decision of the Apex Court in the case of ***(i) Satendra Kumar and Others Vs. Raj Nath Dubey and Others*** reported in ***2016 (14)***

SCC 49; (ii) Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy **reported in** ***1970 (1) SCC 613*** and ***(iii) Vinay Kunar Verma and Others*** Vs. State of Bihar and Others reported in ***1990 (2) SCC 647.***

Submissions on behalf of the State of U.P.

58. The **Additional Chief Standing Counsel** Sri H.P. Srivastava has primarily adopted the submissions made by the learned Senior Counsel on behalf of the appellants, however, the crux of the submission of the Additional Chief Standing Counsel is that in pursuance of the recommendation of the Pay Committee, the Government Order dated 03.05.2011 after abolishing the 93 posts in the cadre of P.T.G.T.S and 133 posts of P.T.G.T.O. together with 37 posts were merged in the post of P.T.G.T.O. with a provision to fill up the said post only through direct recruitment from the Public Service Commission restricting the total posts to 120 and 50 posts which were in excess of 120 and which were occupied by the present incumbents, on their retirement/promotion or for any other reason, upon becoming vacant would stand abolished.

59. It is also contented that Rule 8 of the U.P. Government Servant Seniority Rules, 1991 provides for appointments being made from promotion or direct recruitment but the seniority would be considered from the date of the order of initial appointment on the substantive post. It is urged that since the Seniority Rules of 1991 provides for counting the seniority from the date of initial appointment which in the present case would mean 03.05.2011 for the appellants and not from the date when the Rules were amended in the year 2018. For the said reason and in light of the submissions made in respect of the effect of Rule 4 of the 1980 also that an explanatory note has been appended in Rule 4 by the the 1st amendment Rules, 2018 which has not been correctly noticed by the learned Single Judge, which has vitiated the outcome hence the impugned order requires intervention.

Submissions of Private respondents (writ petitioners before learned Single Judge):

60. **Sri Gaurav Mehrotra,** learned counsel refuting the submissions of the learned Senior Counsel in the aforesaid three appeals, compositely has urged that from the bare perusal of Rule 4 (1) of the Rules of 1980 it will reveal that it did not confer any power on the State Government to merge one category of posts with another category, without amending the Rules. It is also urged that the Rule-4 only provides for changing the strength which denotes a change in numbers only but it cannot be extended to mean that it empowers the State Government to re-structure the cadre by abolishing the posts of P.T.G.T.S. and merging the same with a higher Post of P.T.G.T.O. Such an exercise could only be carried out by amending the Rules. It is further urged that the State Government was aware of the aforesaid and for the said reason in the Government Order dated 03.05.2011 itself provided that the Rules would be amended.

61. It has also been urged by Sri Mehrotra that the issue regarding the ambit

of Rule 4 of the Rules of 1980 that it encompasses the power to merge as well as re-structure the Cadre by a Government Order was not raised before the learned Single Judge and has been only raised for the first time in Special Appeal No. 303 of 2020.

62. It is also submitted by Sri Mehrotra that prior to filing of the instant special appeals, it was never the case of any member of the appellants' class or such similarly situate persons that the re-structuring could be done without amending the Rules. Even while a writ petition was filed before a coordinate Bench at Allahabad i.e. Dr. Pratigya Srivastava and Others Vs. State of U.P. & another (supra), the contention has always been that the State Government was required to amend the Rules which had not been done which was causing injustice and creating an impediment in the promotional avenues, hence, a direction was sought against the State Government for enacting the amended Rules.

63. It is also submitted that even assuming for a moment, though not conceded, that Rule 4 (1) of Rules of 1980 confers any power on the State Government to merge the two posts but then again there is clear cut findings against the said exercise of power in the decision rendered by the Division Bench dated 13.04.2017 passed in W.P. No. 1802 (S/B) of 2017 and the said decision was never assailed before any superior Court and had attained finality . It is urged that though the said decision dated 13.04.2017 was put under review but the Review Petition was also dismissed and no effort was made by the appellants to assail the said order before a Superior Forum either by any member of the appellants group or similarly situate person or by the State Governent. This being an undisputed position, the findings returned by the earlier Division Bench were binding both on the present appellants as well as the State-Governments and a mandamus having been issued by the Division Bench directing the State to prepare a seniority list in respect of the respondents and the same having been done by the Competent Authority by issuing the seniority list dated 17.11.2017 which again had attained finality as it was never challenged by any person of the appellants group or similar situate persons, hence, they cannot now take a contrary stand by submitting that the earlier decision was rendered *per incuriam* or was bad for ignoring Rule 4 of the Rules of 1980.

64. It is further urged by Sri Mehrotra that the submissions regarding the earlier decision dated 13.04.2017 being *per incuriam* was completely fallacious, inasmuch as, a decision even if *per incuriam* only has the effect of loosing its precedent value but it does not loose its binding effect, least of all, inter se the parties, upon whom it is binding.

65. It is also urged that it is now well settled that even an erroneous decision on a point of law, inter-se the parties, continues to operate as *res-judicata* and the submissions of the appellants, contrary is not quite in consonance with law. It is further submitted that the appellants herein belong to the Class of those persons who were initially appointed as P.T.G.T.S. and in pursuance of the Government Order dated 03.05.2011 were upgraded to the post of P.T.G.T.O. This class had contested the proceedings and as such not having assailed the earlier orders including the decisions of the Division Bench dated 13.04.2017 as well as the seniority list

dated 17.11.2017 before any superior forum or before any Tribunal, hence, such findings became final and even if for a moment for the sake of argument it is considered to be erroneous yet the same cannot come to the rescue of the appellants at this subsequent stage of litigation, thus, the earlier decisions continue to have a binding effect and precludes the appellants from raising such arguments.

66. It is also urged by Sri Mehrotra that once the seniority list dated 17.11.2017 was issued by the Transport Commissioner in compliance of the mandamus issued by the Division Bench of this Court dated 13.04.2017 also after clarification from the Contempt Court, it was well within the knowledge of the appellants yet they chose not to assail the said seniority list. It is now well settled that once a seniority list has been finalised then it is not open for the Authority concerned to tinker with the same. If at all the appellants had any grievance, the same could only have been agitated before this Court or before a Tribunal but the Executive did not retain any power to change or amend the said seniority list and for the said purpose the impugned order dated 15.04.2019 passed by the Transport Commissioner was in excess of jurisdiction and the fact that the private respondents had specifically raised such objections before the Authority concerned, yet the same was not considered and brushing the same aside, the Transport Commissioner passed the impugned order which was challenged before the learned Single Judge and the same has rightly been set aside by the learned Single Judge.

67. Sri Mehrotra in support of his submissions relies upon a decision of the Apex Court in the case of ***H.S. Vankani and Others Vs. State of Gujarat and Others*** reported in ***2010 (4) SCC 301 ; Ambika Prasad Mishra Vs. State of U.P. and Others*** reported in ***1980 (3) SCC 719; A.R. Antulay Vs. R.S. Nayak and Another*** reported in ***1988 (2) SCC 60; and*** in the case **of *Dr. Subramaniam Swamy Vs. State of Tamil Nadu and Others reported and Others in 2014 (5) SCC 75.***

68. Taking his arguments further, Sri Mehrotra has also submitted that the seniority list dated 17.11.2017 was in pursuance of a Mandamus issued by the Division Bench of this Court in W.P. No. 1802 (S/B) of 2015 dated 13.04.2017. It is submitted that the effect of a mandamus issued cannot be diluted nor it can be done away with by an amendment. It is submitted that once the Division Bench in its decision dated 13.04.2017 found that the Government Order dated 03.05.2011 was not in confirmity with the Rules and it could not introduce something which was not provided in the Rules, hence, with the aforesaid findings the mandamus was issued, hence, even by the amendment the effect of such a mandamus could not be diluted. In support of his submission, he relies upon a decision of the Apex Court in the case of ***Madan Mohan Pathak and Others Vs. Union of India and Others*** reported in ***1978 (2) SCC 50.***

69. It has also been urged by Sri Mehrotra that certain rights which had accrued to the respondents herein were valuable rights which could not have been taken away even by amending the Rules retrospectively. It is submitted that though it is not the case of the appellants or the State that the Rules were amended

retrospectively but yet an argument has been raised that by appending the explanatory note to Rule 4 (1) by the 1st Amendment Rules, 2018, in effect it gave a retroactive effect to the merger of posts by the Government Order dated 03.05.2011, consequently, the seniority of the appellants ought to be recognized from 03.05.2011, is also erroneous. It is urged that once a right has been settled, it cannot be taken away even by introducing a retrospective amendment in a Statute. The Rules being subordinate piece of legislation cannot be treated at a pedestal higher than the legislation itself. What is impermissible in respect of the legislation cannot be made permissible in respect of a subordinate piece of legislation, such as the Rules of 1980.

70. In order to buttress his submissions, the learned counsel for the private respondents relies upon a decision of the Apex Court in the case of ***Chairman, Railway Board and Others Vs. C.R. Rangadhamaih and Others*** **reported in** ***1997 (6) SCC 623, case of J.S. Yadav Vs. State of U.P.*** **reported in** ***2011 (6) SCC 570*** and the case of ***Central Board of Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another*** reported in ***2005 (2) SCC 673.***

71. Sri Mehrotra has also submitted that upon perusal of the record, it would indicate that in so far as the present private respondents are concerned, the process of selection was commenced by the Commission in the year 2009. The respondents were found duly eligible and having qualified were selected to the post of P.T.G.T.O. It is in the interim period that the Government Order dated 03.05.2011 came into the picture which was assailed by the Ministerial Service Association Transport Commissioner Office, Lucknow in W.P. No. 2811 (SS) of 2011 wherein an order of status-quo was passed.

72. Upon due selection of the present respondents they could not be given the joining in view of the status-quo order as such the State Government made an application in the said W.P. No. 2811 (SS) of 2011 and the interim order maintaining status-quo was modified vide order dated 22.02.2013 to the extent that the 15 selected incumbents also included the present respondents were permitted to join on the post in question, however, their joining was made subject to further orders passed in the aforesaid writ petition. It is submitted that the respondents were given the substantive appointment from 22.07.2013 and 06.08.2013. Since the writ petition was dismissed as withdrawn, therefore, there was no effect on the substantive appointments of the respondents.

73. It is further urged that even creation of supernumerary posts as per Rule 4 (2) of the 1980 Rules, the same is well within the powers of the Government. The creation of the supernumerary posts and appointment thereon from time to time does not affect the date of appointment on a substantive post. It is urged that the definition of the word "substantive appointment" mentioned in Rule 4 (h) of the U.P. Government Servants Seniority Rules, 1991 clearly provides that substantive appointments means an appointment not being ad-hoc on a post in the cadre of service made after selection in accordance with the Service Rules relating to that service. It is submitted that in view of the aforesaid definition, it cannot be said that the appointment of the petitioners on a supernumerary post would not grant them

the benefit of a substantive appointment. In support of his submission, he relies upon the decision of ***J.S. Yadav Vs. State of U.P. (Supra)*** wherein it has been held that the cadre may also include temporary, supernumerary and shadow posts created in different grades.

74. It is lastly urged by Sri Mehrotra that the impression given by the appellants that the seniority list dated 17.11.2017 has the effect of ousting the appellants from the zone of consideration of seniority and promotion for all times to come is absolutely misfounded. He has drawn the attention of the Court to the seniority list which has been forwarded to the State Government which includes the names of the appellants and the similarly situate persons. It has been pointed out that in pursuance of the seniority list dated 17.11.2017, the respondents have been placed from Serial Nos. 1 to 13 whereas the appellants herein have been placed from serial no. 14 onwards. Thus, the apprehension and submission of the appellants is clearly misconceived.

75. It is submitted that for all the aforesaid reasons, the submissions of the appellants are only fallacious and the decision of the learned Single Judge which considers the effect of the Division Bench decision of this Court dated 13.04.2017 as well as the finality attached to the seniority list dated 17.11.2017 does not require any interference and the three appeals be dismissed.

Discussions and Analysis:-

76. Upon consideration of the rival submissions, at the outset the primary ground of attack of the learned Senior Counsel for the appellants is based on the premise that the earlier Division Bench judgment of this Court dated 13.04.2017 is *per incuriam* and upon this premise it is urged that the scope of Rule 4(1) and (2) of the Rules of 1980 has not been considered in the correct perspective thus robbing the earlier judgment of its binding value. If Rule 4(1) and (2) of Rules of 1980 are construed in the manner as suggested by the appellants, then it would be seen, that the merger of posts could be done without amending the Rules and as the appellants being in the cadre post prior in time from the date of induction of the respondent hence they would be senior to the respondents, hence, the Transport Commissioner was right in placing the appellants above the respondents vide its order dated 15.04.2019 which has been incorrectly set aside by the learned Single Judge.

77. Moreover, it has been urged that the finding in the earlier Division Bench judgment would also not hamper or operate as *res-judicata* as it is based on erroneous appreciation of law rather it is based on ignorance of the relevant Rule 4 of 1980 Rules.

78. Once the issue of seniority is looked afresh, in light of the submissions made by the learned Senior Counsel for the appellants, considering the 1st Amendment Rules of 2018 having been promulgated and the matter being thrown open to be considered again by the decision of the learned Single Judge dated 07.02.2019 passed in W.P. No. 3654 (S/S) of 2019 with a fresh perspective it would reveal that the Transport Commissioner rightly passed the order dated 15.04.2019 which did not

warrant any interference by the learned Single Judge.

79. It has also been urged that the Note appended to Rule 4 of the Rules of 1980 by the 1st Amendment Rules of 2018 was not a marginal note rather it was explanatory note having retroactive operation and the learned Single Judge erred in treating it to be a marginal note, thus, the judgment under challenge dated 20.10.2020 is suceptible to judicial interference.

80. In order to resolve the controversy involved in these appeals, the following points are being formulated which will be helpful in deciding the matter lucidly:-

Point 1:- Whether the earlier Division Bench decision dated 13.04.2017 passed in W.P. No. 1802 (S/B) of 2015 is per incurium and if so its effect on this subsequent round of litigation?

Point 2:- Whether the earlier Division Bench decision dated 13.04.2017 passed in W.P. No. 1802 (S/B) of 2015 and its findings therein would operate as resjudicata/constructive *res-judicata*, in this subsequent round of litigation and if so its effect?

Point 3:- The true import of the 'Note' appended to Rule 4 by the 1st Amendment Rules of 2018, as to whether it is a marginal or an explanatory note and whether it has a prospective or retrospective/retroactive effect?

Apart from the three points as noted above, the other submissions advanced by the learned Senior Counsel for the appellants shall be considered in the 4th point under the head of Ancillary arguments, as under:-

Point 4:- Ancilary Arguments:-

(a) Whether the date of 03.05.2011 could be considered to be the material date for ascertaining the seniority of the appellants?

(b) Whether the Transport Commissioner was justified in passing the order dated 15.04.2019 thereby disturbing the seniority list which was circulated in pursuance of the order passed by a Division Bench dated 13.04.2017 ?

(c) Whether the writ petitioners (the respondents herein) can merely challenge the seniority list without assailing the Government Order dated 03.05.2011 while the Government Order dated 03.05.2011 stood affirmed as it was not set aside by the earlier Division Bench judgment dated 13.04.2017 in W.P. No. 1802 (S/B) of 2015.

81. Now, the Court embarks upon the exercise to answer the points as formulated within the framework of the arguments of the respective parties and the matter on record.

82. ***Point No. 1:-*** At the very outset, 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)."

83. 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 previou 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]

84. 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.

85. The Constitution Bench of the Apex Court in the case of ***A.R. Antulay Vs. R.S. Nayak and Another*** reported in ***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."

86. 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."

87. Thus, from the pronouncement as noticed above, it is clearly discernable that the doctrine of per-incuriam merely takes away the precendent value of a decision but in no manner it dilutes or affects the binding nature of the aforesaid decision on the parties inter-se.

88. As far as the legal proposition of *per incuriam* and its binding effect on parties inter-se as explained by the Apex Court in the case of ***A.R. Antulay (Supra)*** is concerned it could not be disputed by the learned Senior Counsel for the appellants.

89. Applying the aforesaid principles to the present case, it would be crystal clear that the earlier decision rendered on 13.04.2017 in W.P. No. No. 1802 (S/B) of 2015 did take note of the Rules as well as the Government Order dated 03.05.2011, though, there is no specific mention of the Rule 4 but nevertheless it has given its finding concluding that the Government Order dated 03.05.2011 could not bring in effect, putting the persons like the appellants in seniority over the people like the respondents and at par without amending the Rules. The rules were before the earlier Division Bench and it cannot be said that the Rules of 1980 were not considered whereas the presumption is

otherwise that after considering the entire Rules, the judgment was delivered especially when the judgment takes note of the Rules and the submissions of the parties and specific reference to the Rules of 1980 has been made therein.

90. This decision, between the two classes i.e. those who were directly recruited and appointed on the post of P.T.G.T.O. such as private respondents and those who were working as P.T.G.T.S. while their posts were merged with P.T.G.T.O., was rendered by a coordinate Bench and the said decision though challenged in the Review but unsuccessfully and not taken any further before any superiour Court, cannot be treated as per-incuriam.

91. Even though for the sake of argument, if at all, it is treated as such, nevertheless it will not rob the decision of its binding value on the two class of persons who are parties inter-se as noticed above, and thus this Court is unable to accept the submission of learned Senior Counsel that the earlier Division Bench judgement is per-incuriam. Accordingly, the submissions of the appellants relating to the earlier decision being per-incuriam is turned down.

Thus, point No. 1 is decided in the negative.

92. ***Point No. 2.*** The next submission of the learned Senior Counsel for the appellants is that the earlier decision will not operate as *res-judicata* in the present round of litigation, is also misconceived. As noticed above, the earlier round of litigation was between the two class. One of the said class, had agitated the matter and a finding was returned in the decision dated 13.04.2017. This finding which was returned regarding the Government Order not supplementing the Rules and that the effect of the Government Order could not be given effect without amending in the Rules is a finding which is binding inter-se between the same persons or class of persons including their representatives and the same can operate as *res-judicata*.

93. The doctrine of *res-judicata* has been explained by the Apex Court in the case of ***Dr. Subramanian Swami Vs. State of Tamil Nadu and Others*** reported in ***2014 (5) SCC 75*** wherein it has been held that even an erroneous decision on a question of law attracts the doctrine of *res-judicata* in between the parties. The question regarding the correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as *res-judicata*.

94. The relevant paras Nos. 39 to 48 from the aforesaid reported case of Subramanian Swami (Supra) reads as under:-

"39. The scope of application of doctrine of res judicata is in question. The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject-matter or status" and "res judicata" literally means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments". Res judicata pro veritate accipitur is the full maxim which has, over the years, shrunk to mere "res judicata", which means that res judicata is accepted for truth. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence interest reipublicae ut sit finis litium (it concerns the State that there

be an end to law suits) and partly on the maxim nemo debet bis vexari pro una et eadem causa (no man should be vexed twice over for the same cause).

40. Even an erroneous decision on a question of law attracts the doctrine of res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. (Vide Sha Shivraj Gopalji v. Edappakath Ayissa Bi [(1949) 62 LW 770 : AIR 1949 PC 302] and Mohanlal Goenka v. Benoy Kishna Mukherjee [AIR 1953 SC 65] .)

41. In Raj Lakshmi Dasi v. Banamali Sen [AIR 1953 SC 33] , this Court while dealing with the doctrine of res judicata referred to and relied upon the judgment in Sheoparsan Singh v. Ramnandan Prasad Singh [(1915-16) 43 IA 91 : (1916) 3 LW 544 : AIR 1916 PC 78] , wherein it had been observed as under: (Raj Lakshmi Dasi case [AIR 1953 SC 33] , AIR p. 38, para 15)

"15. ... "... the rule of res judicata, while founded on ancient precedent, is dictated by a wisdom which is for all time. ... Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: "If a person, though defeated at law, sue again, he should be answered, "you were defeated formerly'. This is called the plea of former judgment." ... And so the application of the rule by the courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.' (Sheoparsan Singh case [(1915-16) 43 IA 91 : (1916) 3 LW 544 : AIR 1916 PC 78] , IA pp. 98-99)" (emphasis in original)

42. This Court in Satyadhyan Ghosal v. Deorajin Debi [AIR 1960 SC 941] explained the scope of principle of res judicata observing as under: (AIR p. 943, para 7)

"7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter--whether on a question of fact or a question of law--has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct."

A similar view has been reiterated by this Court in Daryao v. State of U.P. [AIR 1961 SC 1457] , Greater Cochin Development Authority v. Leelamma Valson [(2002) 2 SCC 573 : AIR 2002 SC 952] and Bhanu Kumar Jain v. Archana Kumar [(2005) 1 SCC 787] .

43. The Constitution Bench of this Court in Amalgamated Coalfields Ltd. v. Janapada Sabha Chhindwara [AIR 1964

SC 1013] , considered the issue of res judicata applicable in writ jurisdiction and held as under: (AIR p. 1018, para 17)

"17. ... Therefore, there can be no doubt that the general principle of res judicata applies to writ petitions filed under Article 32 or Article 226. It is necessary to emphasise that the application of the doctrine of res judicata to the petitions filed under Article 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It only seeks to regulate the manner in which the said rights could be successfully asserted and vindicated in courts of law."

44. In Hope Plantations Ltd. v. Taluk Land Board, Peermade [(1999) 5 SCC 590] , this Court has explained the scope of finality of the judgment of this Court observing as under: (SCC pp. 604 & 607, paras 17 & 26)

"17. ... One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice ever, because such a process would be contrary to considerations of fair play and justice.

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26. ... Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it."

(See also Burn & Co. v. Employees [AIR 1957 SC 38] , G.K. Dudani v. S.D. Sharma [1986 Supp SCC 239 : 1986 SCC (L&S) 622 : (1986) 1 ATC 241 : AIR 1986 SC 1455] and Ashok Kumar Srivastav v. National Insurance Co. Ltd. [(1998) 4 SCC 361 : 1998 SCC (L&S) 1137])

45. A three-Judge Bench of this Court in State of Punjab v. Bua Das Kaushal [(1970) 3 SCC 656 : AIR 1971 SC 1676] considered the issue and came to the conclusion that if necessary facts were present in the mind of the parties and had gone into by the Court, in such a fact situation, absence of specific plea in written statement and framing of specific issue of res judicata by the court is immaterial.

46. A similar view has been reiterated by this Court in Union of India v. Nanak Singh [AIR 1968 SC 1370] observing as under: (AIR p. 1372, para 5)

"5. This Court in Gulabchand Chhotalal Parikh v. State of Gujarat [AIR 1965 SC 1153] , observed that the provisions of Section 11 of the Code of Civil Procedure are not exhaustive with respect to all earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit, and on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. There is no good reason to preclude such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and

thus to give limited effect to the principle of the finality of decisions after full contest."

47. It is a settled legal proposition that the ratio of any decision must be understood in the background of the facts of that case and the case is only an authority for what it actually decides, and not what logically follows from it. "The court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed."

48. Even otherwise, a different view on the interpretation of the law may be possible but the same should not be accepted in case it has the effect of unsettling transactions which had been entered into on the basis of those decisions, as reopening past and closed transactions or settled titles all over would stand jeopardised and this would create a chaotic situation which may bring instability in the society."

95. It will be relevant to notice that the doctrine of constructive *res-judicata* is also important to note. A matter directly and substantially in issue, may again be so, either actually or constructively. It is constructive when it might and ought to have been made a ground of attack or defence in former proceedings. It is well known that the doctrine of res judicata is codified in S. 11 of the Code of Civil Procedure but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law, the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of S. 11 of the Code of Civil Procedure and in many other situations also principles not only of direct res judicata but of constructive res judicata are applied. If by any judgment or order any matter in issue has been directly and explicitly decided, the decision operates as res judicata and bars the trial of an indentical issue in a subsequent proceedings between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in the eyes of the law to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.

96. This Court draws strength from the decisions of the Apex Court in the case of ***State of U.P. Vs. Nawab Hussain 1977 (2) SCC 806*** as well as from the case of ***Ferro Alloys Corporation Ltd. and Another Vs. Union of India and Others reported in 1999 (4) SCC 149.***

97. Thus, in the present case, where the earlier Division Bench decision dated 13.04.2017 had been put to review unsuccessfully and thereafter it was not challenged in any appeal before any superiour Court, thus, the said decision attained finality. In such a situation where the litigation is between the same class of people, at a subsequent stage now, it cannot be urged that the ealier decision was incorrect and the same cannot bind the present appellants.

98. Moreover, the issue of Government Order dated 03.05.2011 was directly in issue before the earlier Division Bench in W.P. No. 1802 (S/B) of 2015 and

the submissions raised at this stage by the appellants and the State was very well open to them to raise and thus 'it might and ought to' have been made a ground in the former proceedings, hence, the submissions of the appellants is also hit by the doctrine of constructive *res-judicata*, as explained above.

99. Now if decisions cited by learned Senior Counsel Sri Tiwari are considered, it would indicate that in the case of ***Satendra Kumar (supra***), the Apex Court while dealing with the issue of *res-judicata* in paragraph 16 of the said report has held and reiterated that the bar of *res-judicata* shall not apply, if it relates to another issue founded upon a different cause of action though the parties may be the same. The aforesaid decision does not lay down the proposition that in respect of the same issue the matter can be re-agitated even though if incorrectly decided.

100. It would be seen that the issue whether the members of P.T.G.T.S. as merged on the basis of Government Order w.e.f. 03.05.2011 whether is a valid exercise without amending the Rules, has been decided by a Division Bench on 13.04.2017. The seniority list on the basis of the aforesaid finding was quashed in the said decision.

101. It is the issue of seniority, in consequence of that said decision, which has been assailed before the learned Single Judge who has held the same to be bad as it is in the teeth of the Division Bench Judgment, accordingly, it cannot be said that the instant litigation was either in respect of a different issue arising out of a different cause of action, hence, the said decision does not come to the rescue of the appellants. Specially when the seniority list was prepared on 17.11.2017 in compliance of the judgment dated 13.04.2017 and the same was not challenged and thereafter it also attained finality.

102. Now at this stage, the appellants cannot be permitted to do something indirectly which they failed to do directly. The said seniority list dated 17.11.2017 was binding as it has not been challenged before any Tribunal or Court. Same is the proposition held by the Apex Court in the case of ***Mathura Prasad (Supra)***, hence, the same also does not help the appellants for the reason, recorded hereinabove.

103. In so far as the decision regarding ***Vinod Kumar Verma (supra)*** is concerned, the said case is clearly distinguishable, inasmuch as, in the aforesaid case, the matter was regarding the merger of two cadres by an executive order but what is noticeable is that one cadre itself was created by an executive order and so by another executive order, it was merged. In the instant case, neither the service or posts of P.T.G.T.S. was created by an executive order rather it was an outcome of the Rules of 1980, thus, the merger without a specific enabling provision in the Rules of 1980, the same could not have been merged with the higher post of P.T.G.T.O. and this issue has already been considered by the earlier Division Bench in its decision dated 13.04.2017 in W.P. No. 1802 (SB) of 2015, hence, the said decision of ***Vinod Kumar Verma (Supra)*** also does not come to the rescue of the appellants.

In light of the above discussion, the submission of learned counsel for the appellants do not find favour with this Court and is turned down. Accordingly, Point No. 2 is decided in the affirmative.

104. **Point No. 3:-**.Now to answer the point no. 3, it will be necessary to notice the provisions of the Rules of 1980 and also the change after the amendment in the year 2018.

105. Much emphasis has been laid on Rule 4, hence, it will be appropriate to reproduce Rule-4 which reads as under:-

"4. Cadre of the service --*(1) The strength of the service and of each category of posts therein shall be such as may be deternined by the Government from time to time.*

(2) The strength of the service and of each category of posts therein shall until orders varying the same are passed under sub-rule (1) be as given in Appendix 'A';

Provided that ---

(i) the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post without thereby entitling any person to compensation and;

(ii) the Governor may create such additional permanent or temporary posts from time to time as he may consider proper;"

106. It will be relevant to notice, that the Rule 5 has already been reproduced in the preceeding paragraphs of this judgment, however, at the cost of repetition, Rule 5 is also reproduced hereinafter to get a comprehensive overview of the Rules of 1980 at one place. Rule 5 reads as under:-

***"5. Source of recruitment**--Recruitment to the various categories of posts in the service shall be made from the following sources--*

(I) Passenger Tax, Goods-Tax Officer- (i) By direct recruitment through the Commission.

(ii) By promotion through the Commission from amongst--

(a) the permanent Tax Superintendent/Passenger Tax/Goods Tax Syperintendents who have put in at least five years of continuous service as such:

(b) the permanent Assistant Public Prosecutors who have put in at least five years of continous service as such; and

(c) the permanent Head Assistants, Head Clerks of the Transport Commissioner's Office, who have put in at least five years of continuous service as such:

Provided that as far as possible the recruitment shall be so arranged that 50 per cent posts in the cadre are held by direct recruits and rest by promotion as follows:-

(a) Tax Superintendent/Goods Tax, Superintendents/Passenger Tax Superintendents--40 per cent;

(b) Assistant Public Prosecutors-5 per cent.

(c) Head Assistant/Head Clerks in Transport Commissioner's Office-5 per cent.

(2) Tax Superintendents.- By promotion through the Commission from amongst the permanent passenger Tax/Goods Tax Superintendents.

(3) Passenger/Goods Tax Superintendents.-- (i) By direct recruitment through the Commission.

(ii) By promotion through the Commission from amonst:-

(a) the permanent Section in Charges Noter and Drafters and Stenographers of Transport Commissioner's Office who have put in at

least five years of continuous service as such; and

(b) the permanent Head Clerks, Head Clerk-cum-Accountants and Stenographers in the Regional Transport Offices, who have put in at least five years of continuous service as such;

Provided that, as far as possible, the recruitment shall be so arranged that 50 per cent posts in the cadre are held by direct recruits, and rest by the promotion as follows:-

(a) Section in charge and Noter and Drafters -15 per cent.

(b) Stenographers in Transport Commissioner's Officer- 14 per cent

(c) Stenographers in Regional Offics-14 per cent."

107. The learned Senior Counsel for the appellants have also drawn the attention to Rule 14 which provides for determination of vacancies and it enables the Appointing Authority to determine and intimate to the Commission the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies to be reserved for the candidates belonging to Scheduled Castes, Scheduled Tribes and other Categories under Rule 6 of the 1980 Rules.

108. Rule 18 provides for appointment and it states that on occurrance of substantive vacancies, the Appointing Authority shall make appointments by taking candidates in the order in which they stand in the lists prepared under Rules 15, 16 and 17, as the case may be.

109. From the perusal of the Rule 15, 16 and 17 which has been referred to in Rule 18, it would indicate that it relates to procedure for direct recruitment and also for preparation of a combined lists of personnel comprising of persons working on the post of P.T.G.T.S., Tax Superitendent, Head Assistant/Head Clerks and also persons working incharge as Stenographers of the Transport Commissioner Office, Noters and Drafters, Head Clerks and Head Clerk-cum-Accountant, Stenographers in Regional Offices on the basis of seniority.

110. Rule 22 indicates the scales of pay admissible to the persons appointed to various categories of posts in the service whether in substantive or officiating capacity or as temporary measure which shall be such as may be determined by the Government from time to time. Rule 22 has provided the scale of pay for the posts as mentioned therein.

111. An appendix-A has also been appended to the Rules after Rule 28 which provides for the posts and total strength against each such post.

112. It is sought to be urged by the appellants that where Rule 22 confers power upon the State Government to amend the Payscales and Rule 4 specifically confers powers on the Government to determine the strength of the service in each category of posts, the necessary corollary is that such powers also includes the power to re-structure the cadre including the merger of one post with a higher post as it is nothing but determining the number and strength of the posts.

113. It has been urged that a Government Order dated 03.05.2011 in effect raised the Payscale of the P.T.G.T.S. to that of P.T.G.T.O. This was well within the power of the State Government in terms of Rule 22. In the same breath, the same

Government Order also determined the strength of service including the category of posts and thus P.T.G.T.S. posts were merged with the higher posts. As a result, the strength of the service was determined by abolishing the post of P.T.G.T.S. and increasing the number of posts of P.T.G.T.O. In effect with the enhancement of the Payscales and merger of the post, the Government Order stood implemented and nothing further was required to be done nor by the Rules of 1980 were to be amended, as this re-structuring could be done in terms of the Rule 4 and 22 iteself.

114. This Court upon considering the respective submissions of the parties as well as from the perusal of the record, finds that though Rule 4 does mention that the Government can determine the strength of service and each category of posts from time to time, however, at this stage, this Court is unable to accept this contention that it does bring within its ambit the power to re-structure the cadre since this aspect of the matter has already attained finality in light of the decision of the earlier Division Bench judgment dated 13.04.2017 passed in W.P. No. 1802 (S/B) of 2015. The relevant portion of the said decision reads as under:-

"10. Regard being had to the aforesaid decision, it is established that till day the provisions of Government Order dated 3.5.2011 have not become part of Rules, 1980. Rule 5 of the Rules, 1980 deals with the source of recruitment. Under the Rules, Permanent Tax Superintendents and Permanent Goods Superintendents are the feeding cadre of Passenger Tax, Goods Tax Officers. The Government Order dated 3.5.2011 has put them at par with the Passenger Tax, Goods Tax Officer, which amounts to amendment in the Rules.

11. The Government Order dated 3.5.2011 provides the provisions contrary to the Rules, therefore it cannot be said that by way of Government Order, the State Government has supplemented the Rules.

12. The State Government cannot be permitted to transgress the power of legislature by way of executive order.

13. Therefore, we are of the view that since the decision taken by the State Government for restructuring the post and placing the Passenger Tax Superintendent at per with the Tax Officer has not been inserted in the Rules, the private respondents, who are posted as Passenger Tax Officers, have no right to be placed in the seniority list of Passenger Tax and Goods Tax Officers amongst the petitioners."

115. From the perusal of the aforesaid, it would clearly indicate that the Coordinate Bench of this Court noticed the transgression of power by the State Government by implementing the Government Order dated 03.05.2011 and giving effect to it without amending the Rules. This was the primary reason, in view whereof the seniority list dated 11.07.2015 issued by the Transport Commissioner was quashed. The clear findings that since the Rules had not been amended, the State merely by a Government Order dated 03.05.2021 could not bring the two posts of P.T.G.T.S. and P.T.G.T.O. at par cannot be assailed at this stage in the subsequent round of litigation.

116 Once the aforesaid findings were recorded in the judgment dated 13.04.2017, now it is not open to the appellants to urge

that the decision dated 13.04.2017 did not consider, the applicability of Rule 4. Even otherwise, from the perusal of Rule 4, it merely confers the power on the State Government to determine the strength but does not confer any power to re-structure the cadre and to abolish the posts which is going to run contrary to the provisions contained in Rules.

117. In view of the aforesaid, this Court has no hesitation to hold that Rule 4 clearly provided the powers to determine the strength but not to bring in sweeping changes which had the effect of abolishing the posts and also affecting the feeding cadre which in effect also has a cascading effect on other rules and also for the reason that the finding recorded in its earlier decision of the coordinate Bench dated 13.04.2017 is binding as explained in the preceding paragraphs while dealing with Point No. 1 and 2.

118. The next limb of the argument relating to retrospective/retroactive operation of the Note appended to the amended rule is now being considered.

119. Before dealing with the aforesaid issue, it will be appropriate to note certain settled cannons of interpretation relating to provisions and in what circumstances retrospectively can be attributed.

This aspect has been noticed by the Apex Court in the case of ***Commissioner of Income Tax Vs. M/s. Essar Teleholdings Ltd.*** reported in ***2018 (3) SCC 253*** wherein paras 22 to 26, the Apex Court has held as under:-

"Important principles of statutory interpretation

.....22. The legislature has plenary power of legislation within the fields assigned to them; it may legislate prospectively as well as retrospectively. It is a settled principle of statutory construction that every statute is prima facie prospective unless it is expressly or by necessary implications made to have retrospective operations. Legal maxim nova constitutio futuris formam imponere debet non praeteritis i.e. a new law ought to regulate what is to follow, not the past, contain a principle of presumption of prospectivity of a statute.

23. Justice G.P. Singh in Principles of Statutory Interpretation (14th Edn. in Chapter 6), while dealing with operation of fiscal statute, elaborates the principles of statutory interpretation in the following words:

"Fiscal legislation imposing liability is generally governed by the normal presumption that it is not retrospective and it is a cardinal principle of the tax law that the law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication. The above rule applies to the charging section and other substantive provisions such as a provision imposing penalty and does not apply to machinery or procedural provisions of a taxing Act which are generally retrospective and apply even to pending proceedings. But a procedural provision, as far as possible, will not be so construed as to affect finality of tax assessment or to open up liability which had become barred. Assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. A provision which in terms is retrospective and has the effect of opening up liability which had become barred by lapse of time, will be subject to the rule of

strict construction. In the absence of a clear implication, such a legislation will not be given a greater retrospectivity than is expressly mentioned; nor will it be construed to authorise the Income Tax Authorities to commence proceedings which, before the new Act came into force, had by the expiry of the period then provided, become barred. But unambiguous language must be given effect to, even if it results in reopening of assessments which had become final after expiry of the period earlier provided for reopening them. There is no fixed formula for the expression of legislative intent to give retrospectivity to a taxation enactment. ..."

24. A three-Judge Bench of this Court in Govind Das v. CIT [Govind Das v. CIT, (1976) 1 SCC 906 : 1976 SCC (Tax) 133] , noticing the settled rules of interpretation laid down following in para 11: (SCC pp. 914-15)

"11. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that

"all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only'.

If we apply this principle of interpretation, it is clear that sub-section (6) of Section 171 applies only to a situation where the assessment of a Hindu Undivided Family is completed under Section 143 or Section 144 of the new Act. It can have no application where the assessment of a Hindu Undivided Family is completed under the corresponding provisions of the old Act. Such a case would be governed by Section 25-A of the old Act which does not impose any personal liability on the members in case of partial partition and to construe sub-section (6) of Section 171 as applicable in such a case with consequential effect of casting of the members' personal liability which did not exist under Section 25-A, would be to give retrospective operation to sub-section (6) of Section 171 which is not warranted either by the express language of that provision or by necessary implication. Sub-section (6) of Section 171 can be given full effect by interpreting it as applicable only in a case where the assessment of a Hindu Undivided Family is made under Section 143 or Section 144 of the new Act. We cannot, therefore, consistently with the rule of interpretation which denies retrospective operation to a statute which has the effect of creating or imposing a new obligation or liability, construe sub-section (6) of Section 171 as embracing a case where assessment of a Hindu Undivided Family is made under the provisions of the old Act. Here in the present case, the assessments of the Hindu Undivided Family for Assessment Years

1950-1951 to 1956-1957 were completed in accordance with the provisions of the old Act which included Section 25-A and the Income Tax Officer was, therefore, not entitled to avail of the provision enacted in sub-section (6) read with sub-section (7) of Section 171 of the new Act for the purpose of recovering the tax or any part thereof personally from any members of the joint family including the petitioners."

25. A Constitution Bench of this Court speaking through one of us, Dr A.K. Sikri, J. in CIT v. Vatika Township (P) Ltd. [CIT v. Vatika Township (P) Ltd., (2015) 1 SCC 1] , while considering as to whether proviso inserted in Section 113 of the Income Tax Act w.e.f. 1-6-2002 is prospective or clarificatory/retrospective noticed the general principles concerning retrospectivity. Following was laid down by the Constitution Bench in paras 28, 29 and 33: (SCC pp. 21, 22 & 24)

"28. Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit: law looks forward not backward. As was observed in Phillips v. Eyre [Phillips v. Eyre, (1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd. [L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd., (1994) 1 AC 486 : (1994) 2 WLR 39 (HL)] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

***33. A Constitution Bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas [Keshavlal Jethalal Shah v. Mohanlal Bhagwandas, AIR 1968 SC 1336] , while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows: (AIR p. 1339, para 8)*

"8. ... The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to

entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115 of the Code of Civil Procedure, and the legislature has by the amending Act not attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act.'"

(emphasis in original)

26. A two-Judge Bench, speaking through one of us, Dr A.K. Sikri, J. in Jayam & Co. v. CVAT [Jayam & Co. v. CVAT, (2016) 15 SCC 125] , again reiterated the broad legal principles while testing a retrospective statute in paras 14 and 18 which is to the following effect: (SCC pp. 137, 139 & 140)

"14. With this, let us advert to the issue on retrospectivity. No doubt, when it comes to fiscal legislation, the legislature has power to make the provision retrospectively. In R.C. Tobacco (P) Ltd. v. Union of India [R.C. Tobacco (P) Ltd. v. Union of India, (2005) 7 SCC 725] , this Court stated broad legal principles while testing a retrospective statute, in the following manner: (SCC pp. 737-38 & 740, paras 21-22 & 28)

"(i) A law cannot be held to be unreasonable merely because it operates retrospectively;

(ii) The unreasonability must lie in some other additional factors;

(iii) The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable as to violate constitutional norms;

(iv) Where taxing statute is plainly discriminatory or provides no procedural machinery for assessment and levy of tax or that is confiscatory, courts will be justified in striking down the impugned statute as unconstitutional;

(v) The other factors being period of retrospectivity and degree of unforeseen or unforeseeable financial burden imposed for the past period;

(vi) Length of time is not by itself decisive to affect retrospectivity.' (Jayam & Co. case [Jayam & Co. v. CVAT, 2013 SCC OnLine Mad 2051] , SCC OnLine Mad para 85)

***

18. The entire gamut of retrospective operation of fiscal statutes was revisited by this Court in a Constitution Bench judgment in CIT v. Vatika Township (P) Ltd. [CIT v. Vatika Township (P) Ltd., (2015) 1 SCC 1] in the following manner: (SCC p. 24, paras 33-35)

"33. A Constitution Bench of this Court in Keshavlal Jethalal Shah v. Mohanlal Bhagwandas [Keshavlal Jethalal Shah v. Mohanlal Bhagwandas, AIR 1968 SC 1336] , while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows: (AIR p. 1339, para 8)

"8. ... The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115 of the Code of Civil Procedure, and the legislature has by the amending Act not attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."

34. It would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See CED v. M.A. Merchant [CED v. M.A. Merchant, 1989 Supp (1) SCC 499 : 1989 SCC (Tax) 404] .)

35. We would also like to reproduce hereunder the following observations made by this Court in Govind Das v. CIT [Govind Das v. CIT, (1976) 1 SCC 906 : 1976 SCC (Tax) 133] , while holding Section 171(6) of the Income Tax Act to be prospective and inapplicable for any assessment year prior to 1-4-1962, the date on which the Income Tax Act came into force: (SCC p. 914, para 11)

"11. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that "all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. [Ed.: The matter between two asterisks has been emphasised in Vatika Township case, (2015) 1 SCC 1.] If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

120. Another decision relating to what meaning can be ascribed to a 'Note' appended to a Section and upon consideration it was held to be explanatory. The Apex Court in the case of ***United India Insurance Co. Ltd. Vs. Orient Treasurers Private Ltd.*** reported in ***2016 (3) SCC 46*** in para 39 held as under:-

".....39. It is a settled rule of interpretation that when the words of a statute are clear, plain or unambiguous i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences. In other words, when a language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the Act speaks for itself. Equally well-settled rule of interpretation is that whenever the note is appended to the main section, it is explanatory in nature to the main section and explains the true meaning of the main section and has to be read in the context of main section (See G.P. Singh, Principles of Statutory Interpretation, 13th Edn., pp. 50 and 172). This analogy, in our considered opinion, equally applies while interpreting the words used in any contract."

121. Similarly, in the case of ***Rai Sudhir Prasad Vs. State of Bihar and Others reported in 2004 (13) SCC 25*** while considering a 'Note' appended to a Rule, The Apex Court held that it cannot derogate from the explicit words of substantive provisions. Para 16 of the said report reads as under:-

".....16. A note to a rule cannot derogate from the explicit words of the substantive provision and must be read as

explanatory and in harmony with it. The substantive provision is Rule 103(b) and the relevant note is Note 4, both of which clearly provide for additional pay at 20% of the pay of the officiating post. These provisions entitle the appellant to additional pay of the post of both Medical Superintendent and Principal."

122. Now, noticing the submissions of the learned counsel for the appellants that the Note appended to Section 4 by the First Amendment Rules, 2018 is not a marginal note as noticed by the learned Single Judge but an explanatory note and the effect would be that it recognises an event which has already taken place though not retrospective in effect but having a retroactive implication, hence, the appointments and working of the appellants stands saved and would be treated to be effective from 03.05.2011 and that being the date of substantive appointment, the appellants would be senior and deserve to be placed above the respondents in seniority.

123. The aforesaid submission sounds attractive but in order to arrive at a definitive conclusion, the same has to be tested on the touchstone of the principles of intrepretation as noticed above along with a meaningful consideration of the Rules of 1980, the Government Order dated 03.05.2011 and the 1st Amendment Rules of 2018.

124. For a better appreciation of the issue involved, it will be apposite to notice the Rule 4 unamended and also the amended Rule, side by side, which is being reproduced hereinafter:-

	COLUMN 1 Existing rule	COLUMN 2 Rules as hereby substituted
Cadre of Service	4 (1) The strength of the service and of each category of posts therein shall be such as may be determined by the Government from time to time.	Cadre of Service 4(1) The strength of the service and posts therein shall be such as may be determined by the Government from time to time.
	(2) The strength of the service and each category of posts therein shall until orders varrying the same are passed under sub-rule (1) be as given in appendix 'A'	(2) The strength of the service and of each category of posts therein shall, until orders varrying the same are passed under subrule (1) be as given below:-

		Serial No.		Number of post		
		S.No.	Name of the Post	Permanent/ temporary/ total		
		1	2	3	4	5
		1.	Passenger Tax/ Goods Tax Officer	120	-	120
		Note:- The post of Passenger Tax/Goods Tax Superintendents has been merged in the post of Passenger Tax/Goods Tax Officer vide Government Order No. 1036/thirty-3-11-11-GE/11 dated May 03, 2011 with effect from May 03, 2011.				
	Provided that:-	Provided that:-				
	(i) the appointing authority may leave unfilled or the governor hold in abeyance and vacant post without thereby entitling and person to compensation and;	(i) the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post, without thereby entitling any person to compensation; or				
	(ii) The Governor may create such additional permanent or temporary posts as he may consider proper.	(ii) The Governor may create such additional permanent or temporary posts as he may consider proper.				

125. This Court upon considering the Rules of 1980 prior to amendment in the year 2018, finds that an Appendix-A has been appended after Rule 28. Rule 4 also makes a reference to the said Appendix-A. For the sake of convenience, the Appendix A as incorporated in the Rules of 1980 is being reproduced hereinafter:-

Sr. Nos.	***Name of the Post***	***Name of the Post***	
		Permanent	***Temporary***
1.	Passenger Tax Officer/Goods Tax Officer	26	.....
2.	Tax Superintendents	5	.....
3.	Passenger Tax Superintendents /Goods	54	52

126. Comparing the aforesaid provisions, it would reveal that the Appendix-A appended after Rule 28 of the Rules of 1980, has been lifted and inserted in Rule 4 itself by the 1st Amendment Rules of 2018 and the Note mentions that the post of P.T.G.T.S. has been merged with P.T.G.T.O. w.e.f. 03.05.2011. It will be seen that the number of temporary posts have been abolished and a total number of permanent posts of 120 has been incorporated.

127. Simplicitor, by lifting the appendix and inserting it in the amended Rule 4 by 1st Amendment Rules of 2018 and adding a Note thereto would by itself not necessarily give any indication that the said Note has retroactive operation. Apparently, there is no clear indication to the said effect. Had such a retrospective or retroactive operation intended for the said provision, the legislature would have provided clear indication to the aforesaid effect.

128. The aforesaid 'Note' cannot have a larger effect than the Rule itself. Even earlier, it was permissible for the State to determine the strength of the posts and the members of each posts which is provided in the appendix-A after Rule 28 and it is this appendix which has now been incoporated in the Rule itself in order to clarify that the post of P.T.G.T.S. (which finds mention in Appendix-A of the Rules of 1980) has been merged w.e.f. 03.05.2011 and this much only has been clarified by the 1st Amendment Rules of 2018.

129. The 1st amendment of 2018 which has been made effective w.e.f. 05.03.2018 and in absence of any indication by clear language or necessary implication it cannot be treated to operate retroactively or retrospectively. Merely, by appending a Note to the Rule it will not expand the scope of Rule 4 to have a larger effect or to overreach the main provision of Rule 4 itself. Moreover, when Rule 4 itself only provides for cadre of service and the said Rule 4 itself cannot be made retrospective or retroactive then by a Note it cannot enlarge the scope of Rule 4 to such an extent which would sum contrary to the other rules which after amendment are to take effect from 05.03.2018.

130. As the cadre post of P.T.G.T.S. have been abolished, this Note clarifies the same and only incorporates the date thereof. This in itself cannot be interpreted to an extent as suggested by the appellants which will not only disturb the seniority, settled vide seniority list dated 17.11.2017 prepared in furtherance of the judgment dated 13.04.2017 passed by the Division Bench of this Court in W.P. No. 1802 (SB) of 2015.

131. Once, the preamble of the first Amendment Rules of 2018 indicates that the said Rules will come into effect immediately i.e. from 03.05.2018. A note appended in Rule 4 cannot be given a retroactive effect, inasmuch as, the aforesaid Note merely clarifies an existing fact that the posts P.T.G.T.S. have been merged w.e.f. 03.05.2011.

132. The 1st Amenment Rules of 2018 have to be read as a whole and where such comprehensive amendments have been incorporated vide 1st Amendment Rules of 2018, it does not at any place give indication that the purpose of the aforesaid 'Note' is to give any retroactive application.

133. There is another reason to hold that the Note does not intent to be retroactive or retrospective, inasmuch as, the 1st Amendment Rules clearly state that they come into effect from 05.03.2018. There is nothing to indicate in any of the amended provisions though exhaustive amendments have been carreid out by the

Rules of 2018 yet only particular Rule would operate retrospectively.

134. As noticed above, the normal rule is that any Rule or provision will be prospective in operation unless it is specifically provided or can be deciphered as such by necessary implication. The language of the 1st Amendment Rules of 2018 does not indicate that the Rules of 2018 have retrospective or retroactive application. On the contrary, it specifically provides that it shall come into effect from 05.03.2018. Thus on plain and clear reading of the said amended Rules, it cannot be said that it has retrospective/retroactive application.

135. Now, if it is tested, whether the said Rules can be considered retroactive by necessary implications even then the answer would be in the negative, for the reason that by giving such retroactive/retrospective operation, the existing rights in favour of the respondents which have been crystalized shall be impaired and would result in taking away such rights which were conferred, vested, in them after the decision of the Division Bench dated 13.04.2017 in W.P. No. 1802 (S/B) of 2015 and also in terms of the seniority list dated 17.11.2017 which attained finality as it was never assailed before any Court or Tribunal.

136. This Court is fortified in its view and draws strength from the decision of the Apex Court in the case of ***Chairman, Railway Board and Others Vs. C.R. Rangadhamaih and Others reported in 1997 (6) SCC 623*** and the relevant paras 20 to 24 are being reproduced hereinafter:-

".....20. It can, therefore, be said that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of, e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively.

21. In B.S. Yadav v. State of Haryana [1980 Supp SCC 524 : 1981 SCC (L&S) 343 : (1981) 1 SCR 1024] a Constitution Bench of this Court, while holding that the power exercised by the Governor under the proviso to Article 309 partakes the characteristics of the legislative, not executive, power and it is open to him to give retrospective operation to the rules made under that provision, has said that when the retrospective effect extends over a long period, the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules. (SCR p. 1068 : SCC p. 557, para 76)

22. In State of Gujarat v. Raman Lal Keshav Lal Soni [(1983) 2 SCC 33 : 1983 SCC (L&S) 231 : (1983) 2 SCR 287] decided by a Constitution Bench of the Court, the question was whether the status of ex-ministerial employees who had been allocated to the Panchayat service as Secretaries, Officers and Servants of Gram and Nagar Panchayats under the Gujarat Panchayat Act, 1961 as government servants could be extinguished by making retrospective amendment of the said Act in 1978. Striking down the said amendment on the ground that it offended Articles 311 and 14 of the Constitution, this Court said: (SCC p. 62, para 52)

"52. ... The legislature is undoubtedly competent to legislate with

retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the do's and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history."

23. The said decision in Raman Lal Keshav Lal Soni [(1983) 2 SCC 33 : 1983 SCC (L&S) 231 : (1983) 2 SCR 287] of the Constitution Bench of this Court has been followed by various Division Benches of this Court. (See K.C. Arora v. State of Haryana [(1984) 3 SCC 281 : 1984 SCC (L&S) 520 : (1984) 3 SCR 623] ; T.R. Kapur v. State of Haryana [1986 Supp SCC 584 : (1987) 2 ATC 595 : (1987) 1 SCR 584] ; P.D. Aggarwal v. State of U.P. [(1987) 3 SCC 622 : 1987 SCC (L&S) 310 : (1987) 4 ATC 72 : (1987) 3 SCR 427] ; K. Narayanan v. State of Karnataka [1994 Supp (1) SCC 44 : 1994 SCC (L&S) 392 : (1994) 26 ATC 724] ; Union of India v. Tushar Ranjan Mohanty [(1994) 5 SCC 450 : 1994 SCC (L&S) 1118 : (1994) 27 ATC 892] and K. Ravindranath Pai v. State of Karnataka [1995 Supp (2) SCC 246 : 1995 SCC (L&S) 792 : (1995) 30 ATC 69] .)

24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon [AIR 1967 SC 1889 : (1968) 1 SCR 185 : (1968) 1 LLJ 576] , B.S. Vedera [AIR 1969 SC 118 : (1968) 3 SCR 575 : (1970) 1 LLJ 499] and Raman Lal Keshav Lal Soni [(1983) 2 SCC 33 : 1983 SCC (L&S) 231 : (1983) 2 SCR 287] ."

127. Another decision in point is the Apex Court decision of ***Dr. B.S. Yadav Vs. State of Haryana and Others reported in 1980 (Supplementary) SCC 524*** wherein in para 76, it has held as under:-

"76. The amended Rule 12, as in force in Punjab, lays down the length of continuous service in a cadre post as the guiding criterion for fixing seniority. That

rule was notified by the Governor on December 31, 1976 and was given retrospective effect from April 9, 1976. Since the Governor exercises a legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case. No such nexus is shown in the present case on behalf of the State Government. On the contrary, it appears to us that the retrospective effect was given to the rules from April 9, 1976 for the mere reason that on August 25, 1976 the High Court had issued a notification fixing seniority of the promotees and direct recruits appointed to the Superior Judicial Service of Punjab. The notification issued by the Governor on December 31, 1976, will, therefore, operate on future appointments or promotions made after that date and not on appointments or promotions made before that date. The seniority of all officers appointed or promoted to the Superior Judicial Service, Punjab, before December 31, 1976 will be determined by the High Court according to the criterion of the dates of confirmation, without applying the rule of rotation. The seniority of those promoted or appointed after December 31, 1976 will be determined in accordance with the rules promulgated under the notification of that date. Insofar as we see, judicial officers from Serial Nos. 1 to 36 mentioned in Annexure "P-I' to the Punjab writ petition, that is, beginning with Shri J.S. Chatha and ending with Shri Hardev Singh were appointed or promoted prior to December 31, 1976. Those from Serial No. 37 to Serial No. 43, that is beginning with Shri G.S. Kalra and ending with Shri H.L. Garg, were appointed or promoted after December 31, 1976. The validity of the notification dated December 31, 1976 was not seriously challenged before us, apart from its retrospectivity. We do not also see any constitutional or legal objection to the test of continuous officiation introduced thereby."

138. Similarly in the case of ***Chandrawathi P.K. and Others Vs. C.K. Saji and Others reported in 2004 (3) SCC 734.*** the Apex Court in paragraph 34 has held as under:-

"34. However, so far as Civil Appeals Nos. 890-93 of 2002 are concerned, it appears that amendment to the rule had never come into force and, therefore, it is difficult to accept the contention of the learned counsel for the State that the degree-holders and diploma-holders were to be treated at par with the other cases. In fact, in terms of the rules applicable to the case of the Harbour Engineering Branch of the Kerala Port Trust, two categories, namely, degree-holders and diploma-holders have been placed separately, namely, Group A and Group B and as such the persons holding the respective qualifications would be governed by the rules as existing then. In that view of the matter, the respondents would be in the same position as in the case of T.R. Krishnan [Disposed of on 19-2-1990 (DB)] inasmuch as a right vested in them, in absence of the rule having been given a retrospective effect could not have been taken away. The State in exercise of its power under Article 309 of the Constitution of India may give retrospective effect to a rule but the same

must be explicit and clear by making express provision therefor or by necessary implication but such retrospectivity of a rule cannot be inferred only by way of surmises and conjectures."

139. Upon considering all the facts and circumstances and law applicable, if the Note is to be treated to operate retrospectively w.e.f. 03.05.2011 then it will also do violence to the other Rules of 1980. Thus in order to avoid such conflict and knowing the orders/judgment passed by the Courts from time to time, the 1st Amendment Rules of 2018 was promulgated bringing out exhaustive amendments in Rule Nos. 5, 6, 8, 10, 15, 17, 18, 19, 20, 21, 22 and Rule 24 and Appendix from Rule 28 has been ommitted and actually Rule 4 remained almost untouched except as noticed above, hence, the inescapable conclusion is that the Note is only explanatory to the Main Rule 4 and it explains the abolishing of the post of P.T.G.T.S. (about which was mentioned in the Appendix-A, earlier) and now the existing cadre post and its strength and category has been inserted in the Rule 4 relating to Cadre of service itself and the Note only explains the abolition of the post of P.T.G.T.S. as per the decision vide Government Order dated 03.05.2011.

140. Thus, though the learned Single Judge may have erred in holding the aforesaid note to be marginal, but nevertheless, even though considering the Note to be explanatory, yet this Court is not inclined to accept the submissions that the said explanatory Note has a retroactive application, for the forgoing reasons.

In light of the detailed discussion, Point No. 3 is decided accordingly.

Ancillary Arguments 4. (a).

141. It has also been argued by the learned Senior Advocate that the appellants were working on the substantive post since 03.05.2011, accordingly, in terms of the Uttar Pradesh Government Seniority Rules, 1991, the seniority is to be considered from the date of substantive appointment which in the case of the appellants is 03.05.2011 whereas the private respondents were inducted only in the year 2013, thus, this aspect has not been considered in the correct perspective by the learned Single Judge.

142. From the perusal of the Service Rules,1980, it would indicate that the word "member of service" has been defined in Rule 3(g) and the word "Service" has also been defined in Rule 3 (h) (i). From the conjoint reading of the aforesaid Rules, it would indicate that the service relates to the Uttar Pradesh Transport Taxation (subordinate service) and the year of recruitment means the period of four months commencing commencing from first day of July of the calender month.

143. The member of the service as defined means a person appointed and serving in a substantive capacity under these Rules or the Rules or the Orders enforeced prior to the commencement of the Rules to a post in the cadre of service. Drawing strength from the aforesaid, it would be seen that that the respondents were appointed in the year 2013 through the selection process initiated in the year 2009 against the substantive post, hence, they are the members of the service.

144. The first Amendment Rules of 2018, brought in a new insertion of Rule 3

(hh) wherein the word "substantive appointment' has been defined to mean an appointment not being an ad-hoc appointment on a post to the cadre of service made after selection in accordance with the Rules and if there were no Rules in accordance with the procedure prescribed for the time being by the executive instructions issued by the Government.

..(emphasis supplied)

145. The emphasis is, that by insertion of the aforesid Rule 3 (hh), it became applicable with the promulgation of 1st Amendment Rules of 2018 which came into force w.e.f. 05.03.2018. The power conferred for appointment on any post by executive instructions issued by the Government would only be applicable when there are no Rules.

146. In the present case, the Rules of 1980 were prevalent and the same did not incorporate any such amendments at that point of time. At the relevant time, the recruitment could be done only in terms of unamended Rules of 1980. The respondents being appointed on the substantive post for which the selection process started in the year 2009 cannot by any stretch of imagination be held to be appointed against any ad-hoc posts.

147. It would be further relevant to note that the word "substantive appointment' which has been provided in the U.P. Government Servant Seniority Service Rules, 1991. Rule 8 clearly provides that where the appointments are made from promotion or direct recruitment or both, the seniority would be counted from the date of order of initial appointments on the substantive post and if two or more persons have been appointed simultaneously then seniority would be counted on the basis of the order which has been shown in the order of appointment as prepared by the Commission or the Committee in order of merits.

148. Thus, it would be seen that Rule 8 of the Seniority Rules of 1991 clearly provides that the seniority would be counted from the date of initial appointment. It is not disputed that the Rules of 1991 were applicable to both the appellants as well as the respondents. In light of the discussion uptil now (while dealing with the applicability of Rules 4 and 5) it has been concluded that it was necessary to amend the Rules of 1980 noticed by the earlier Division Bench judgment dated 13.04.2017 and on the said basis, the earlier seniority list so prepared was quashed. Thus, the rules having been amended only by the First Amendment Rules, effective from 05.03.2018, hence, the appointments of the appellants would be treated from the said date when the said rules became effective. Thus, the submission that the respondents have been placed in precedence over the appellants even though they were not born in the cadre does not hold water and is consequently turned down.

Ancillary Arguments: Point No. 4(b)

149. It will be noticeable that the seniority list dated 17.11.2017 was finalized by the Transport Commissioner in pursuance whereof, the respondents amongst such others, who were eligible were placed ahead at serial no. 1 to 13. The appellants who have been working on the post of P.T.G.T.O. since 03.11.2011 have been placed from serial no. 14 onwards below the respondents. The seniority list dated 17.11.2017 was at no point of time challenged before any Court or Tribunal. It is now well settled that once a seniority list

has been finalised by the Executive and not challenged before any Court or Tribunal, subsequently, it is not open for the Executive to tamper with such seniority.

150. The decision of the Apex Court in the case of ***H.S. Vankan***i (supra) is on the said point wherein in paragraphs 38 and 39 of the said report it has held as under:

".....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 instils 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 a 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 the 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 a lot of judicial time from the lowest court to the highest resulting in constant bitterness among the 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 v. S.K. Goel [(2007) 14 SCC 641 : (2009) 1 SCC (L&S) 873] , T.R. Kapoor v. State of Haryana [(1989) 4 SCC 71 : 1989 SCC (L&S) 636 : (1989) 11 ATC 844] and Bimlesh Tanwar v. State of Haryana [(2003) 5 SCC 604 : 2003 SCC (L&S) 737] . In view of the settled law the decisions cited by the appellants in G.P. Doval case [(1984) 4 SCC 329 : 1984 SCC (L&S) 767] , Prabhakar case [(1976) 2 SCC 890 : 1976 SCC (L&S) 367] , G. Deendayalan [(1997) 2 SCC 638 : 1997 SCC (L&S) 749] and R.S. Ajara [(1997) 3 SCC 641 : 1997 SCC (L&S) 851] are not applicable to the facts of the case."

151. Even considering the cummulative effect of the decision passed by the learned Single Judge dated 17.01.2019 passed in W.P. No. 36294 (SS) of 2018 and the decision dated 07.02.2019 passed in W.P. No. 3654 (SS) of 2017 is that the seniority list had to be finalized by the Transport Commissioner considering the placement of both the appellants and the respondents herein by ignoring the order passed by the State-Government dated 19.12.2018, however, noticing the effect of the promulgamation of the 1st Amendment Rules of 2018 as well as in light of the decision dated 13.04.2017, thus, what was being done by the aforesaid decision was to consider the effect of the 1st Amendment Rules of 2018 after hearing

the parties ignoring the decision of the State Government dated 19.12.2018.

152 The record further indicates that the present private respondents had filed detailed objections before the Transport Commissioner raising various issues including the effect of the earleir order passed by the Division Bench, the finality of the seniority list dated 17.11.2017 as well as the effect of the First Amendment Rules, 2018, however, the same has not been considered in the correct perspective as reflected in the order dated 15.04.2019 which was impugned along with the final seniority list of the same day before the learned Single Judge.

153. For the reasons already noted above once the seniority list dated 17.11.2017 had attained finality so also the decision dated 13.04.2017 passed by the coordinate Bench, hence, the only issue before the Transport Commissioner was to consider the placement of the present appellants for seniority taking note of the 1st Amendment Rules of 2018. It did not give right to a Transport Commissioner to re-open issues which had already been settled and to take a view which was contrary to the decision rendered by a coordinate Bench of this Court which if allowed to prevail would amount to overreaching the orders of the Court, consequently, the same has been rightly set aside by the learned Single Judge.

154. Lastly, upon proding the learned counsel for the respective parties, it was undisputed that the seniority list submitted before the State Government in furtherance of the judgment passed by the learned Single Judge dated 20.10.2020, the names of the appellants have been included at Serial No. 14 onwards while the respondents have been placed ahead of the appellants at Serial Nos. 1 to 13. Hence the apprehension of the learned Senior Counsel for the appellants is that the appellants have been ousted from the zone of consideration for promotion for all times is apparently misconceived and misfounded.

155. In light of the detailed discussions and in light of the Authorities of the Apex Court as noted above, the decision of ***Sunder Pillai (supra)*** does not help the appellants.

Ancillary Arguments Point No. 4(c).

156. The submissions of the learned Senior Counsel for the appellants Sri Anil Tiwari that in absence to challenge to the decision of the Pay Commission, 2008 in pursuance whereof the Government Order dated 03.05.2011 was issued, it is not open for the respondents to challenge the other acts which flow from the decision of the Pay Commission including the Government Order.

157. It will be relevant to notice that the respondents are aggrieved by the disturbance of the seniority list which was frustrated and could not have been tampered by the Executive. The Government Order dated 03.05.2011 was a reflective indicator of the decision and the resolution of the Government to implement the same, however, the manner in which the same is to be implemented and made effective is a little different issue. Now, once a decision is taken to which there is no challenge but if the aforesaid decision is implemented by an Authority or in a manner against the provisions of law or in excess of Authority or jurisdiction vested, surely, the said action of implementation alone in the facts and circumstances of the

present case can be challenged. Thus, the aforesaid submission is not worthy of consideration and is turned down.

Conclusion:-

For the reasons recorded hereinabove, this Court is in agreement with the judgment and order dated 20.10.2020 passed in W.P. No. 12438 (SS) of 2019 (Vijay Kishore Anand & Others Vs. State of U.P. and Others) and it does not suffer from an error to pursuade this Court to interfere in exercise of Appellate Powers conferred under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, accordingly, all the three ***Special Appeal No. 296 of 2020 (Ashutosh Kumar Upadhyay & Others Vs. Vijay Kishore Anand & Others); Special Appeal No. 302 of 2020 (Ramesh Chandra & Others Vs. State Of U.P. Thru. Prin. Secy. Transport Dept. Lko. & Ors.) and Special Appeal No. 303 of 2020 (Mahesh Kumar Verma & Anr. Vs. Vijay Kishore Anand & Ors.)*** are ***dismissed*** and the judgment of the learned Single Judge dated 20.10.2020 passed in W.P. No. 12438 (SS) of 2019 is affirmed.

In the facts and circumstances, the costs are made easy.

(2021)07ILR A567
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.07.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 1618 of 2021

Chhotey Lal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Satish Kumar Sharma

Counsel for the Respondents:
C.S.C.

Fair price shop - Cancellation of license - Enquiry - Rules of evidence under Evidence Act - Principles of Natural Justice - Applicability - Held - petitioner, only a licensee of a fair price shop, which license is result of a contract - In such cases Principles of Natural Justice & strict Rules of Evidence would hardly apply - Only stock verification and verification of Distribution Register could have been done to find out the discrepancy in distribution - merely because statements of 52 card holders were not recorded, order of termination cannot be held to be invalid (Para 12)

Dismissed. (E-4)

List of Cases cited :

State of Haryana & ors. Vs Ratan Singh 1977 (2) SCC 491

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

(1) Heard the learned counsel for the petitioner and Shri V. P. Nag, who appears for the State respondents.

(2) The petitioner is aggrieved by the order dated 16.01.2021 passed by the Licensing Authority cancelling the Fair Price Shop License and also the order dated 19.11.2021 passed by the Appellate Authority rejecting his Appeal.

(3) It is the case of the petitioner that he is Fair Price Shop Licensee of Village

Panchayat Golok Kodar, Mauza Lodhpurwa, Vikas Khand Reusa, Tehsil Biswan, District Sitapur for the past several years and no complaint has even been made in respect of distribution of essential commodities to the card holders against him. A false and frivolous complaint was made by some card holders that the petitioner had taken thumb impression of the card holders on the E-POS machine but had not distributed the essential commodities to them. On such complaint an inspection was made on 05.05.2020 and on the basis alleged irregularities in distribution the Supply Inspector lodged the First Information Report under Section 3/7 of the Essential Commodities Act on the same day and the petitioner's license was suspended on 07.05.2020. The petitioner filed a Writ Petition challenging the suspension order namely Writ Petition No.13518 (M/S) of 2020. This Court dismissed the writ petition on grounds of statutory remedy being available on 31.08.2020 but observed that the petitioner may file his reply to the Show Cause Notice which shall be considered by the Sub Divisional Officer and appropriate orders be passed in the enquiry so held. It has been submitted that the petitioner filed a detailed reply on 09.09.2020 which was not taken in to consideration. The opposite party no.3 issued a reminder on 15.09.2020 for submission of reply within three days. The petitioner again filed a reply on 22.09.2020 pointing out that he has already submitted a detailed reply on 22.09.2020. Another notice was issued to the petitioner on 03.11.2020 which sought the copy of the distribution register for the month of May, 2020 which the petitioner produced before the Licensing Authority. He also produced copies of distribution register for the month of February, March, and April, 2020 and the certificate issued by the Supervising Authority deputed for monitoring the distribution of foodgrains at his fair price shop. The petitioner's stock register had been kept back by the Supply Inspector, Biswa, District Sitapur, therefore, he could not produce the same. The petitioner requested for copies of statements of villagers recorded during the course of the enquiry but none was supplied to him. The S.D.M. without looking to the reply of the petitioner passed the impugned order cancelling the Fair Price Shop license of the petitioner.

(4) It has been submitted that six villagers were found at the shop of the petitioner during the time of inspection and on 05.05.2020 the statements of such villagers which were recorded alleging that the petitioner had asked them to put their thumb impression on the E-POS machine and had not distributed the foodgrains to them. Such statements were not provided to the petitioner and no proper opportunity of hearing was given in respect of 52 card holders whose thumb impressions were allegedly taken by the petitioner on the E-POS machine but no foodgrains were distributed to them.

(5) The petitioner alleges that the signatures on blank papers were taken by the Inspecting Team and arbitrarily his statement was recorded that he had not distributed the foodgrains to the beneficiary. He has also alleged that the Supply Inspector demanded Rs.30,000/- on 04.05.2020 and when the petitioner refused to give the same on 05.05.2020 the Supply Inspector alongwith others connived to get the spot inspection done on his shop. The Distribution register and the supply register were both in the custody of the Supply Inspector and he made manipulations thereon. The persons deputed to supervise

the distribution of foodgrains had given a certificate in favour of the petitioner. It has been submitted that according to the Government Order dated 05.08.2019 there is no provision to prepare the Distribution Register and Supply Register by the licensee and distribution is done only on the basis of thumb impression taken on the E-POS machine.

(6) It has also been submitted that in the Government Order dated 05.08.2019 a provision has been made that the reply of the licensee shall be analyzed by one Officer who is higher in rank than the Enquiry Officer which was not done in his case. It has been further submitted that once his Fair Price Shop license was cancelled as the petitioner had failed to give the description of the stock he had approached this Court for expediting his Appeal and the Court has expedited the matter, being annoyed the Joint Commissioner passed an order on 16.01.2021 rejecting the Appeal.

(7) Learned Standing Counsel on the basis of counter affidavit filed by the Licensing Authority states that the complaints were received from card holders and on the basis of which the inspection was carried out on 05.05.2020. It was found that although there were thumb impressions of card holders on the E-POS machine the foodgrains were not being given to them. At the time of inspection Mr. Dinesh Tiwari, Sub Inspector of Police, Mr. Ramjas Yadav, Head Constable, were present. The petitioner was also present. On inspection of E-POS machine it was found that a total of 229 cards had been entered till 05.05.2020. On 05.05.2020 52 thumb impressions were found. The petitioner himself had admitted that thumb impressions were taken but the ration had not be distributed. The Electronic weighing machine installed in front of the shop was found inoperative. Moreover, on physical verification of the petitioner's shop a total of 109 bags of wheat were found to be sealed and stitched, only 20 kgs. of wheat was found to be lying near the counter. A total quantity of 154.70 kgs. of wheat was found. 79 bags of rice were found stitched and kept in the shop amounting to total quantity being 139.33 kgs. As per the allotment of Antyodaya and eligible households and the distribution shown by the petitioner, wheat and rice stock in the shop of the petitioner was much more. It was apparent that the petitioner was taking thumb impressions of most of the card holders but the foodgrains were not being distributed to them. The Foodgrain were kept back for the purpose of black-marketing. The statements of six card holders present during the inspection were recorded. The F.I.R. was lodged under Section 3/7 of the Essential Commodities Act, the District Magistrate on being presented with the facts directed for suspension of license which order was passed on 07.05.2020. Show Cause Notice was issued to the petitioner twice but the petitioner failed to submit any reply on account of fact that he was in prison. On being released on bail, the petitioner was given copy of the suspension order, Charge-sheet, and all other documents/statements which the Licensing Authority proposed to rely upon in the Enquiry. The office letter dated 05.09.2020 alongwith its annexures is not being denied by the petitioner. The petitioner has submitted his reply on 16.09.2020 and again on 22.09.2020 which was taken into account in passing the order cancelling the

Fair Price Shop License of the petitioner. The petitioner filed an Appeal which has also been rejected on 16.11.2020.

(8) Learned counsel for the State-respondents has read out the copy of the Inspection report submitted to the District Magistrate, Sitapur, on 05.05.2020 which mentioned in detail how the spot inspection was carried out and on comparison of the stock available in the shop with the stock that was supposed to be distributed to the card holders it was found that there was a huge discrepancy which meant that the petitioner was compelling the card holders to put their thumb impression on the E-POS Machine but had not distributed the foodgrains to them.

(9) Learned counsel for the State-respondents has also taken this Court through the order of cancellation of the Fair Price Shop impugned in this petition. From a perusal of the order dated 19.11.2020 passed by the Licensing Authority, it is evident that the procedure for conducting inspection has been mentioned in detail including the verification of stock and the amount of wheat and rice having been found in excess of the distribution shown on paper by the petitioner. It is also evident from the order of cancellation that the copies of statements of six card holders were given to him. From the Distribution Register examined by the Licensing Authority it came out that only thumb impressions of 175 card holders were made thereon without indicating the names or Ration Card numbers of the card holders to whom such thumb impressions belonged. It was evident that the Distribution Register was fabricated and prepared only food the Authorities.

(10) This Court has also perused the order dated 16.01.2021 passed by the Appellate Authority where the Appellate Authority has found that the procedure prescribed for conducting enquiry was strictly followed is the spot inspection. The stock of wheat and rice was found much more than would have been available had the distribution of foodgrains being done properly by the petitioner. On there being no procedural impropriety found in the order passed by the Licensing Authority, the Appellate Authority rejected the Appeal.

(11) Having considered the arguments raised by the learned counsel for the petitioner regarding violation of principles of natural justice and the statements of 52 card holders not being recorded whose thumb impressions on E-POS Machine were recorded on 05.05.2020 and discovered during spot inspection, this Court is of the considered opinion that there being no quantity of foodgrains shown to be distributed to these 52 card holders in the Distribution Register and the fact that the stock of wheat and rice in the shop of the petitioner were found to be much more than would have been available had the distribution been done regularly, substantiates the contention of the respondents that the petitioner had committed great irregularities in the distribution of essential commodities warranting cancellation of his license. The statements of 52 card holders were not required. In the **State of Haryana and Others Vs. Ratan Singh reported in 1977 (2) SCC 491,** a three judge Bench of the Hon'ble Supreme Court was considering an Appeal by the State where the respondent was a conductor of a Bus of the State Transport undertaking. The Bus was stopped and the Inspector of the flying squad discovered that some passengers were not issued tickets though they paid fares. A domestic enquiry was held and the respondent services were terminated. He filed a Suit and the learned Trial Court held that the domestic enquiry was nullity because the ticketless travellers were not examined. At the domestic enquiry, the statements were not recorded by the Inspector as per the Departmental

instructions, and the co-conductor's evidence in favour of the respondent showed that the respondent was not guilty. The decree of the Trial Court was confirmed by the Appellate Court and the High Court. Allowing the Appeal, the Supreme Court observed that in a domestic enquiry the strict and sophisticated rules of Evidence Act may not apply. All materials which are logically probative for a prudent mind are permissible, though Departmental Authorities and the Administrative Tribunal must be careful in evaluating such materials and should not glibly swallow what, strictly speaking is not relevant under the Evidence Act. The essence of a judicial approach is objectivity, exclusion of extraneous materials or considerations, and observance of Rules of Natural Justice. Of course, fairplay is the basis and if perversity or arbitrariness, bias or surrender of independence of judgment vitiate the conclusions reached, such finding, even though of a domestic tribunal, cannot be held to be good. The simple points in all such cases is, was there some evidence or was there no Evidence --not in the sense of the technical rules governing Court proceedings, but in a fair commonsense way as a man of ordinary understanding and worldly wisdom will accept. Sufficiency of evidence in proof of the finding by a domestic Tribunal is beyond scrutiny by the Court, while absence of any evidence in support of the finding i**dismissed.** s an error of law apparent on the record and the Court can interfere with the finding. Learned courts below had mis-directed themselves, perhaps, in insisting on the evidence of the ticketless passengers. Also, merely because the statements were not recorded, the order of termination cannot be invalid.

(12) In the case in hand, the petitioner is only a licensee of a fair price shop which license is the result of a contract. A contract wherein the beneficiary is the common man/people of the village who would receive the foodgrains at subsidized rates out of taxpayers money. The license is a privilege arising out of contractual obligations. In such cases the Principles of Natural Justice and strict Rules of Evidence would hardly apply. Only stock verification and verification of Distribution Register could have been done to find out the discrepancy in distribution. Moreover, the statements of six card holders who were present during spot inspection were taken and copies of statements were given to the petitioner. The petitioner in his reply could not refute the allegations made against him to the satisfaction of the Licensing Authority.

(13) With regard to the allegations made by the petitioner that the Supply Inspector had approached him and had demanded Rs.30,000/-, the petitioner has not impleaded the Supply Inspector, in person as a party in the array of the respondents. The allegations of *malice* in fact cannot be substantiated.

(14) The writ petition is devoid of merits, it is **dismissed.**

(2021)07ILR A571
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.07.2021

BEFORE

THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Misc. Bench No. 9896 of 2021

Anshad Badarudheen ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sheeran Mohiuddiin Alavi, Aftab Ahmad, Saipan Shaikh, Tahir

Counsel for the Respondents:
Government Advocate, Anurag Kumar Singh

A. National Investigation Agency Act,2019 - Sections 2(1)(g), 6(3) & 10 - Investigation of Scheduled Offences, Section 6, - Power of State Government to investigate Scheduled Offences - Section 10 - Validity - Unlawful Activities (Prevention) Act - *Held* - In absence of determination by the Central Government as to whether offence is "Scheduled Offence" or not, State Agency is fully competent to investigate scheduled offence(s) - If it is interpreted that in the absence of determination u/s 6 (3) of the NIA Act by the Central Government, the State Government would not have power to investigate in respect of Scheduled Offence, then such an interpretation would render the provisions of S. 10 of the NIA Act as redundant

B. National Investigation Agency Act, 2019 - Sections 6(4), 6(5) & 10 - when State Government could not investigate Scheduled Offences - *Held* - words "Save as otherwise provided in this Act" occurring in S. 10 refers to S. 6 (6) of the NIA Act, which provides that where Central Government has issued a direction under Section 6 (4) or Section 6 (5) of the NIA Act for getting the Scheduled Offence (s) investigated by the Agency, the State Government and any Police Officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency -

Held - In the instant case, Central Government has not issued any direction to get the Scheduled Offence (s) investigated by the Agency, therefore, State Government was fully competent to investigate the matter arising out of F.I.R. under Arms Act, Explosive Substances Act, 1908, Unlawful Activities (Prevention) Act (Para 14, 16, 17)

C. Criminal Procedure Code (2 of 1974) – Section 173 - Transfer of investigation to C.B.I. - Transfer of investigation to independent investigating agency like CBI must be in rare and exceptional cases

In the present case investigation concluded by the Investigating Agency of the State - police report has been submitted & cognizance of the offence has also been taken - petitioner unable to show Investigating Officer mala fide - not a case of abuse of power and non-compliance by the Investigating Agency - it is not a rare or exceptional case where investigation needs to be transferred to the CBI as a court monitored matter (Para 26, 26)

Dismissed. (E-4)

List of Cases cited :

1. St. of A.P. thru IG, NIA Vs Mohd Hussain @ Saleem

2. Pragya Singh Thakur Vs NIA (2014) 1 SCC 258

3. Hussna Vs NIA & anr. 2017 (4) ADJ 489 (DB) (LB)

4. Mantu Sharma Vs St. of U.P. 2017 (6) ALJ 133

5. Mohd. Umar & ors. Vs St. of Raj & anr. 2016 Cr.L.J. 437

6. Aqil Hussain Vs St. of NCT of Delhi & ors. 2021 Cr.L.J. 1405
7.K.V. Rajendran Vs SP, CBCID South Zone, Chennai & ors. (2013) 12 SCC 480

8. CBI & anr. Vs Rajesh Gandhi & anr. 1996 (11) SCC 253

9. Bikramjit Singh Vs St. of Punjab (2020) 10 SCC 616

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. The petitioner, by means of the instant writ petition, is seeking the following reliefs :-

(i) To issue the writ of mandamus, to direct Respondent No.3 to take over the investigation of Case Crime/F.I.R. No.0004 of 2021 registered at Police Station-ATS, Lucknow, wherein investigation is being conducted by the respondent no.5.

(ii) To issue a writ, order or direction in the nature of mandamus to direct the respondent no.3 to investigate the role of Respondent No.4 i.e. Special Task Force in fabricating evidences and falsely implicating the petitioner as well as the co-accused in the alleged heinous crimes in the name of the PFI under monitoring of this Hon'ble Court or under supervision of Hon'ble sitting judge of this Hon'ble High Court, as this Hon'ble Court may deem fit, just and proper, in the interest of justice and equity".

2. In order to appreciate the controversy involved in this writ petition, it is necessary to set out the relevant facts, herein below : -

3. The petitioner and his friend, namely Firos K. C., are residents of the State of Kerala and are admittedly members of Popular Front of India (hereinafter referred to as "PFI"), having its Head Office at Delhi. They are said to have been arrested on 11.02.2021 at Mughal Sarai Railway Station when they were going to Lokmanya Tilak Terminus, Mumbai from Katihar, Bihar. It is further stated that the First Information Report bearing No.0004 of 2021 dated 16.02.2021 has been lodged in this connection under Sections-120-B, 121A of I.P.C., Section 3 and 5 of Arms Act, Sections-3, 4 and 5 of Explosive Substances Act, 1908, Sections-13, 16, 18 & 20 of Unlawful Activities (Prevention) Act (hereinafter referred to as "UA (P) Act)" at Police Station-ATS, District-Lucknow disclosing their arrest from Kukrail Jungle, Lucknow on 16.02.2021. It is also stated by the petitioner that the petitioner's wife, namely, Smt. Mohsina M. T. filed an application dated 15.02.2021 before Circle Inspector of Police, Pandalam, Police Station, Kerala for tracing the whereabouts of her husband i.e., the petitioner, which was registered as F.I.R. No.0250 of 2020, under Section 57 of Kerala Police Act, 2011. The wife of Firoz K. C., namely, Smt. Soujath also filed a similar complaint, which was registered as F.I.R. No.0113 of 2021, under Section-57 of Kerala Police Act, 2011 at Police Station-Badagara, District-Kozhikode Rural, Kerala, for tracing the whereabouts of her husband. According to the petitioner, F.I.R. No.0004 of 2021 has been lodged at Police Station-ATS, District-Lucknow after illegally detaining the petitioner for the sole reason that the petitioner and his friend, Firoz K. C. are members of the PFI.

4. We have heard Mohd. Tahir and Mohd. S. M. Alavi, learned counsel for the petitioner, Sri S. N. Tilhari, learned A.G.A. appearing for the State-respondents, Sri Anurag Kumar Singh, learned counsel for Central Bureau of Investigation (hereinafter referred to as "CBI") and considered the record available before us.

5. Learned counsel for the petitioner has contended that the respondent no.7/First Informant has got a case registered under the provisions of Sections-120-B, 121A of I.P.C., Section 3 and 5 of

Arms Act, Sections-3, 4 and 5 of Explosives Substance Act, 1908, Sections-13, 16, 18 & 20 of UA (P) Act at Police Station-ATS, District-Lucknow. Pursuant to the F.I.R. No.0004 of 2021, the investigation has been undertaken by the State Agency. After conclusion of the investigation and during the pendency of the present writ petition, police report has also been filed, which is unsustainable in the eye of law, being contrary to mandatory provisions of Section 6 of National Investigation Agency Act (hereinafter referred to as the "NIA Act").

6. Elaborating his contention, he has further stated that Section 6 (3) of the NIA Act provides that on receipt of the report from the State Government, the Central Government shall determine on the basis of the information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, whether the offence is a *"Scheduled Offence"* or not and also whether having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the National Investigation Agency (hereinafter referred to as "Agency").

7. In view thereof, learned counsel for the petitioner has submitted that if the provisions of Sections 6 (3) & 10 of the NIA Act are read in a purposive and meaningful manner, then in the absence of determination by the Central Government as to whether offence is *"Scheduled Offence"* or not and also whether having regard to the gravity of offence and other relevant factors, the present matter arising out of FIR No.0004 of 2021 is to be investigated by the Agency, the provisions contained in Section 10 of the NIA Act would not enable the State Agency to investigate any scheduled offence due to occurrence of words "Save as otherwise provided in the Act" in Section 10 of the NIA Act. Therefore, the exercise of completing the investigation and submission of the police report by respondent no.6 is illegal.

8. To substantiate his aforesaid argument, learned counsel for the petitioner has placed reliance upon the judgment in the case of **State of Andra Pradesh through Inspector General, National Investigation Agency vs. Mohd Hussain Alias Saleem and in the matter of Pragya Singh Thakur vs. National Investigation Agency** reported in **(2014) 1 SCC 258.** Hon'ble Supreme Court, in para 19, has held as under :-

"19. We cannot ignore that it is a well-settled canon of interpretation that when it comes to construction of a section, it is to be read in its entirety, and its sub-sections are to be read in relation to each other, and not disjunctively. Besides, the text of a section has to be read in the context of the statute. A few sub-sections of a section cannot be separated from other sub-sections, and read to convey something altogether different from the theme underlying the entire section. That is how a section is required to be read purposively and meaningfully."

9. Per contra, learned A.G.A. has submitted that in the absence of any determination by the Central Government as stipulated under Section 6 (3) of the NIA Act, the State Agency is fully competent to undertake the investigation in respect of scheduled offence and other offences and to conclude it in accordance with the law in view of the provisions of Section 6 (4), (5) and (7) read with Section 10 of the NIA

Act. He has further contended that while exercising such powers, the investigation by the State Agency has been concluded and the police report has also been submitted to the competent court constituted under Section 22 of the NIA Act.

10. To support of his arguments, learned A.G.A. has placed reliance upon the judgments in the case of ***Hussna vs. National Investigating Agency and another*** reported in ***2017 (4) ADJ 489 (DB) (LB), Mantu Sharma vs. State of U.P.*** reported in ***2017 (6) ALJ 133, Mohd. Umar and others vs. State of Rajasthan and another*** reported in ***2016 Cr.L.J. 437*** and ***Aqil Hussain vs. State of NCT of Delhi and others reported in 2021 Cr.L.J. 1405,*** wherein it has been held that in the absence of determination by the Central Government under Section 6 (3) of the NIA Act, the State Government exercising the power conferred upon it under Section 10 of the NIA Act is competent to investigate the scheduled offence.

11. For a proper appreciation of the contentions arising herein, it would be appropriate to notice a few relevant provisions of the NIA Act, which are quoted herein below :-

Section 2 (1) (g) - *"scheduled offence" "means an offence specified in the schedule.*

THE SCHEDULE

1. The Atomic Energy Act, 1962 (33 of 1962);

2. The Unlawful Activities (Prevention) Act, 1967 (37 of 1967);

3. The Anti-Hijacking Act, 1982 (65 of 1982);

4. The Suppression Unlawful Acts Against Safety of Civil Aviation Act, 1982 (66 of 1982);

5. The SAARC Convention (Suppression of Terrorism) Act, 1993 (36 of 1993);

6. The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 (69 of 2002);

7. The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 (21 of 2005) ;

8. Offences under--

(a) Chapter VI of the Indian Penal Code [Sections 121 to 130 (both inclusive)];

(b) Sections 489A to 489E (both inclusive) of the Indian Penal Code."

Section 6 - *Investigation of Scheduled Offences. - (1) On receipt of information and recording thereof under section 154 of the Code relating to any Scheduled Offence the officer-in- charge of the police station shall forward the report to the State Government forthwith.*

(2) On receipt of the report under sub-section (1), the State Government shall forward the report to the Central Government as expeditiously as possible.

(3) On receipt of report from the State Government, the Central Government shall determine on the basis of information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, whether the offence is a Scheduled Offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.

(4) Where the Central Government is of the opinion that the

offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence.

(5) Notwithstanding anything contained in this section, if the Central Government is of the opinion that a Scheduled Offence has been committed which is required to be investigated under this Act, it may, suo motu, direct the Agency to investigate the said offence.

(6) Where any direction has been given under sub-section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.

(7) For the removal of doubts, it is hereby declared that till the Agency takes up the investigation of the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation."

***Section 10**- Power of State Government to investigate Scheduled Offences. Save as otherwise provided in this Act, nothing contained in this Act shall affect the powers of the State Government to investigate and prosecute any Scheduled Offence or other offences under any law for the time being in force.*

12. Thus, from a bare perusal of Section 6 of the NIA Act, it is abundantly clear that it prescribes the manner of investigation of the scheduled offence listed in the Schedule attached to the NIA Act. It provides that a Police Officer, In-charge of the Police Station, on receipt of the report of the offence shall forward the same to the State Government forthwith, which, in turn, shall forward the report to the Central Government, as expeditiously as possible.

13. On the receipt of the report of the State Government, the Central Government has to decide and determine based on the information made available by the State Government or received from other sources, within fifteen days from the date of the receipt of the report, whether the offence is a *"Scheduled Offence"* or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.

14. It also stipulates that if the Central Government is of the opinion that the offence is a *"Scheduled Offence"* and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence. **It is, thus, only where the Central Government determines the offence in question to be a Scheduled Offence or a case fit to be investigated by the Agency that it can be investigated by the Agency. There is nothing on record to suggest that the Central Government, in respect of F.I.R. No.0004 of 2021, has determined as to whether the offence levelled against the petitioner is a Scheduled Offence or that, on the strength of the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.**

(Emphasis supplied)

15. It emanates from the scheme of the NIA Act that the scheduled offence is one enumerated in the schedule appended to the NIA Act. Thus, any further declaration in this regard by the Central Government in view of Section 6 (3) would virtually render the provisions of Section 2 (1) (f) and (g) as redundant.

16. It is also ascertainable from the scheme of the NIA Act that the words

"Save as otherwise provided in this Act" occurring in Section 10 of the NIA Act clearly refer to the provisions of Section 6 (6) of the NIA Act, which provides that where Central Government has issued a direction under Section 6 (4) or Section 6 (5) of the NIA Act for getting the Scheduled Offence (s) investigated by the Agency, the State Government and any Police Officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.

17. **If it is interpreted to convey that in the absence of determination under Section 6 (3) of the NIA Act by the Central Government, the State Government would not have power to investigate in respect of Scheduled Offence, then such an interpretation would not only be against the legislative intent but it would also render the provisions of Section 10 of the NIA Act as redundant.** (Emphasis supplied)

18. In the instant case, admittedly, the Central Government has not issued any direction under Section 6 (4) or Section 6 (5) of the NIA Act to get the Scheduled Offence (s) investigated by the Agency, therefore, the authority and power of the State Government to investigate and prosecute any Scheduled Offence remains unaffected.

19. It is, thus, clear that the State Government was fully competent to investigate the matter arising out of F.I.R. No.0004 of 2021, dated 16.02.2021, under Sections-120-B, 121A of I.P.C., Section 3 and 5 of Arms Act, Sections-3, 4 and 5 of Explosive Substances Act, 1908, Sections-13, 16, 18 & 20 of UA (P) Act at Police Station-ATS, District-Lucknow and arguments of learned counsel for the petitioner to the contrary are fallacious.

20. The learned counsel for the petitioner further contends that the investigation of the matter arising out of F.I.R. No.0004 of 2021, dated 16.02.2021, under Sections-120-B, 121A of I.P.C., Sections 3 and 5 of Arms Act, Sections-3, 4 and 5 of Explosive Substances Act, 1908, Sections-13, 16, 18 and 20 of UA (P) Act at Police Station-ATS, District-Lucknow needs to be transferred to the CBI only on the ground that the State Authority and Investigating Agency are prejudiced and biased towards the petitioner as he is a member of PFI, which is termed by respondent no.5 as "South Terror" on its portal, which is evident from Annexure No.7 to this petition. It has also been stated that the transfer of the investigation to the CBI is necessary because the investigation is not being carried out in a free and fair manner.

21. In ***K.V. Rajendran Vs. Superintendent of Police, CBCID South Zone, Chennai and others*** reported in ***(2013) 12 SCC 480,*** Hon'ble The Supreme Court has held as under :

13. The issue involved herein, is no more res integra. This Court has time and again dealt with the issue under what circumstances the investigation can be transferred from the State investigating agency to any other independent investigating agency like CBI. It has been held that the power of transferring such investigation must be in rare and

exceptional cases where the court finds it necessary in order to do justice between the parties and to instil confidence in the public mind, or where investigation by the State police lacks credibility and it is necessary for having "a fair, honest and complete investigation", and particularly, when it is imperative to retain public confidence in the impartial working of the State agencies. Where the investigation has already been completed and charge-sheet has been filed, ordinarily superior courts should not reopen the investigation and it should be left open to the court, where the charge-sheet has been filed, to proceed with the matter in accordance with law. Under no circumstances, should the court make any expression of its opinion on merit relating to any accusation against any individual. (Vide Gudalure M.J. Cherian v. Union of India [(1992) 1 SCC 397] , R.S. Sodhi v. State of U.P. [1994 Supp (1) SCC 143 : 1994 SCC (Cri) 248 : AIR 1994 SC 38] , Punjab and Haryana High Court Bar Assn. v. State of Punjab [(1994) 1 SCC 616 : 1994 SCC (Cri) 455 : AIR 1994 SC 1023] , Vineet Narain v. Union of India [(1996) 2 SCC 199 : 1996 SCC (Cri) 264] , Union of India v. Sushil Kumar Modi [(1996) 6 SCC 500 : AIR 1997 SC 314] , Disha v. State of Gujarat [(2011) 13 SCC 337 : (2012) 2 SCC (Cri) 628 : AIR 2011 SC 3168] , Rajender Singh Pathania v. State (NCT of Delhi) [(2011) 13 SCC 329 : (2012) 1 SCC (Cri) 873] and State of Punjab v. Davinder Pal Singh Bhullar [(2011) 14 SCC 770 : (2012) 4 SCC (Civ) 1034 : AIR 2012 SC 364] .)

14. In Rubabbuddin Sheikh v. State of Gujarat [(2010) 2 SCC 200 : (2010) 2 SCC (Cri) 1006] this Court dealt with a case where the accusation had been against high officials of the Police Department of the State of Gujarat in respect of killing of persons in a fake encounter and Gujarat Police after the conclusion of the investigation, submitted a charge-sheet before the competent criminal court. The Court came to the conclusion that as the allegations of committing murder under the garb of an encounter are not against any third party but against the top police personnel of the State of Gujarat, the investigation concluded by the State investigating agency may not be satisfactorily held. Thus, in order to do justice and instil confidence in the minds of the victims as well of the public, the State police authority could not be allowed to continue with the investigation when allegations and offences were mostly against top officials. Thus, the Court held that even if a charge-sheet has been filed by the State investigating agency there is no prohibition for transferring the investigation to any other independent investigating agency.

15. In State of W.B. v. Committee for Protection of Democratic Rights [(2010) 3 SCC 571 : (2010) 2 SCC (Cri) 401] a Constitution Bench of this Court has clarified that extraordinary power to transfer the investigation from State investigating agency to any other investigating agency must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigation or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. (See also Ashok Kumar Todi v. Kishwar Jahan [(2011) 3 SCC 758 : (2011) 2 SCC (Cri) 75 : AIR 2011 SC 1254] .)

17. In view of the above, the law can be summarised to the effect that the Court could exercise its constitutional powers for transferring an investigation

from the State investigating agency to any other independent investigating agency like CBI only in rare and exceptional cases. Such as where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instil confidence in the investigation or where the investigation is prima facie found to be tainted/biased."

22. Hon'ble The Supreme Court in ***Central Bureau of Investigation and another vs. Rajesh Gandhi and another*** reported in ***1996 (11) SCC 253*** has held that the decision to investigate or the decision on the Agency which should investigate, does not attract the principle of natural justice. The accused cannot have a say in who should investigate the offence he is charged with.

23. It is admitted to the petitioner that the Central Government has, so far, not directed the Agency to investigate in respect of the F.I.R.No.0004 of 2021, dated 16.02.2021, under Sections-120-B, 121A of I.P.C., Section 3 and 5 of Arms Act, Sections-3, 4 and 5 of Explosive Substances Act, 1908, Sections-13, 16, 18 & 20 of UA (P) Act at Police Station-ATS, District-Lucknow, invoking its power under Section 6 (3) of the NIA Act. The said investigation has been concluded by the Investigating Agency of the State, respondent no.6. The police report qua the present petitioner has been submitted to the competent court. The cognizance of the offence has also been taken by the special court constituted by the State Government in exercise of power vested in it by Section 22 of the NIA Act.

24. Hon'ble The Supreme Court in **Bikramjit Singh vs. State of Punjab,** reported in **(2020) 10 SCC 616,** in para 26, has held as under :

"26. Before the NIA Act was enacted, offences under the UAPA were of two kinds -- those with a maximum imprisonment of over 7 years, and those with a maximum imprisonment of 7 years and under. Under the Code as applicable to offences against other laws, offences having a maximum sentence of 7 years and under are triable by the Magistrate's courts, whereas offences having a maximum sentence of above 7 years are triable by Courts of Session. This scheme has been completely done away with by the NIA Act, 2008 as all Scheduled Offences i.e. all offences under the UAPA, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under that Act. In the absence of any designated court by notification issued by either the Central Government or the State Government, the fallback is upon the Court of Session alone. Thus, under the aforesaid scheme what becomes clear is that so far as all offences under the UAPA are concerned, the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D(2)(b) is non-existent, "the Court" being either a Sessions Court, in the absence of a notification specifying a Special Court, or the Special Court itself. The impugned judgment in arriving at the contrary conclusion is incorrect as it has missed Section 22(2) read with Section 13 of the NIA Act. Also, the impugned judgment has missed Section 16(1) of the NIA Act which states that a Special Court may take cognizance of any offence without the

accused being committed to it for trial, inter alia, upon a police report of such facts."

25. Placing reliance upon the aforesaid judgment, the contention of learned counsel for the petitioner is that only special court, constituted under Section 22 of the NIA Act, has jurisdiction to take cognizance of the offences in question. In absence of such court, the sessions court has jurisdiction to take cognizance because, in the present matter, F.I.R. No.0004 of 2021 has been registered under the provisions of UA (P) Act also. The aforesaid contention of the learned counsel for the petitioner has been vehemently opposed by the learned A.G.A., who submits that the State Government, in exercise of power vested in it by Section 22 of the NIA Act, has constituted special court and the special court has taken cognizance of the offence in question. In view of the above, we do not find any substance in the aforesaid arguments of the learned counsel for the petitioner.

26. The petitioner has, thus, been unable to show that the power of investigation has been exercised by the Investigating Officer *mala fide*. It is also not found to be a case of abuse of power and non-compliance by the Investigating Agency following under Chapter XII of the Code of Criminal Procedure. The investigation has also been concluded by the respondent no.6. So far as the allegation of use of term "South Terror" on the portal of respondent no.5 is concerned, it is pertinent to mention here that use of such term would not per se import element of malice or bias towards the petitioner. However, we view this fact with profound concerned and disapprove use of such term.

27. In view of the aforesaid discussion, we are of the considered view that it is not a rare or exceptional case where investigation needs to be transferred to the CBI as a court monitored matter.

28. No other issue has been urged before us by the learned counsel for the parties.

29. As discussed above, the writ petition is liable to be dismissed and the same is hereby **dismissed.**

(2021)07ILR A580
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.06.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Misc. Bench No. 10928 of 2021

Ankur Agarwal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ajay Pratap Singh 'Vatsa'

Counsel for the Respondents:
G.A.

A. Practice & Procedure - Interim orders - Object & Scope - interim orders/directions are issued on the basis of prima facie finding & makes temporary arrangements to preserve status quo to ensure that the matter does not either become infructuous or a fait accompli before final hearing - Precedent -interim directions based on tentative reasons, restricted to peculiar facts of the case involving extraordinary situation have no value of precedent - interim order which does not finally and conclusively decide an issue

cannot be a precedent - interim order and direction issued in a case binds the parties to that case only and that too, till the final decision of the matter by final judgment - Interim order not binding on Co-ordinate Bench the Court (Para 17, 18)

Constitution of India, Art.226 - Quashing of FIR - Court has to eschew itself from embarking upon a roving enquiry into the last details of the case - not advisable to adjudge whether the case shall ultimately end in submission of charge sheet and then eventually in conviction or not - Only a prima facie satisfaction of the court about the existence of sufficient ingredients constituting the offence is required in order to see whether the F.I.R. requires to be investigated or deserves quashing - ambit of investigation into the alleged offence is an independent area of operation and does not call for interference in the same except in rarest of rare cases (Para 23)

FIR u/ss 409, 120-B IPC & S. 13(1) r/w S.13(2) of Prevention of Corruption Act - petitioner is the holder of mining lease - F.I.R. lodged on the basis of inquiry report of Lok Ayukta in regard to corruption and irregularities - allegation of embezzlement of Government exchequer of Rs.14,10,50,63,200/- - Sufficient ground for investigation in the matter shown - FIR not liable to be quashed (Para 22, 24, 25)

Dismissed. (E-4)

List of Cases cited :

1. St. of Assam Vs Barak Upatyaka D.U. Karmachari Sanstha (2009) 5 SCC 694

2. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. (Criminal Appeal No. 330 of 2021, decided on 13.04.2021)

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

(1) The Court has convened through **Video Conferencing.**

(2) Heard Sri Ajay Pratap Singh "Vatsa', learned counsel for the petitioner and learned AGA for the State and perused the material brought on record.

(3) The present writ petition under Article 226 of the Constitution of India has been filed by the petitioner, Ankur Agarwal, challenging the First Information Report dated 01.01.2014 so far as it relates to the petitioner registered as F.I.R. No. 01 of 2014, under Sections 409/120-B of the Indian Penal Code and Section 13 (1) read with Section 13 (2) of the Prevention of Corruption Act, 1988.

(4) Learned counsel for the petitioners has argued that the petitioner is lease holder of mining in District Mirzapur. The State Government took a decision to construct Memorial and Parks in the city of Lucknow and NOIDA and for this purpose, a Committee comprising Managing Director of U.P. Rajkiya Nirman Nigam Ltd., the Director of the Department of Geology and Mining and the Joint Director was constituted for making inspection in the Ahraura Region of District Mirzapur to verify as to whether sufficient quantity of pink sandstones were available or not. The said Committee, after due inspection, found the sufficient quantities of pink sandstones in the aforesaid area and, therefore, a Committee of seven officials of which three officers belonged to the U.P. Rajkiya Niram Nigam Ltd and four belonging to the Geology Department conducted a survey and submitted its report. In pursuance thereof, a letter dated 13.07.2007 was sent by the Director, Geology and Mining, U.P. to the Managing Director of U.P. Rajkiya Nirman Nigam Ltd. to the effect that it has been decided that a consortium of lease

holders should be constituted for the purposes of entering into an agreement for the purposes of supply of sandstone of the required quantity and necessary steps were recommended to be taken for the aforesaid purpose. Thereafter, individual letters of intent for supply of Mirzapur sandstones were issued to the petitioner. On the basis of the said letter of intent of the State Government, the petitioner supplied requisite quantity of sandstone to the department and has also received the payment at the agreed rate and at that relevant time, there is no complaint or allegation regarding quality or quantity of material supplied by the petitioner to the State Government but after change of Government in Uttar Pradesh, the newly formed Government has instituted an inquiry in the matter and entrusted it to the U.P. Lok Ayukta to enquire into the allegations of corruption and irregularities during the period 2007 to 2011 as regards to supply of sandstone from District of Mirzapur, Sonbhadra, Bayana, Bharatpur/Jaipur (Rajasthan) and other districts.

(5) It has been argued by the learned Counsel for the petitioner that the Lok Ayukta, without affording any opportunity of hearing, conducted enquiry and submitted his report to the State Government. He argued that there is no allegation against the petitioner in the finding recorded by the Lok Ayukta that the required quantity of sandstones was not supplied or the sandstone supplied was of an inferior quality nor the allegation that there is collusion between the petitioner and the officials of State Government as uniform and there was no difference whatsoever regarding the rates at which such supply was made by an individual lease holder. However, a notice dated 29.08.2013 and 20.09.2013 was served upon the petitioner, which was issued by the District Magistrate, Mirzapur to show cause as to why his mining leases be not cancelled and his name be not placed in the blacklist. Feeling aggrieved, the petitioner has filed Writ-C No. 62139 of 2013 : *Ankur Agarwal Vs. State of U.P. and others* and other similarly situated lease holder has also filed Writ-C No. 54197 of 2013 : *Panna Lal and 15 others Vs. State of U.P. and others*, before this Court at Allahabad, in which interim protection has been granted by the Court vide orders dated 10.10.2013 and 13.11.2013, respectively, restraining the District Magistrate, Mirzapur to take any further action pursuance to notice issued by him. The aforesaid writ petition is pending before this Court at Allahabad.

(6) Learned Counsel for the petitioner has further argued that in pursuance of the recommendations of the Lok Ayukta, the U.P. Vigilance Establishment, Sector Lucknow has lodged F.I.R. on 01.10.2014, registered as F.I.R. No. 1 of 2014, under Sections 409/120-B I.P.C. and Section 13 (1) read with Section 13 (2) of the Prevention of Corruption Act, at Police Station Gomti Nagar, District Lucknow. He argued that from perusal of the aforesaid F.I.R. reveals that the same is registered against 19 persons and the name of the petitioner is not there. However, during the course of investigation, a summon/notice dated 14.02.2014/15.02.2014 was issued to the petitioner by the Vigilance Establishment for appearance on 03.03.2014 and again notices dated 30.05.2015 and dated 02.02.2016 were issued to the petitioner by the Vigilance Department requiring him to produce certain documents. The petitioner has complied with the aforesaid directions of

the establishment. Thereafter, the matter remained silent but all of a sudden on 15.05.2021, while the petitioner was not in his house, the local police conducted raid and stated that the petitioner is being required for arrest in pursuance of the impugned F.I.R.

(7) Learned Counsel for the petitioner has further submitted that perusal of the impugned F.I.R. mainly revolves around with an allegation that without adopting the tender process, the work has been given by means of consortium and the sandstone which could have been purchased at a rate of Rs.50 to Rs.75 have been purchased at an excessive rate of Rs.150/- per cubic feet without conducting survey of market rate collusively. He argued that out of 59 identically placed suppliers, only 20 suppliers have been targeted with ulterior motive under political influence. He argued that neither offence under Section 409 I.P.C. nor the provisions of Prevention of Corruption Act are attracted to the petitioner, who is a contractor although he has been involved in the construction activities entrusted to him by U.P. Rajkiya Nirman Nigam Ltd. and furthermore, no charge-sheet has yet been filed against the petitioner pursuant to the impugned F.I.R. He argued that impugned FIR is abuse of the process of law. Thus, the impugned FIR is liable to be quashed.

(8) Learned Counsel for the petitioner has further stated that two accused persons, namely, Ashok Kumar and Panna Lal Yadav have also challenged the impugned F.I.R. by filing writ petition No. 6369 of 2020 (M/B) and 12206 of 2020 (M/B), respectively, wherein vide orders dated 06.03.2020 and 31.07.2020, respectively, a Co-ordinate Bench of this Court has stayed the arrest of the aforesaid writ petitioners. Therefore, the benefit of the aforesaid interim orders may be granted to the present writ petitioner.

(9) *Per contra*, learned AGA for the State opposed the prayer of the petitioner for quashing the impugned F.I.R. and also staying the arrest of the petitioner and argued that from the perusal of the FIR, *prima facie*, it cannot be said that no cognizable offence is made out, hence, no ground exists for quashing the F.I.R. or staying the arrest of the petitioner. Moreover, the petitioner has an efficacious remedy for seeking anticipatory bail in the matter before the competent Court, which has been made applicable in the State of U.P. w.e.f. 06.06.2019.

(10) Learned AGA has also argued that the the State Government has sanctioned the prosecution of co-accused, Rajeev Kumar Singh, Heera Lal, Rakesh Chandra, Rajesh Chaudhari, Shiv Pal Singh, Bhupendra Dutt Tripathi and Shukh Lal Yadav, who were public servant, in respect of F.I.R. No. 01 of 2014, which is the impugned F.I.R. in the present case, and the said sanction order was challenged by them by filing Writ Petition Nos. 25382 of 2020 (M/B), 25759 of 2020, 25756 of 2020 (M/B), 25639 of 2020 (M/B), 25508 of 2020 (M/B), and 25453 of 2020 (M/B), respectively, before this Court and this Court, vide judgment and order dated 21.01.2021 and 17.02.2021, respectively, dismissed the aforesaid writ petitions.

(11) So far as the claim of the petitioner for giving the benefit of interim orders as has been granted by a Co-ordinate

Bench of this Court vide orders dated 06.03.2020 and 31.07.2020 passed in writ petition No. 6369 of 2020 (M/B) and 12206 of 2020 (M/B), respectively, it has been argued by the learned AGA that the instant writ petition is being argued finally by the parties, therefore, aforesaid interim orders passed by a Co-ordinate Bench of this Court cannot be granted to the petitioner.

(12) We have examined the submissions advanced by the learned Counsel for the parties and gone through the record.

(13) Before proceeding further on merit of the case, we deem it appropriate to first adjudicate the submission of the learned counsel for petitioner that the petitioner is entitled to get the benefit of the interim orders dated 06.03.2020 and 31.07.2020 passed in writ petition No. 6369 of 2020 (M/B) and 12206 of 2020 (M/B), respectively.

(14) The interim order dated 06.03.2020 passed in Writ Petition No. 6369 of 2020 (M/B) reads as under :-

"Heard learned counsel for the petitioner, learned A.G.A. and perused the record.

This petition seeks issuance of a writ in the nature of certiorari for quashing the impugned First Information Report dated 01.01.2014 registered as Case Crime No.1 of 2014, under Sections - 409/120B IPC and Sections 13(1)(d) and 13(2) of Prevention of Corruption Act, at Police Station - Gomti Nagar, District - Lucknow.

After hearing learned counsel for the parties, who are present today and going through the records, prima facie, the submission made by learned counsel for the petitioner appears to be correct, as such, as an interim measure, we hereby provide that the prosecution in question may go on but till the next date of listing or till filling of the police report under Section 173 (2) Cr.P.C., whichever is earlier, the petitioner shall not be arrested in connection with the aforesaid first information report number. However, the petitioner will co-operate with the investigation.

Learned A.G.A. prays for and is granted four weeks' time to file counter affidavit. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

List thereafter."

(15) The interim order dated 31.07.2020 passed in Writ Petition No. 12206 of 2020 (M/B) reads as under :-

"Heard learned counsel for the petitioner, learned A.G.A. appearing for the opposite party nos.1, 3 to 6 and perused the record.

This petition seeks issuance of a writ in the nature of certiorari for quashing of the impugned F.I.R. dated 01.01.2014 registered by the Opposite Party No.6 as Case Crime No.1 of 2014, Under Sections 409, 120-B IPC and Section 13 (1) (d) and 13 (2) of Prevention of Corruption Act, Police Station Gomti Nagar, District Lucknow.

It is submitted by the learned counsel for the petitioner that in identical circumstances the arrest of the co-accused Ashok Singh has been stayed by this Court vide order dated 06.03.2020 passed by this Court. The said order is being quoted hereinbelow:-

"Heard learned counsel for the petitioner, learned A.G.A. and perused the record.

This petition seeks issuance of a writ in the nature of certiorari for quashing the impugned First Information Report

dated 01.01.2014 registered as Case Crime No.1 of 2014, under Sections - 409/120B IPC and Sections 13(1)(d) and 13(2) of Prevention of Corruption Act, at Police Station - Gomti Nagar, District - Lucknow.

After hearing learned counsel for the parties, who are present today and going through the records, prima facie, the submission made by learned counsel for the petitioner appears to be correct, as such, as an interim measure, we hereby provide that the prosecution in question may go on but till the next date of listing or till filling of the police report under Section 173 (2) Cr.P.C., whichever is earlier, the petitioner shall not be arrested in connection with the aforesaid first information report number. However, the petitioner will co-operate with the investigation.

Learned A.G.A. prays for and is granted four weeks' time to file counter affidavit. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

List thereafter."

Accordingly, the learned counsel for the petitioner submits that the same benefit may be given to the present petitioner also, as such, his arrest may be stayed.

Shri S.P. Singh, learned A.G.A. has opposed the matter on merit but he has not disputed the fact that as an interim protection, the arrest of the co-accused Ashok Singh has already been stayed by this Court.

After hearing learned counsel for the parties and going through the records, prima facie, the submission made by the learned counsel for the petitioner appears to be correct, as such, as an interim measure till the next date of listing or till the filing of the police report under Section 173 (2) Cr.P.C. whichever is earlier, petitioner (Panna Lal Yadav) shall not be arrested in connection with the aforesaid case crime number. However, the petitioner will co-operate with the investigation.

Learned A.G.A. prays for and is granted four weeks' time to file counter affidavit. Rejoinder affidavit, if any, may be filed within two weeks' thereafter.

List thereafter alongwith Writ Petition No.6369 (M/B) of 2020 (Ashok Singh Vs. State of U.P. Through Principal Secretary)."

(16) It transpires from the aforesaid interim order dated 06.03.2020 that the same is not speaking order, whereas interim order dated 31.07.2020 has been passed by giving parity of the aforesaid interim order dated 06.03.2020 and that too also not a speaking order.

(17) It is settled law that the interim orders/directions are issued on the basis of *prima facie* finding and makes temporary arrangements to preserve *status quo* to ensure that the matter does not either become infructuous or a fait accompli before final hearing and this view has again been reiterated by the Hon'ble Supreme Court in the case of **State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha :** (2009) 5 SCC 694). The Hon'ble Supreme Court again held that interim directions based on tentative reasons, restricted to peculiar facts of the case involving extra- ordinary situation have no value of precedent and the interim order which does not finally and conclusively decide an issue cannot be a precedent. Apart from above, it is also settled law that the interim order and direction issued in a case binds the parties to that case only and that too, till the final decision of the matter by final judgment.

(18) Here, at this stage, we are finally hearing the matter with the consent of the learned Counsel for the parties, therefore, interim orders dated 06.03.2020 and 31.07.2020 passed in writ petition No. 6369 of 2020 (M/B) and 12206 of 2020 (M/B), respectively, by a Co-ordinate Bench of this Court are not binding on us. Therefore, the plea of the petitioner in this regard is not sustainable and is, accordingly, rejected. Now, we proceed to adjudicate the matter on merits.

(19) The legal position on the issue of quashing of FIR or criminal proceedings is well-settled that the jurisdiction to quash a complaint, FIR or a charge-sheet should be exercised sparingly and only in exceptional cases. The Courts should not ordinarily interfere with the investigations of cognizable offences. However, where the allegations made in the FIR or the complaint even if 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, the FIR 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.

(20) Recently, in **Neeharika Infrastructure Private Limited vs. State of Maharashtra (Criminal Appeal No. 330 of 2021, decided on 13.04.2021),** a three-judge Bench of the Hon'ble Supreme Court considered the powers of the High Court while adjudicating a petition for quashing of the FIR under Article 226 of the Constitution of India and under Section 482 of the Criminal Procedure Code, 1973. In ***Neeharika Infrastructure Private Limited (supra),*** the appellants challenged an interim order issued by the Bombay High Court, in a quashing petition filed under Section 482 Cr.P.C. and Article 226 of the Constitution. The Bombay High Court issued an interim order directing that *"no coercive measures shall be adopted against the petitioners in respect of the said FIR"*. While examining the correctness of the said interim order, Hon'ble the Supreme Court in para-23 has held as under :

"23. In view of the above and for the reasons stated above, our final conclusions on the principal/core issue, whether the High Court would be justified in passing an interim order of stay of investigation and/or "no coercive steps to be adopted", during the pendency of the quashing petition under Section 482 Cr.P.C and/or under Article 226 of the Constitution of India and in what circumstances and whether the High Court would be justified in passing the order of not to arrest the accused or "no coercive steps to be adopted" during the investigation or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of/not entertaining/not quashing the criminal proceedings/complaint/FIR in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India, our final conclusions are as under:

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the "rarest of

rare cases (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely,

casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. xvii) Even in a case where the High Court is *prima facie* of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

xviii) Whenever an interim order is passed by the High Court of "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied.

(21) Keeping in mind the aforesaid dictum of the Hon'ble Supreme Court, we find that in the instant case, it transpires from the impugned F.I.R. that it has been lodged on the basis of inquiry report of Lok Ayukta in regard to corruption and irregularities committed during the period 2007 to 2011 for supply of sandstone. It also transpires that there is embezzlement of Government exchequer of **Rs.14,10,50,63,200/-** and in the said loss of Government exchequer, besides former ministers, officer(s) of the State, Firms related to construction work and persons are responsible as with their connivance, the said amount has been embezzled.

(22) Admittedly, the petitioner is the holder of mining lease in District Mirzapur, therefore, *prima facie*, it cannot be said that the petitioner is not involved in the present case as it is a categorical averment in the impugned F.I.R. that in the embezzlement of Government exchequer, apart from former ministers, Government officials and officer of Nirman Agency, the firm related to construction work and persons are also responsible as the said embezzlement have been made with their connivance.

(23) It is well settled that this Court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge whether the case shall ultimately end in submission of charge sheet and then eventually in conviction or not. Only a *prima facie* satisfaction of the court about the existence of sufficient ingredients constituting the offence is required in order to see whether the F.I.R. requires to be investigated or deserves quashing. The ambit of investigation into the alleged offence is an independent area of operation

and does not call for interference in the same except in rarest of rare cases.

(24) Keeping in view the aforesaid law and considering the submissions raised by learned counsel for the petitioner, we are of the considered view that the submissions advanced by the learned Counsel for the petitioner call for determination on questions of fact which may be adequately discerned either through proper investigation or which may be adjudicated upon only by the trial court and even the submissions made on points of law can also be more appropriately gone into only by the trial Court in case a charge sheet is submitted in this case. The perusal of the record makes out, *prima facie*, offences at this stage and there appears to be sufficient ground for investigation in the case.

(25) In view of the aforesaid, considering the allegations made in the FIR and material brought on record, it cannot be said that no *prima facie* case is made out against the petitioner, rather there appears to be sufficient ground for investigation in the matter. Accordingly, we do not find any justification to quash the impugned F.I.R.

(26) The petition lacks substance and is, accordingly, **dismissed.**

(2021)07ILR A589
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.07.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE NARENDRA KUMAR JAUHARI, J.

Misc. Bench No. 11190 of 2021

&

Misc. Bench No. 11396 of 2021

Hemant Kumar Saini ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Ayodhya Prasad Mishra, Rituraj Mishra

Counsel for the Respondents:
G.A., Akhilesh Awasthi

Criminal Law - Narcotic Drugs & Psychotropic Substances Act, 1985 - Section 65 - Power to call for information, - notice is merely for enquiry/interrogation - Constitution of India, Article 226 - Writ of Certiorari - to quash notice/summon issued u/s 67 - writ petition against such a kind of notice should not ordinarily be entertained - It is pre-mature in nature because notice by itself does not give rise to cause of action, as no adverse order has yet been passed - in the event of adverse decision, it will certainly be opened to accused persons to assail the same in appropriate proceedings under the law - Undoubtedly in certain conditions, when there is a question of infringement of fundamental right or on the point of lack of jurisdiction, such notice/summon can be challenged (Para 50)

Case of petitioners is at the stage of investigation & the notice/summon u/s 67 has been issued to petitioners only for the satisfaction of investigating officer that whether there has been any contravention of the provisions of the N.D.P.S. Act,1985 or not - It is quite possible that in the enquiry if the evidence comes before the Investigating Officer that the Firm of petitioners has not violated N.D.P.S. Act, 1985 as well as Drugs and Cosmetics Act, 1940, the enquiry/Investigating Officer of NCB may submit its report accordingly and the petitioners may be exonerated from prosecution (Para 50)

Dismissed.(E-4)

List of Cases cited:

1. Ashok Kumar Vs U.O.I., Cri. Misc. Case No.2976 of 2014 dt 15.10.2014

2. Ram Dayal Mathur Vs U.O.I. W.P. No.8953 of 2013 (MB)

3. St.of Punjab Vs Rakesh Kumar (2019) 2 SCC 466

4. Ram Dayal Mathur Vs U.O.I. MB No. 8953 of 2013 dt 03.04.2015

5. St. of Uttaranchal Vs Rajesh Kumar Gupta 2007 (1) SCC 355

6. U.O.I. Vs Sanjeev V. Despande, MANU/SC/0688/2014

7. Niharika Furniture Vs St. of Mah., MANU/SC/0272/2021

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

(The judgment is pronounced in terms of Chapter VII Sub-rule (2) of Rule (1) of the Allahabad High Court Rules, 1952 by Hon'ble Ramesh Sinha, J.)

1. Writ Petition (Misc. Bench) No.11190 of 2021 has been filed by the petitioner, Hemant Kumar Saini, one of the partners of the Firm M/s Preksha Trading Company, with the following main reliefs :-

(i) Issue a writ, order or direction in the nature of Certiorari for quashment of the notice/summon issued under section 67 of Narcotic Drugs & Psychotropic Substances Act, 1985 dated 13.05.2021 by the Narcotics Control Bureau Lucknow relating crime no.16/2021 registered at Police Station - Kotwali District - Varanasi on 05.04.2021 under section 8/21/29 of N.D.P.S. Act and similarly subsequent summon if any issued by investigating officer/opposite party no.3 contained as Annexure No.1 alongwith the present Writ Petition.

(ii) Issue a writ order or direction in the nature of Mandamus Commanding and directing the opposite parties particularly opposite party no.2 to 4 not to arrest and harass the petitioner in pursuance of the impugned notice/summon issued under section 67 of NDPS Act dated 13.05.2021 by the N.C.B. Lucknow relating crime no.16/2021 registered at Police Station - Kotwali, District - Varanasi on 05.04.2021 under section 8/21/29 of N.D.P.S. Act during the pendency of the present writ petition, in the interest of justice."

2. After amendment in the prayer clause (Crl. Misc. Application No.76529/2021), following prayer has been added by learned counsel for the petitioner :-

"(v) It is also prayed that this Hon'ble Court may kindly be pleased to issue a writ in the nature of certiorari for quashing of FIR as recorded under section 42 of NDPS Act and entire investigation which is being carried in pursuance thereof conducted by the investigating officer of the department of Narcotics Control Bureau, Lucknow, in the interest of Justice."

3. Almost on the same grounds, another Writ Petition (Misc. Bench) No.11396 of 2021 has been filed by petitioner Yogita Nand Yadav, the another partner of the Firm M/s Preksha Trading Company, with the following main reliefs :-

*(i) Issue a writ, order or direction in the nature of **Certiorari** to quash the investigation of NCB case crime*

no.16/2021 under section 8/21/29 of NDPS Act registered on 03.04.2021 in the office of Narcotics Control Bureau, Lucknow under section 42 of NDPS Act through Form NCB-1 and notice/summons issued under section 67 of Narcotics Drugs & Psychotropic Substances Act, 1985 dated 13.05.2021 by the Narcotics Control Bureau, Lucknow and subsequent recovery effected on 05.04.2021 at Varanasi and similarly subsequent summon if any issued by investigating officer/opposite party no.3 so far as against the petitioner is concern contained as ***Annexure No.1*** *along with the present Writ Petition.*

(ii) It is further prayed that the petitioner is ready to appear again before investigating officer as already appeared on 12.04.2021 and this Hon'ble Court may kindly be pleased to direct the investigating officer to not arrest the petitioner after recording his statement if any and the investigating officer first consider about the question of jurisdiction for making search, seizure and investigation in the interest of justice.

(iii) Issue a writ order or direction in the nature of ***Mandamus*** *Commanding and directing the opposite parties particularly opposite party no.2 to 4 not to arrest and harass the petitioner in pursuance of the impugned notice/summon issued under section 67 of NDPS Act dated 13.05.2021 by the N.C.B. Lucknow relating crime no.16/2021 registered at Police Station - Kotwali, District - Varanasi on 05.04.2021 under section 8/21/29 of N.D.P.S. Act during the pendency of the present writ petition, in the interest of justice.*

4. Since both the writ petitions have been filed by the petitioners on almost similar facts and grounds, therefore, both the writ petitions have been heard together and are being decided with a common judgment.

5. The brief facts which have emerged from the case of prosecution need to be noted at the very outset.

6. A specific information provided to Narcotics Control Bureau authority by an informer that huge quantity of codiene based syrup have illegally been stored in the shop/godown No.09 and Shop No.31 of Gyan Mondal Plaza @ Imam Mondal Plaza @ Aaj Press Building, Sant Kabir Marg near Maidagin Chauraha, Police Station Kotwali, Varanasi, by one Sunil Jaiswal. The information was reduced in writing by the authorities of the Narcotics Control Bureau (hereinafter referred to as "the N.C.B.") in NCB-I format and submitted to superior officer, i.e. Superintendent, N.C.B., Lucknow on 03.04.2021. A team was constituted consisting of Shri Raj Kumar Shaw, Intelligence Officer, Shri Kumar, Sepoy and Shri Manjeet, Driver, for further action as per provisions of Narcotic Drugs & Psychotropic Substance Act, 1985 (hereinafter referred to as "the N.D.P.S. Act,1985). The aforesaid team reached Varanasi along with necessary articles and meet the S.H.O., Kotwali Varanasi and shared the information to procure police party. The information was also communicated to Drug Inspector, Varanasi. The N.C.B. team along with police personnel and Drug Inspector, Varanasi reached at the suspected shops on 05.04.2021. The shops in question, i.e. Shop Nos. 09 and 31 were found locked. The team tried to contact to Sunil Jaiswal but after repeated calls and long waiting, said Sunil Jaiswal did not appear before the team to open the shops. The team inquired

about Sunil Kumar Jaiswal through his brother's shop also but Sunil Jaiswal could not be contacted. Then the team arranged a local key maker, Abhishek Jaiswal, who opened the lock of both the premises in presence of independent witnesses. The Shop No.09 was found fully packed with medicines.

7. The following medicines (Codeine based syrups) were recovered from Shop No.09 :-

Serial No.	Name of Medicine	Quantity
1.	Onerex Cs	30240 Bottles
2.	Onerex Cs	42600 Bottles
3.	Welcyre	4200 Bottles
4.	Plencyre	6480 Bottles
5.	CC Kuffs +	24624 Bottles
6.	CC-Kuffs +	3888 Bottles
	Total	112032 Bottles

From Shop No.31, following drugs were recovered :-

Serial No.	Name of Drug	Quantity
1.	Onerex CC cough syrup	2520 Bottles
2.	Welcyrex	720 Bottles
	Total	3240 Bottles

8. Certain documents, like registration certificate, copies of bank pass-book, PAN Card, AADHAR Card, GST Certificate, appointment receipt of passport and ITR were also recovered from the Shop No.31. The Drug Inspector took four bottles of each batch of Codeine based syrup as sample, rest of the recovered medicines were seized and sealed by the N.C.B. Brass seal. After completion of search and seizure of both the shops in presence of independent witnesses and joint team of N.C.B., Police and Drug Inspector, search-cum-seizure memo was prepared on the spot. All the legal formalities were completed by the team without causing any damage to any person or property. Both the shops were locked by the new locks purchased by the N.C.B. team.

9. Learned counsel for the petitioners submitted that petitioners are running a medical shop for sale and purchase of medicines under the valid license granted by the competent authority under partnership with other person, namely, Sunil Kumar Jaiswal under the name and style of M/s New Preksha Trading Company, having its godown in House No.62/16, Saptsagar, Medicine Market, Maidagin, Post Visheswarganj, Police Station - Kotwali, District Varanasi. The licence was effective from 19.07.2018 for sale, purchase and stocking of medicines. The petitioners have no criminal history in their credit and they are ready to co-operate with the investigation, but well established apprehension is that whenever they will appear before the Investigating Officer, without fair and proper investigation, by making pressure and threat, just to get undue advantage being in custody, the petitioners may be arrested and send to jail. The authorities of N.C.B. have no jurisdiction to make search and seizure and also to issue notice under Section 67 of N.D.P.S. Act, 1985.

10. Learned counsel for the petitioners further submitted that on the basis of seizure memo dated 05.04.2021,

the N.C.B. officials registered a case vide Crime No.16/2021, on 05.04.2021, under Section 8/21/29 of N.D.P.S. Act,1985, against the accused Sunil Kumar Jaiswal. The authorities of N.C.B. also issued notice to petitioners under Section 67 of N.D.P.S. Act,1985, which is without jurisdiction and against the mandates of N.D.P.S. Act, 1985 as well as Drugs and Cosmetics Act, 1940. The officers of N.C.B. broken the locks and seized the shop illegally and without any jurisdiction. The medicines were kept in godown under the valid licence granted by the concerned authorities. The cough syrup Onerex, CC cough syrup, Welcyrex, Plencyrex cough syrup, Plencyrex and RC-KUFFS (Plus) are medicines of schedule H (1) of the Drugs & Cosmetics Act with the leveling of Rx. The cough syrups were purchased by the Wind Biotech [manufactured Onerex and RC-KUFFS (Plus)] and so far as Welcyrex and Plencyrex are concerned, the same were manufactured by the Similax Health Care Pvt. Ltd., Baddi, Himanchal Pradesh. Both firms are reputed and having valid license for manufacturing medicines. The said cough syrups were purchased from the firms which are registered, namely, Sri Radha Medical Agency and M/s A.R. Pharma and S.K. Drug Agency, situated at Varanasi. All the three firms are also running under the valid licence granted by the Drugs and Cosmetics Authority. The partnership firm of petitioners M/s Preksha Ayurvedics is having valid licence to carry the business of sale and purchase. If the entire prosecution story is taken as it is, even the provisions of N.D.P.S. Act, 1985 are not attracted at all. It may be the case of petitioners falling under the provisions of Drugs and Cosmetics Act, 1940. The petitioners have been sent a notice which is cryptic in nature and on the printed proforma without recording any ground of enquiry or fact which is necessitated to send in the name of petitioners.

11. It has further been submitted by learned counsel that the petitioners have been granted licence for carrying out the medical store business for sale, stock, exhibit for sale or distribute by whole sale drugs specified in Schedule C and C (1) of the Schedule of Drugs and Cosmetics Act, 1940.

12. Learned counsel for the petitioners has further submitted that the co-accused (one of the partners, namely, Sunil Jaiswal) was arrested when he appeared to record statement and to cooperate in the investigation and inquiry, on 15.05.2021, which is illegal. The petitioners also apprehend that they may be arrested by Investigating Officer on his appearance. No illegal act has been done by the petitioners because the alleged codeine syrup is medicine of Schedule 'H', for which they have been granted license for its stock, sale, purchase, etc.

13. Learned counsel for petitioners submitted that the cases of petitioners are squarely covered by the judgment of this Court passed in the case of ***Ashok Kumar through (Brother) Rakesh Kumar Pawar Vs. Union of India, under Section 482 Cr.P.C. No.2976 of 2014, decided on 15.10.2014,*** *as well as* ***Writ Petition No.8953 of 2013 (MB) Ram Dayal Mathur Vs. Union of India***, in which the Court has quashed the notice under Section 67 of N.D.P.S. Act, 1985.

14. Learned counsel for the petitioners has further submitted that

notification issued on 26.10.2005, by the Directorate General of Health Service and again issued in March, 2009, by which it has been clarified by the highest authority under the Drug and Cosmetics Act, 1940 that number of cough syrup preparations contained codeine only by virtue of the fact that these preparation contains codeine and its salts, did not fall under the provisions of N.D.P.S. Act, 1985 and Narcotic Drugs and Psychotropic Substances Rules, 1985. They fall under Schedule 'H' of the Drugs and Cosmetics Rules, 1945 and such drugs are governed by the said rules. The recovered cough syrup contains less than the permitted quantity of codeine per does unit and it will not fall within the definition of Section 2 (xi) (b) of the N.D.P.S. Act, 1985. The present case is covered by the Rules of Drugs and Cosmetics Act, 1940. Learned counsel for the petitioners further submitted that the provisions of Drugs and Cosmetics Act, 1940 provides punishment for the defined offences and only complaint can be filed against the wrong doer under the Drugs and Cosmetics Act, 1940 by the authorities authorized under the Drugs and Cosmetics Act, 1940, not by the authorities under the provisions of N.D.P.S. Act, 1985. The alleged cough syrup have been purchased by the petitioner firm through proper receipts. The alleged cough syrup is a schedule 'H' drug which includes "Codeine" as one of the ingredients which is required for the therapeutic purposes. The "Codeine" contained in the recovered syrup is within the prescribed limit and percentage and the same has been purchased by the firm authorized legally for sale and supply of the medicines by the petitioner. The petitioner has already submitted his reply to the notice issued under Section 67 of the N.D.P.S. Act,1985 through registered post. The provisions of N.D.P.S. Act,1985 itself speaks that the N.D.P.S. Act,1985 would not be applicable if the drug in question has been stored for sale and purchase for medical and scientific purposes, and according to the terms and conditions of the licence granted under the Drugs and Cosmetics Act, 1940. In the present case, petitioners are running the medical shop business under the licence granted by the authority authorized under the Drugs and Cosmetics Act, 1940 for medical purposes, therefore, the provisions of N.D.P.S. Act,1985 would not be applicable at all.

15. *Per contra*, the learned counsel for the Narcotics Control Bureau has submitted that on a reliable information the team of N.C.B. searched and seized the codeine based cough syrup and prepared its search and seizure memo dated 05.04.2021, which is in accordance with law. The investigation of the offence is continuing. It has been mentioned in the petition that the Firm of petitioners had purchased the codeine based cough syrup by M/s A.R. Pharma, Varanasi through proper bills but during the course of investigation, when N.C.B. team along with Drug Inspector, Varanasi visited the premises of M/s A.R. Pharma on 04.06.2021, it has been found that the said firm did not exist on the ground. On that premises a Chamber of one Advocate was found. The said observations were noted by the Drug Inspector, Varanasi for their own inquiry too. Since the firm M/s A.R. Pharma does not exist on the ground, thus, all codeine phosphate cough syrup bottles claimed to be supplied by the firm M/s A.R. Pharma are illegal.

16. Learned counsel for N.C.B. further submitted that on further enquiry, the concerned courier company SPOTON LOGISTICS PVT. LTD. VARANASI, has supplied the

information that the consignment of medicines never reached at the premises on M/s A.R. Pharma. It was not received by the owner of the M/s A.R. Pharma. The said consignment was directly delivered to one Deepak, at Shop No.09, Second Floor, Gyanmandal Plaza, SaptaSagar, Varanasi. This premises belongs to New Preksha Trading Company. Thus the firm M/s A.R. Pharma illicitly diverted the said consignment from transport courier agency to New Preksha Trading, without proper receiving, stock taking and checking the physical veracity of the said consignment. Thus, a physically non-existing company is getting deliveries of Codeine based cough syrup bottles and directly diverting it to new wholesaler without proper receiving, stock taking and without checking physical veracity of consignment. It is clear illegal act of diversion of codeine containing cough syrup bottles done by M/s A.R. Pharma and New Preksha Trading Company. The receipt and further sale of all codeine phosphate consignments of M/s A.R. Pharma are under investigation. In his statement under Section 67 of NDPS Act, 1985 the proprietor of M/s A.R. Pharma failed to provide all sale, purchase documents of codeine based cough syrup which is supplied to New Preksha Trading Company and Preksha Ayurvedics. He also admitted that he has illegally diverted the consignment of codeine based cough syrup directly to his customers without checking the veracity of consignment. The codeine based cough syrups were sold for other purposes than the therapeutic purposes.

17. Learned counsel for the Narcotics Control Bureau has further submitted that during course of investigation the team of Narcotics Control Bureau along with Drug Inspector, Varanasi also visited to the given address of M/s S.K. Drug Agency on 04.06.2021. The said firm also did not exist on the ground. On that premises, one cosmetic/bridal make up shop is being run. Since the said firm does not physically exist on ground, thus, all codeine phosphate cough syrup bottles claimed to be supplied by it to New Preksha Trading Company and Prechcha Ayurvedic are illegal.

18. Learned counsel further contended that no licence has been issued in the name of the present petitioners. The licence issued by the competent authority is for the therapeutic and medical use only and not for the use of intoxication or for getting a stimulant effect. Possession, sale and purchase of codeine based cough syrup for non therapeutic and non medical usage is illegal and hence provisions of N.D.P.S. Act,1985 shall be attracted. The petitioner Hemant Kumar Saini till now has not appeared before the Investigating Officer and has not shown or submitted any document to Investigating Officer in support of his claim and petitioner Yogita Nand Yadav is avoiding to appear after once appearing before enquiry officer and after assurance to appear again, despite repeated

summons and is not co-operating with the on going investigation. The investigation of the case is going on and the Investigating Officer is still in the process of collecting the criminal case history, if any, against the petitioners.

19. Learned counsel has further argued that the Narcotics Control Bureau has bonafide jurisdiction of search, seizure, inquiry and investigation under the provisions of N.D.P.S. Act, 1985 which is a special Act enacted by the Parliament with the objective to control and regulate the illicit trafficking relating to Narcotic Drug and Psychotropic Substance. The Drug and Cosmetics Act, 1940 deals with drugs which are intended to be used for therapeutic or medical usage, on the other hand, the N.D.P.S. Act, 1985 intend to curb and penalize the usage of drugs which are used for intoxication or for getting a stimulant effect. Any diversion and illegal sale, purchase, possession of drugs intended for therapeutic or medical usage must attract provisions of N.D.P.S. Act, 1985. Under the provisions of Section 67 of N.D.P.S. Act,1985 the authorized officers may call for information from any person to satisfy himself whether there has been any contravention of the provision of the N.D.P.S. Act, 1985. The investigation of the case is being conducted with fair and proper manner and and with clean hands. The provisions of Section 80 of N.D.P.S. Act, 1985 and Section 2 of Drugs and Cosmetics Act give power to proceed and investigate the case under the N.D.P.S. Act,1985 also. Thus, the provisions of N.D.P.S. Act,1985 can be applied along with the provisions of Drugs and Cosmetics Act, 1940.

20. Learned counsel has further submitted that N.C.B. Case No.16 of 2021, under Section 8/21/29 of N.D.P.S. Act,1985 has not been registered in Police Station Kotwali, District Varanasi, as mentioned by the petitioners. The police team had joined N.C.B. raiding team during course of search for assistance only. The N.C.B. has jurisdiction and power under the provisions of N.D.P.S. Act, 1985 to make search and seizure, investigate and during enquiry may call for information from any person to satisfy whether there has been any contravention of provisions of N.D.P.S. Act, 1985. The petitioners are not co-operating in the investigation. Summons under Section 67 of N.D.P.S. Act, 1985 had been issued on 07.04.2021, 20.04.2021, 13.05.2021 and on 02.06.2021 to provide opportunity to the petitioners to show their claim over seized items. On each occasion, petitioners deliberately avoided investigation. The petitioners should disclose all the sale and purchase record which has yet not been disclosed by them as they are not co-operating in the investigation and enquiry. The petitioners have not come with clean hands before the Court.

21. Learned counsel has also submitted that the GST return filing statement was checked and it was found that the said Firm had filed last GST return on 23.04.2021 but the petitioners and partner have not shown full record of corresponding sale and purchase shown by the Firm, particularly, regarding the recovered 1,15,244 bottles of codeine based cough syrup seized under seizure memo dated 05.04.2021. Learned counsel has further mentioned that one of the partner of Firm Preksha Ayurvedic Mr. Yogitanand Yadav [the petitioner in Writ Petition No.11396 (MB) of 2021] appeared before the N.C.B. team under the compliance of Section 67 of NDPS Act, 1985 on 12.04.2021 but N.C.B. officials did not

arrest him, although further he did not appear before the Investigating Officer. Hence, it is wrong to say that petitioners have every apprehension that when they will appear before the Investigating Officer, in compliance of notice issued against him under Section 67 of N.D.P.S. Act,1985 they will be arrested.

22. Learned counsel has further submitted that the judgment passed by this Court in ***Ashok Kumar Vs. Union of India, Crl. Misc. Case No.2976 of 2014*** is under challenge in Hon'ble Apex Court in ***Criminal Appeal No. 000115/2018 (Union of India Vs. Ashok Kumar)*** which is pending before the Hon'ble Supreme Court and the judgment is awaited.

23. Learned counsel has further submitted that the writ petitions filed by the petitioners are misconceived and against the provisions of law. Mere notice under Section 67 of N.D.P.S. Act, 1985, cannot be challenged under writ jurisdiction of the Court, as this is the process of investigation, hence the present writ petitions are liable to be dismissed.

24. We have heard arguments advanced by learned counsel for the petitioners, Shri A.P. Mishra, and Shri Akhilesh Awasthi, learned counsel for Narcotics Control Bureau and perused the material brought on record.

25. Learned counsel for the petitioners has argued that in the present case the provisions of N.D.P.S. Act, 1985 are not attracted, rather this may be a case falling under the Drugs and Cosmetics Act, 1940.

26. So far as the applicability of the Drugs and Cosmetics Act, 1940 is concerned, this Act has been enacted by the Parliament to regulate the import, manufacture, distribution and sales of drugs and cosmetic, whereas the N.D.P.S. Act, 1985 has been enacted with a view to make stringent provision for the control and regulation of operations relating to Narcotic drugs and psychotropic substances. In this context, it has been held by Hon'ble Supreme Court in the case of **State of Punjab Vs. Rakesh Kumar, (2019) 2 SCC 466 in paragraph** 7 that : -

"7. At the outset it is essential to note the objectives of the two legislations before us i.e. the Drugs and Cosmetics Act, 1940 and the NDPS Act. The Drugs and Cosmetics Act, 1940 was enacted to specifically prevent substandard drugs and to maintain high standards of medical treatment. (Chimanlal Jagjivan Das Sheth v. State of Maharashtra, AIR 1963 SC 665) : (1963) 1 Cri LJ 621). The Drugs and Cosmetics Act,1940 was mainly intended to curtail the menace of adulteration of drugs and also of production, manufacture, distribution and sale of spurious and substandard drugs. On the other hand, the NDPS Act is a special law enacted by the Parliament with an object to control and regulate the operations relating to narcotic drugs and psychotropic substances. After analyzing the objectives of both the Acts, we can safely conclude that while the Drugs and Cosmetics Act deals with drugs which are intended to be used for therapeutic or medicinal usage, on the other hand, the NDPS Act intends to curb and penalize the usage of drugs which are used for intoxication or for getting a stimulant effect."

27. Subject matter of the case is the recovery of medicines in the form of syrup,

namely, Onerex Cs, Welcyre, Plencyre and CC KUFFs, which contain codeine as one of its ingredients. The Codeine is derived from opium and comes under the provisions of N.D.P.S. Act, 1985.

28. For its operations, Section 2 of N.D.P.S. Act, 1985 essentially provides for three kinds of offending substance, i.e. "Manufactured Drug", "Narcotic Drug" and "Psychotropic Substance".

"2(xi) "Manufactured Drug" *means:-*

"(a) All coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) Any other narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug, but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug;"

2(xiv) "Narcotic drug *means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured goods.*

2(xxiii) "Psychotropic Substance" *means :-*

"Psychotropic substance means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule."

29. Reference also needs to be made to Section 2(xvi)(c), which defines **'Opium Derivative'**, which reads as under :-

2 (xvi) : "Opium derivative" means-

(a).....

(b).....

(c) "Phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts"

(d).....

(e).....

30. From the above wording of definitions, it is apparent that medicine syrup which contains codeine as its ingredient, that codeine is an opium derivative and opium comes under the definition of Narcotic Drug. In this regard Section 8 of N.D.P.S. Act, 1985 make provision and certain restrictions, which reads as under :-

"8. Prohibition of certain operations.-*No person shall-*

(a) cultivate any coca plant or gather any portion of coca plant; or

(b) cultivate the opium poppy or any cannabis plant; or

(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes."

31. Learned counsel for the Narcotic Control Bureau has vehemently argued that from the shop/godown of petitioners manufactured drug has been seized in bulk which was kept there without any valid authorization, which amounts to clear violation of Section 8 of N.D.P.S. Act, 1985. Section 8 of NDPS Act, 1985, clearly prohibits possession of narcotic substance, except for medical or scientific purposes and that too, in accordance with relevant provisions of law. In support of his contention learned counsel for the Narcotic Control Bureau has placed reliance in the dictum of Hon'ble Supreme Court in the case of ***Union of India Vs. Sanjeev V. Despande, MANU/SC/0688/2014.*** The Hon'ble Supreme Court has held as under :-

"25. In other words, DEALING IN narcotic drugs and psychotropic substances is permissible only when such DEALING is for medical purposes or scientific purposes. Further, the mere fact that the DEALING IN narcotic drugs and psychotropic substances is for a medical or scientific purpose does not by itself lift the embargo created under section 8(c). Such a dealing must be in the manner and extent provided by the provisions of the Act, Rules or Orders made thereunder. Sections 9[9] and 10[10] enable the Central and the State Governments respectively to make rules permitting and regulating various aspects (contemplated under Section 8(c), of DEALING IN narcotic drugs and psychotropic substances."

32. In case in hand, the proceedings against the petitioners are at the stage of enquiry/investigation. It has to be ascertained by the Investigating Officer that whether the Rules of 1945 (Drugs and Cosmetics Rules, 1945) has been followed by the petitioners/firm or not. It is also in embryo that the recovered medicines which were kept by petitioners' firm in his shop/godown, are for the purpose of medicines and therapeutic use or not and whether they followed the provisions of Drugs and Cosmetics Act, 1940 and Rules of 1945 and in the transaction of drugs the proper accounts and records are being maintained or not, as it is mandatory by the provisions Section 18-B of Drugs and Cosmetics Act, 1940, which reads as under :-

"[18-B. Maintenance of records and furnishing of information. *Every person holding a license under clause (c) of section 18 shall keep and maintain such records, registers and other documents as may be prescribed and shall furnish to any officer or authority exercising any power or discharging any function under this Act such information as is required by such officer or authority for carrying out the purposes of this Act.]"*

33. The provisions of Rule 65 of Rules of 1945 makes provisions regarding conditions of licence. Learned counsel for the N.C.B. has argued that during the search no register, record/entries were found which may validate the stock.

34. Therefore, whether the petitioners-firm is holding a valid licence or not and whether conditions for licence are being followed by the petitioners-firm or not; whether the necessary records are being maintained by the petitioners-firm or not, all these points are the subject matter of enquiry/investigation, which is continuing. Therefore, any conclusion, in this regard can be drawn only after finalization of inquiry/investigation.

35. In the present facts of the case according to provision of Section 80 of N.D.P.S. Act, 1985 and Section 2 of Drugs and Cosmetics Act, 1940, the proceedings can be initiated and inquiry can be made under the provisions of N.D.P.S. Act, 1985 as well as under the Drugs and Cosmetics Act, 1940. Section 80 of N.D.P.S. Act, 1985, reads as under :-

*"**80. Application of the Drugs and Cosmetics Act, 1940 not barred.**-The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Drugs and Cosmetics Act, 1940 (23 of 1940) or the rules made thereunder."*

Section 2 of Drugs and Cosmetics Act, 1940, makes following provision :-

"2.Application of other laws not barred.- The provisions of this Act shall be in addition to and not in derogation of, the Dangerous Drugs Act, 1930 (2 of 1930), and any other law for the time being in force.

36. The above provisions clearly indicates that provisions of Drugs and Cosmetics Act, 1940 and Rules of 1945 have co-relation with the provisions of N.D.P.S. Act, 1985 and Rules. They cannot stand in isolation. Therefore, at this stage of proceedings, it cannot be said that the case of petitioners is covered by the provisions of Drugs and Cosmetics Act, 1940 only and action taken by prosecution (N.C.B.) under the provisions of N.D.P.S. Act, 1985 is illegal and without jurisdiction.

37. Learned counsel for the petitioners has argued also on the point that the recovered syrups fall under Schedule "H' and H1 of the Drugs and Cosmetics Rules, 1945, hence in the case the provisions of the Drugs and Cosmetics Act, 1940 are applicable.

38. In this regard, whether the provisions of the Drugs and Cosmetics Act, 1940 as well as provisions of Rule 97 (c), (d), (e) and (f) of 1945 Rules, are being followed or not, this is also the matter of enquiry/investigation. Rule 97 (c), (d), (e) and (f) of Rules of 1945 reads as under :-

*"**97. Labelling of medicines.- (1)** The container of a medicine for internal use shall-*

(a).....

(b) if it contains a drug substance specified in Schedule H, be labeled with the symbol Rx and conspicuously displayed on the left top corner of the label and bealso labeled with the following words in legible black coloured font size in completely red rectangular box:

SCHEDULE H PRESCRIPTION

DRUG-CAUTION
Not to be sold by retail without the prescription of a Registered Medical Practitioner.

(c) if it contains a substance specified in Schedule H and comes within the purview of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) be labeled with the symbol NRx, which shall be in red and conspicuously displayed on the left top corner of the label, and be also labeled with the following words in legible black coloured font size in completely red rectangular box :

SCHEDULE H PRESCRIPTION DRUG-WARNING
To be sold by retail on the prescription of a Registered Medical Practitioner only.

(d).....

(e) if it contains a drug substance specified in Schedule H1, be labeled with symbol Rx, which shall be in red conspicuously displayed on the left top corner of the label and shall also be labeled with the following words in legible black coloured font size in completely red rectangular box :

SCHEDULE H1 PRESCRIPTION DRUG - CAUTION
-It is dangerous to take this preparation except in accordance with the medical advice.
Not to be sold by retail without the prescription of a Registered Medical Practitioner

-

(f) if it contains a drug substance specified in Schedule H1 and comes within the purview of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) be labeled with symbol NRx, which shall be in red and conspicuously displayed on the left top corner of the label and shall also be labeled with the following words in legible black coloured font size in completely red rectangular box :

SCHEDULE H1 PRESCRIPTION DRUG-CAUTION
-It is dangerous to take this preparation except in accordance with the medical advice.
-Not to be sold by retain without the prescription of a Registered Medical Practitioner.

39. Hence whether the provisions of above Rule 97 along with other relevant provisions of Act of 1940 are being followed in the case or not is also subject matter of enquiry/investigation as there is nothing on record at this stage which may prove it.

40. Learned counsel for the petitioners has further submitted that the recovered syrup is a medicine which contains the quantity of codeine under permissible limit and vide notification of Central Government dated 14.11.1985 the medicine has been prepared by the manufacturer for therapeutic purposes, for the above point of argument, learned counsel for the petitioners placed reliance on paragraph 46 of the case law of ***Ashok Kumar Vs. Union of India and others, decided by this Court on 15.10.2014,*** which reads as under :-

"46. Central Notification Dated 14.11.1985 and published in Gazette of India has been issued under Section 2 (xi) (b) of N.D.P.S. Act wherein "Manufactured Drugs" have been mentioned. Relevant portion of notification, Annexure-5, issued under N.D.P.S. Act reads as under :

"S.O.526(E), dated 14th November, 1985.- In exercise of the powers conferred by sub-clause (b) of clause (xi) of section 2 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985), the Central Government hereby declare the following narcotic substance and preparation to the (be) manufactured drugs, namely:

X X X

X X X

(35) Methyl morphine (commonly known as 'Codeine') and Ethyl morphine and their salts (including Dionine), all dilutions and preparations except those which are compounded with one or more other ingredients and containing not more than 100 milligrams of the drug per dosage unit and with a concentration not more than 2.5 percent in undivided preparations and which have been established in therapeutic practice."

41. Learned counsel for the petitioners submits that the petitioners-firm is also entitled to get the benefit of above notification.

42. On the above point of argument, it is to be noted that as according to the definition mentioned in Section 2 (XIV) of N.D.P.S. Act,1985, opium has been kept under the definition of "Narcotic Drugs". The Section 2 (xiv) reads as under :-

"2. Definitions.- In this Act, unless the context otherwise requires,-

(i).....

(ii).....

(iii).....

(iv).....

(vi).....

(vii).....

(viii).....

(ix).....

(x).....

(xi).....

(xii).....

(xiii).....

(xiv) "narcotic drug" means coca leaf, cannabis (hemp), ***opium,*** *poppy straw and includes all manufactured goods.*

43. 'Codeine' is derivative of opium. What is the percentage/ratio of 'codeine' in the recovered and seized syrup, is not on record. The same has to be ascertained during the course of investigation/enquiry/ laboratory report, as it has been shown in

search memo that the samples of recovered syrup has been taken by Drug Inspector for investigation, hence in the context of seized syrups no conclusion can be drawn taking into account the said notification dated 14.11.1985, at this stage.

44. Learned counsel for the petitioners has submitted that the search and seizure made by the team of Narcotic Control Bureau by breaking the lock of petitioners- firm was illegal and without jurisdiction.

45. In this regard, Section 42 of N.D.P.S. Act, 1985, reads as under :-

"42. Power of entry, search, seizure and arrest without warrant or authorisation.-

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intellegence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act :

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances, granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector :

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for

the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

46. In view of the provisions of Section 42 of N.D.P.S. Act, 1985, *prima facie*, it cannot be said that the team of Narcotic Control Bureau was having no jurisdiction to search and seize the syrups having codeine.

47. Learned counsel for the petitioners has further submitted that the case of petitioners is squarely covered by the case of ***Ram Dayal Mathur Vs. Union of India [MB No. 8953 of 2013, decided by this Court on 03.04.2015, and Ashok Kumar Vs. Union of India (supra) decided by this Court on 15.10.2014,*** wherein it has been held that the cough syrups having codeine in permissible limit and ratio, the case will be governed by the provisions of the Drugs and Cosmetics Act, 1940 and Rules of 1945 and the provisions of N.D.P.S. Act, 1985 are not applicable. The conclusion in the above case has been mentioned in paragraph 101 of the judgment, which reads as under :-

"101. Considering the above noted discussion, relevant provisions of N.D.P.S. Act and Rules, relevant provisions of D & C Act and Rules, judgments rendered by various courts and documents appended with the petition which have neither been disputed nor controverted referred to hereinabove, this Court concludes as follows:

(i) Even if all the facts and circumstances alleged by the prosecuting agency are admitted to be correct, it cannot be said that the petitioner, who was serving as Territory Sales Manager in M/s Abbott Healthcare Pvt. Ltd. (manufacturer of Phensedyl Cough Syrup), Division at Lucknow, in any way abetted or conspired to commit offence under Section 8 of the N.D.P.S Act as punishable under Section 21 of the said Act. It was the duty of the petitioner to procure orders of Phensedyl Cough Syrup from licenced stockists or distributors and ensure its supply from licenced manufacturer viz; employer of the petitioner.

(ii) Phensedyl Cough Syrup is a Schedule 'H' drug under the Drugs and Cosmetics Act; has been manufactured by M/s Abbott Healthcare Pvt. Ltd, a licenced manufacturer under the D & C Act and Rules; had been stocked by a licenced stockist viz; M/s Simran Pharma, owned by co-accused, at licenced premises.

(iii) Phensedyl Cough Syrup is a therapeutic drug containing 'codeine' within specified limits, as provided under licence of the licenced manufacturer, under Drugs and Cosmetics Act.

(iv) Phensedyl Cough Syrup, as recovered, is covered under exception provided under entry no.35 of Central Government Notification dated 14.11.1985 isued under Section 2 (xi)(b) of the N.D.P.S.Act and, therefore, cannot be construed as a Narcotic Drug or Manufactured Drug, hence, Section 8 of the N.D.P.S.Act would not be attracted.

(v) The Directorate General of Health Services has issued clarification dated 26.10.2005 to specify that Phensedyl is a Schedule 'H' drug under the D & C Act and Rules and although it contains

'codeine' in limited prescribed quantity, would not fall under the provisions of N.D.P.S.Act and Rules.

(vi) Considering the Narcotic contents and nature of Schedule 'H' drug, the manufacture and distribution of the drug has been regulated under the D & C Act and Rules. For that purpose the provisions require the manufacturer, stockist, distributor and seller etc. to obtain licence, which is issued on compliance of certain conditions. If it is ensured that these conditions are adhered and complied with and the Schedule 'H' drug is sold only on prescription, there would be no misuse of the drug. The authorities therefore are required to ensure strict compliance of the conditions of licence so as to prevent its misuse.

In the case in hand, if at all, an offence has been committed, it would be under the D & C Act, committed by the stockist viz; the co-accused, for violation of the provisions of Section 18-B punishable under Section 28-A of the D & C Act and/or other provisions.

(vii) This Court is also persuaded in concluding as above by judgments rendered by the Punjab and Haryana High Court in 1996 Cr.L.J. 3329, Amrik Singh v. State of Punjab; 1998 Cr.L.J. 1460 titled 'Rajeev Kumar v. State of Punjab'; 1997 Cr.L.J. 3104 titled 'Deep Kumar v. State of Punjab' and judgment rendered by the Hon'ble Supreme Court of India in Md. Sahab Uddin and another v. State of Assam, decided on 5.10.2012 in Criminal Appeal No.1602 of 2012, S.L.P.(Crl.) No.5503 of 2012 read with judgment of Gauhati High Court in Md.Sahab Uddin and another v. State of Assam (Bail Application no.885 and 886 of 2012, decided on 25.5.2012). Likewise the judgment rendered by the Hon'ble Supreme Court of India in Rajesh Kumar Gupta's case (supra) favours the legal proposition propounded on behalf of the petitioner.

(viii) This Court has also taken into account that N.D.P.S. Act and Drugs and Cosmetics Act, both are Central Legislations. N.D.P.S. Act specifically provides exceptions whereunder a 'narcotic drug' (codeine) can be used for medicinal/therapeutic purposes. Under the provisions of the Act, Central Notification dated 14.11.1985, whereunder prescribed quantity of codeine has been allowed to be included, per dosage unit, has been issued. Admittedly, Phensedyl Cough Syrup contains 'codeine' within the prescribed quantity. Thus, in the considered opinion of this Court Phensedyl Cough Syrup falls within the exception provided under the N.D.P.S.Act and, therefore, its possession with licenced stockists would not invite the penalties under N.D.P.S. Act. Phensedyl Cough Syrup, in the facts and circumstances of this case is required to be considered as a drug under the Drugs and Cosmetics Act."

48. In reply of above argument, learned counsel for the N.C.B. has submitted that the case of ***State of Uttaranchal Vs. Rajesh Kumar Gupta, 2007 (1) SCC 355,*** which has been relied upon by this Court in the case of ***Ashok Kumar Vs. Union fo India (supra)***, has been over ruled by the Hon'ble Supreme Court in the case of ***Union of India Vs. Sanjeev V. Despande (supra)*** and the Court while deciding the case of ***Ashok Kumar Vs. Union of India (Supra),*** decided on 15.10.2014, has not discussed the law laid down by the Hon'ble Supreme Court in the case of ***Union of India Vs. Sanjeev V. Despande (supra),*** which was decided earlier, i.e. on 12.08.2014. Therefore, the

case of ***Ashok Kumar Vs. Union of India (supra)***, in the light of law laid down by Hon'ble Apex Court in ***Union of India Vs. Sanjeev V. Despande (supra)*** lost its binding effect. It has also been submitted that the judgment of ***Ashok Kumar*** (supra) has been challenged by prosecution in Apex Court vide Criminal Appeal No.000115/2018 ***(Union of India Vs. Ashok Kumar***), which is subjudice, The argument of learned counsel for N.C.B. finds force. In view of the court, at this stage the petitioners are not entitled for any relief on the basis of findings of the above case of ***Ashok Kumar*** (Supra).

49. Learned counsel for the petitioners has further submitted that the notice issued by Narcotics Control Bureau under Section 67 of N.D.P.S. Act, 1985 is without jurisdiction and is liable to be quashed. Section 67 of NDPS Act, 1985 reads as under :-

"67. Power to call for information, *etc.-Any officer referred to in section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provisions of this Act,-*

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;

(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(c) examine any person acquainted with the facts and circumstances of the case."

50. The case of petitioners is at the stage of collection of evidence/enquiry/investigation and the notice/summon under Section 67 has been issued to petitioners only for the satisfaction of investigating officer that whether there has been any contravention of the provisions of the N.D.P.S. Act,1985 or Rule or Order or not. It is quite possible that in the enquiry if the evidence comes before the Investigating Officer that the Firm of petitioners has not violated the Rules and Regulations and orders of N.D.P.S. Act, 1985 as well as Drugs and Cosmetics Act, 1940, the enquiry/Investigating Officer of NCB may submit its report accordingly and the petitioners may be exonerated from prosecution. The wording mentioned in Section 67 of N.D.P.S. Act, 1985, makes it clear that notice is merely for enquiry/interrogation. In the opinion of Court, a writ petition against such a kind of notice should not ordinarily be entertained. It is pre-mature in nature because the notice by itself does not give a rise of cause of action, as no adverse order has yet been passed. It is quite possible that if the transaction is in accordance with law, the authorities may be satisfied by the enquiry and in the event of adverse decision, it will certainly be opened to accused persons/petitioners to assail the same in appropriate proceedings under the law. Undoubtedly in certain conditions, when there is a question of infringement of fundamental right or on the point of lack of jurisdiction, the such notice/summon can be challenged, but it is not in the present case.

51. Hence, at this stage of proceeding, it is not permissible in law to quash the notice/summon which has been issued to the petitioners for the purpose of enquiry/investigation, to satisfy himself that whether there has been any contravention of the provision of the Act,

Rule or order of relevant inactment. Present case is at the stage of enquiry/investigation of fact that whether the offence has been committed by the petitioners-firm or not. By discussing many judgments, Hon'ble Supreme Court held in the case of ***Niharika Furniture Vs. State of Maharashtra, MANU/SC/0272/2021***, that the Court will not normally interfere with an investigation into the case and will permit investigation into the offence, alleged to be completed. The intention of law is always that the investigating agency may be permitted to complete the investigation. Therefore, it will not be justified that the until investigation/enquiry is completed the FIR in question be nipped into bud by quashing same at the early stage of proceedings.

52. In view of the above discussion, the court is not inclined to quash the notice/summons issued against petitioners in both the writ petitions as well as the FIR as prayed in Writ Petition (Misc.Bench) No.11190/2021 (Hemant Kumar Saini Vs. Union of India & others). The Court finds that present writ petitions are misconceived and are liable to be dismissed.

53. Accordingly, both the writ petitions are **dismissed.**

54. Let a copy of the judgment be placed on the record of Writ Petition (Misc. Bench) No.11396 of 2021 (Yogita Nand Yadav Vs. Union of India & others).

(2021)07ILR A607
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.06.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Misc. Bench No. 13252 of 2021

Heera Lal Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Meenakshi Singh Parihar

Counsel for the Respondents:
G.A..

Constitution of India - Art.226 - Criminal Procedure Code,1973 - Section 154 - Indian Penal Code,1860 – Sections 471, 468, 467, 420 & 120B - Quashing of First Information Report - specific allegation against the petitioner in the F.I.R. with regard to making educational qualification contrary to rules - this fact came into light after thorough inquiry conducted in the matter by the Special Investigation Team - it cannot be said that prima facie, the petitioner cannot be involved in the instant case - FIR, not liable to be quashed. (Para 22, 25)

Dismissed. (E-4)

List of Cases cited :

Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. (Criminal Appeal No. 330 of 2021, decided on 13.04.2021)

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

(1) The Court has convened through **Video Conferencing**.

(2) Heard Sri H.G.S. Parihar, learned Senior Advocate, assisted by Mrs. Meenakshi Singh Parihar, learned Counsel for the petitioner and Ms. Meera Tripathi,

learned Additional Government Advocate for the State/respondents no. 1 and 2.

(3) The instant writ petition under Article 226 of the Constitution of India has been filed by the petitioner, Heera Lal Yadav, challenging the First Information Report dated 27.10.2020 to the extent of petitioner registered as Case Crime No. 0013 of 2020, under Sections 120-B, 471, 468, 467 and 420 I.P.C., Police Station S.I.T., Lucknow.

(4) Learned Senior Counsel appearing on behalf of the petitioner has submitted that earlier the petitioner has challenged the impugned F.I.R. before this Court at Allahabad by filing Criminal Misc. Writ Petition No. 12605 of 2020 : *Heera Lal Yadav Vs. State of U.P. and 2 others*, wherein, initially, a Co-ordinate Bench of this Court at Allahabad, vide order dated 14.12.2020, restrained the respondents from taking any coercive action against the petitioner in connection with the impugned F.I.R. and the same was continued from time to time, however, when the case was listed before another Co-ordinate Bench of this Court at Allahabad on 24.03.2021, the same was dismissed on the ground that this Court at Allahabad has no jurisdiction to hear the matter as the impugned F.I.R. has been registered at Police Station S.I.T., Lucknow and liberty was granted to the petitioner to approach the appropriate forum/court, if so advised. Thereafter, the petitioner has filed the instant writ petition, challenging the impugned F.I.R.

(5) It has been argued by the learned Senior Counsel appearing on behalf of the petitioner that the impugned F.I.R. has been lodged against eight persons including the petitioner. He argued that the petitioner has falsely been implicated in the impugned F.I.R. as the entire process of selection/recruitment were completed on the basis of the resolution of the Board of Directors of the Managing Committee/U.P. Co-operative Bank Ltd. Lucknow on 07.07.2015 and at that time, the petitioner was not working in the office of U.P. Co-operative Bank Ltd., Lucknow from 20.10.2014 to 22.04.2015.

(6) Learned Senior Counsel appearing on behalf of the petitioner further argued that at present, the petitioner is holding Class-I post and working on the post of Additional Commissioner-cum-Additional Registrar, Co-operative Society, U.P., Lucknow. On 20.10.2014, the State Government has appointed the petitioner on the post of Managing Director, U.P. Co-operative Bank Ltd., Lucknow. On 12.03.2013, the Commissioner-cum-Registrar Co-operative Societies, U.P., Lucknow wrote a letter to the Managing Director, U.P. Co-operative Bank Ltd., Lucknow for the direct recruitment on different post of Assistant Manager and Assistant Manager (Computer). On 7.5.2014, the Principal Secretary (Karmik), State of U.P., Lucknow wrote a letter to the Principal Secretary, Co-operative, U.P., Lucknow for the recruitment of the employee in the Co-operative department on the different post. On 05.12.2014,, the Commissioner-cum-Registrar, Uttar Pradesh, wrote a letter to the Principal Secretary, Co-operative Uttar Pradesh, Lucknow. On 30.01.2015, the petitioner being the then Managing Director, U.P. Co-operative Bank Ltd, Lucknow, sent a requisition for the recruitment/selection on the post of Assistant Manager/ Assistant Manager (Computer) before the Secretary, U.P. Co-operative Institutional Service Board, Lucknow. Thereafter, on 21.03.2015, the petitioner has proposed the

educational qualification for the recruitment on the post in question, which was sent before the Commissioner-cum-Registrar Co-operative Societies, Uttar Pradesh, Lucknow for its approval. Thereafter, the petitioner was transferred from the post of Managing Director, U.P. Co-operative Bank Ltd., Lucknow on 22.04.2015 and in his place, on the same day i.e. 22.04.2015, co-accused Rabikant Singh, Additional Registrar, Co-operative Society took the charge of the post of Managing Director, U.P. Co-operative Bank Ltd., Lucknow. He argued that after the transfer and posted as Additional Registrar, Co-operative and Additional Commissioner in the office of the Registrar, Co-operative Societies, Lucknow, Uttar Pradesh, the petitioner has got no concern with the further development/recruitment/selection/ appointment on the post of Assistant Manager and Assistant Manager (Computer) in U.P. Co-operative Bank Ltd., Lucknow.

(7) Learned Senior Counsel appearing for the petitioner submitted that co-accused, namely, Rabi Kant Singh, Ram Jatan Yadav and Santosh Kumar and Rakesh Kumar Mishra, have approached this Court by filing writ petition Nos. 21793 of 2020 (M/B), 22257 of 2020 (M/B), 2561 of 2021 (M/B) and 3373 of 2021 (M/B), wherein interim protection has been granted to them. Therefore, the petitioner is also entitled to get similar protection as has been granted to the co-accused.

(8) Learned Additional Government Advocate, on the other hand, opposed the prayer for quashing the impugned F.I.R. and argued that interim protection has been granted to co-accused, namely, Rabi Kant Singh, Ram Jatan Yadav and Santosh Kumar and Rakesh Kumar Mishra, only on the ground that interim order dated 14.12.2020 has been granted in Criminal Misc. Writ Petition No. 12605 of 2020, which has been filed by the petitioner before this Court at Allahabad. Thereafter, as the impugned F.I.R. has been registered at police station S.I.T., Lucknow, therefore, Co-ordinate Bench of this Court at Allahabad, vide order dated 24.03.2021, dismissed the writ petition and granted liberty to the writ petitioner to approach the appropriate forum/Court, if so desire. He argued that while dismissing the writ petition filed by the present writ petition, Co-ordinate Bench of this Court at Allahabad has not extended or directed to continue the interim order dated 14.12.2020, meaning thereby after dismissal of the writ petition, the interim order dated 14.12.2020 has become redundant as it merges into final order.

(9) It has further been argued by the learned Additional Government Advocate that on the basis of the interim order dated 14.12.2020 passed in Criminal Misc. Writ Petition No. 12605 of 2020, which has been filed by the present writ petitioner, co-accused has sought interim protection, which was granted to them. Now, after dismissal of the aforesaid writ petition wherein interim order dated 14.12.2020 was not enforced as it merges into final order, the petitioner has come before this Court seeking relief to grant him the benefit of the interim order as has been granted to co-accused, which cannot be granted to the present writ petitioner.

(10) On merits, learned Additional Government Advocate has argued that in respect of the irregularities committed in

selection held in the year 2015, number of complaints for corruption in the said selection was received in the office of Hon'ble the Chief Minister and other office of the State Department, whereupon an inquiry was entrusted to the S.I.T, who, after thorough enquiry, has found that the petitioner, who was the then Managing Director of U.P. Co-operative Bank, is responsible for making educational qualification for ten posts contrary to rules. Therefore, it cannot be said that the petitioner has no concern with the aforesaid selection. He argued that from the perusal of the FIR, *prima facie*, it cannot be said that no cognizable offence is made out, hence, no ground exists for quashing of the F.I.R. or staying the arrest of the petitioner.

(11) Having heard the submissions advanced by the learned Counsel for the parties and gone through the record, we find that initially, the petitioner has filed Criminal Misc. Writ Petition No. 12605 of 2020, wherein vide order dated 14.12.2020, following interim order has been passed :-

"As prayed, list in the additional cause list on 15.1.2021.

Till then no coercive action shall be taken against the petitioner in connection with FIR dated 27.10.2020 in Case Crime No. 0013 of 2020, under section 120-B, 471, 468, 467 and 420 IPC, Police Station S.I.R., District Lucknow."

(12) The aforesaid interim order dated 14.12.2020 was extended from time to time as is evident from Annexure Nos. 2 to 4 to the writ petition. Thereafter, co-accused Rabi Kant Singh has approached this Court by filing Misc. Bench No. 21793 of 2020 : Rabi Kant Singh Vs. State of U.P. and others, wherein following interim order dated 12.01.2021 has been passed :

"Heard Mr. H.G.S. Parihar, learned Senior Advocate assisted by Mr. Prashant Kumar Singh, learned counsel for the petitioner as well as learned A.G.A. on behalf of the State.

Learned A.G.A. was granted time vide order dated 9.12.2020 'to submit progress report of the investigation done so far and the evidence, if any collected against the petitioner regarding his involvement in the alleged crime'.

Learned A.G.A. has filed short counter affidavit. However, in the short counter affidavit no specific statement regarding progress report of the investigation done so far and the evidence, if any, collected against the petitioner regarding his involvement in the alleged crime. This fact has been noted by the court vide order dated 16.12.2020. The court thereafter had again granted time to learned A.G.A. to file counter affidavit.

Learned A.G.A. submits that the investigation is still pending and the averments made in the short counter affidavit are the only material available with the investigating authority regarding the investigation done so far.

Learned counsel for the petitioner has also submitted that co-accused Heera Lal Yadav has been granted protection by this court at Allahabad vide order dated 14.12.2020, passed in Criminal Misc. Writ Petition No.12605 of 2020, copy of the order dated 14.12.2020 has been placed before the court, same is taken on record.

We have considered the submissions made by parties' counsel and gone through the records.

Let detailed counter affidavit be filed by the opposite parties within three weeks.

List thereafter.

Till filing of counter affidavit or till filing of report under Section 173 (2)

Cr.P.C. whichever is earlier no coercive action shall be taken against the petitioner in pursuance of impugned First Information Report dated 27.10.2020, registered as FIR/Case Crime No.0013 of 2020, under Sections 12-B/471/ 468/467/420 of IPC at Police Station SIT, District Lucknow. However, the petitioner will co-operate with the investigation."

(13) Subsequently, co-accused Ram Jatan Yadav has filed Misc. Bench No. 22257 of 2020, in which also following interim order dated 12.01.2021 has been passed :-

"Heard Mr. Balram Yadav, learned counsel for the petitioner as well as learned A.G.A. on behalf of the State.

Learned A.G.A. was granted time vide order dated 9.12.2020 'to submit progress report of the investigation done so far and the evidence, if any collected against the petitioner regarding his involvement in the alleged crime'.

Learned A.G.A. has filed short counter affidavit. However, in the short counter affidavit no specific statement regarding progress report of the investigation done so far and the evidence, if any, collected against the petitioner regarding his involvement in the alleged crime. This fact has been noted by the court vide order dated 16.12.2020. The court thereafter had again granted time to learned A.G.A. to file counter affidavit.

Learned A.G.A. submits that the investigation is still pending and the averments made in the short counter affidavit are the only material available with the investigating authority regarding the investigation done so far.

Learned counsel for the petitioner has also submitted that co-accused Heera Lal Yadav has been granted protection by this court at Allahabad vide order dated 14.12.2020, passed in Criminal Misc. Writ Petition No.12605 of 2020, copy of the order dated 14.12.2020 has been placed before the court, same is taken on record.

We have considered the submissions made by parties' counsel and gone through the records.

Let detailed counter affidavit be filed by the opposite parties within three weeks.

List thereafter.

Till filing of counter affidavit or till filing of report under Section 173 (2) Cr.P.C. whichever is earlier no coercive action shall be taken against the petitioner in pursuance of impugned First Information Report dated 27.10.2020, registered as FIR/Case Crime No.0013 of 2020, under Sections 420, 467, 468, 471 and 120-B of IPC at Police Station SIT, District Lucknow. However, the petitioner will co-operate with the investigation."

(14) Thereafter, co-accused Santosh Kumar has filed Misc. Bench No. 2561 of 2021, in which following interim order dated 29.1.2021 has been passed :

"Heard Mr. H.G.S. Parihar, learned Senior Advocate, assisted by Mr. Saharsh, learned Counsel for the petitioner, learned AGA for the State/respondents and perused the record.

The present writ petition has been filed by the petitioner, namely, Santosh Kumar, seeking to quash the First Information Report dated 27.10.2020 registered as Crime No./F.I.R. No. 0013 of 2020, under Sections 420, 467, 468, 471 and 120B I.P.C., police station Special Investigation Team, District Lucknow with

a further prayer to stay the arrest during the pendency of the investigation of the said case.

It has been argued by the learned Senior Counsel appearing on behalf of the petitioner that the impugned F.I.R. has been lodged against the petitioner with an oblique motive and just to harass the petitioner. He submits that co-accused, namely, Rabi Kant Singh and Ram Jatan Yadav have also approached this Court by filing writ petition no. 21793 (M/B) of 2020 : Rabi Kant Singh Vs. State of U.P. and others and writ petition No. 22257 of 2020 : Ram Jatan Yadav Vs. State of U.P. and others, respectively and a Co-ordinate Bench of this Court, vide order dated 12.01.2021 has granted interim protection to co-accused, Rabi Kant Singh and Ram Jatan Yadav, a copy of which has been annexed as Annexure nos. 10 and 11 to the writ petition, respectively. Similarly, co-accused Heera Lal Yadav has also been granted protection by this Court at Allahabad vide order dated 14.12.2020, passed in Criminal Misc. Writ Petition No.12605 of 2020, copy of the order dated 14.12.2020 has been annexed as Annexure no. 9 to the writ petition. He also submits that the role of the present writ petitioner in the impugned F.I.R. is similar to that of co-accused. Therefore, the petitioner is also entitled to get similar protection as has been granted to the co-accused.

Considering the peculiar facts and circumstances of the case, prima facie, a case of interim relief is made out.

Learned AGA has accepted notice on behalf of the respondents.

Let counter affidavit be filed within four weeks. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

Connect with Writ Petition No. 22257 of 2020 (M/B) and 21793 of 2020 (M/B) and list thereafter.

Till filing of counter affidavit or till filing of report under Section 173 (2) Cr.P.C., whichever is earlier, no coercive action shall be taken against the petitioner in pursuance of impugned First Information Report. However, the petitioner will co-operate with the investigation."

(15) Thereafter, Criminal Misc. Writ Petition No. 12605 of 2020 was dismissed vide order dated 24.03.2021, which reads as under :

"Heard Sri O.P. Singh, learned Senior Advocate assisted by Sri Indra Jit Singh, learned counsel for the petitioner and Sri Amit Sinha, learned counsel for the State and perused the record.

The present writ petition has been filed with following prayers:-

"1. Issue a writ of certiorari calling for record of the case and quashing the impugned first information report dated 27.10.2020 registered as Case Crime No.0013 of 2020, under section 120-B, 471, 467 and 420 I.P.C., Police Station S.I.T., District Lucknow. (Annexure No.1) in respect of the petitioner.

2. Issue a writ, of mandamus commanding the respondent no to arrest the petitioner in pursuance to the impugned first information report dated 27.10.2020 registered as Case Crime No.0013 of 2020, under section 120-B, 471, 467 and 420 I.P.C., Police Station S.I.T., District Lucknow.

3. Issue any other suitable writ, order or direction which this Hon'ble Court may deem, fit and proper under the facts and circumstances of the case.

4. Award cost to the writ petition in favour of the petitioner."

At the very outset, learned counsel for the State raised a preliminary objection regarding maintainability of the present writ petition at Allahabad. It is argued that the impugned first information report has been registered at District Lucknow for offence which was committed at Lucknow and as such this Court has no jurisdiction to entertain the present writ petition and hear it. It is argued that on the own showing of the petitioner, the impugned first information report, the copy of which is annexed as Annexure-1 to the writ petition was registered at Police Station S.I.T., District Lucknow and as such this Court has no jurisdiction to hear and entertain the present writ petition which should be dismissed.

Learned Senior Advocate appearing for the petitioner argued that the present writ petition may be transferred to the Lucknow Bench of this Court in view of the judgement of ***Sri Nasiruddin Vs. State Transport Appellate Tribunal: (1975) 2 SCC 671.*** *It is argued that since the first information report has been registered at Lucknow, this Court has powers to do so under Clause 14 of the United Provinces High Courts (Amalgamation) Order, 1948 and as such the same be transferred to Lucknow for its hearing.*

Before proceeding to examine the matter on merits, we propose and consider it appropriate to deal with the preliminary objection raised by Sri Amit Sinha, learned counsel for the State.

The Apex Court in the case of ***Sri Nasiruddin (supra)*** *has noted in paragraphs 12 and 13 as follows:-*

"12. It is in this context that the following five questions were referred for decision to the Full Bench :

(1) Can a case falling within the jurisdiction of the Lucknow Bench of this Court be presented at Allahabad ?

(2) Can the Judges sitting at Allahabad summarily dismiss a case presented at Allahabad pertaining to the jurisdiction of the Lucknow Bench ?

(3) Can a case pertaining to the jurisdiction of Lucknow Bench, presented and entertained at Allahabad, be decided finally by the Judges sitting at Allahabad, without there being an order as contemplated by the second proviso to Article 14 of the U.P. High Court (Amalgamation) Order, 1948 ?

(4) What is the meaning of the expression "in respect of cases arising in such areas in Oudh" used in first proviso to Article 14 of the High Court (Amalgamation) order, 1948 ? Has this expression reference to the place where the case originated or to the place of the sitting of the last Court of authority whose decree or order is being challenged in the proceedings before the High Court ?

(5) Whether this writ petition can be entertained, heard and decided by the Judges sitting at Lucknow?

13. The majority view of the Full Bench gave the following answers:-

(1) A case falling within the jurisdiction of Judges at Lucknow should be presented at Lucknow and not at Allahabad.

(2) However, if such a case is presented at Allahabad, the Judges at Allahabad cannot summarily dismiss it only for that reason. The case should be returned for filing before the Judges at Lucknow and where the case has been mistakenly or inadvertently entertained at Allahabad, a direction should be made to the High Court office to transmit the papers of the case to Lucknow.

(3) A case pertaining to the jurisdiction of the Judges at Lucknow and presented before the Judges at Allahabad cannot be decided by the Judges at Allahabad in the absence of an order contemplated by the second proviso to Article 14 of the Amalgamation Order, 1948.

(4) The expression "in respect of cases arising in such areas in Oudh" used in the first proviso to Article 14 of the High Court (Amalgamation) Order, 1948, refers to legal proceedings, including civil cases, criminal cases, petitions under Articles 226, 227 and 228 of the Constitution and petitions under Articles 132, 133 and 134 of the Constitution instituted before the Judges sitting at Lucknow and having their origin, in the sense explained in the majority judgment in such areas in Oudh as the Chief Justice may direct. The expression "arising in such areas in Oudh" refers to the place where the case originated in the sense explained in the majority judgment and not to the place sitting of the last court or authority whose decree or order is being challenged in the proceeding before the High Court.

(5) The Lucknow Bench have no jurisdiction to hear writ petition No. 750 of 1964 which gave rise to writ petition No. 3294 of 1970."

While, dealing with the said questions and the answers as given therein, the conclusions as drawn by the Apex Court are in paragraph 38 of the said judgement which are as follows:-

"38. To sum up. Our conclusions are as follows. First, there is no permanent seat of the High Court at Allahabad. The seats at Allahabad and at Lucknow may be changed in accordance with the provisions of the order. Second, the Chief Justice of the High Court has no power to increase or decrease the areas in Oudh from time to time. The areas in Oudh have been determined once by the Chief Justice and, therefore, there is no scope for changing the areas. Third, the Chief Justice has power under the second proviso to paragraph 14 of the order to direct in his discretion that any case or class of cases arising in Oudh areas shall be heard at Allahabad. Any case or class of cases are those which are instituted at Lucknow. The interpretation given by the High Court that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in Oudh areas shall be instituted or filed at Allahabad, instead of Lucknow is wrong. The word "heard" means that cases which have already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso to paragraph 14 of the order he directed to be heard at Allahabad. Fourth, the expression "cause of action" with regard to a civil matter means that it should be left to the litigant to institute cases at Lucknow Bench or at Allahabad Bench according to the cause of action arising wholly or in part within either of the areas. If the cause of action arises wholly within Oudh areas then the Lucknow Bench will have jurisdiction. Similarly, if the cause of action arises wholly outside the specified areas in Oudh then Allahabad will have jurisdiction. If the cause of action in part arises in the specified Oudh areas and part of the cause of action arises outside the specified areas, it will be open to the litigant to frame the case appropriately to attract the jurisdiction either at Lucknow or at Allahabad. Fifth, a criminal case arises where the offence has been committed or otherwise as provided in the Criminal Procedure Code. That will attract the jurisdiction of the Court at Allahabad or Lucknow. In some cases depending on the

facts and the provision regarding jurisdiction, it may arise in either place."

The controversy as has been raised in the present case has been answered by the Apex Court in its conclusion which has been dealt with as the third conclusion therein. The same is at the cost of repetition being again extracted herein below:-

"38. ..... Third, the Chief Justice has power under the second proviso to paragraph 14 of the order to direct in his discretion that any case or class of cases arising in Oudh areas shall be heard at Allahabad. Any case or class of cases are those which are instituted at Lucknow. The interpretation given by the High Court that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in Oudh areas shall be instituted or filed at Allahabad, instead of Lucknow is wrong. The word "heard" means that cases which have already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso to paragraph 14 of the Order be directed to be heard at Allahabad."

A perusal of the third conclusion of the Apex Court in the case of ***Sri Nasiruddin (supra)*** *leaves no doubt that a case which has already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso to paragraph 14 of the Amalgamation Order be directed to be heard at Allahabad but not vice-versa. This leaves with no doubt that a case filed or instituted at Lucknow can be directed to be heard at Allahabad but a case filed or instituted at Allahabad cannot be directed to be heard at Lucknow. The legal proposition is quite clear and specific.*

Looking to the position of law as stated above and the facts of the present case, this Court comes to a conclusion that the preliminary objection regarding maintainability of the present writ petition at Allahabad as raised by the learned counsel for the State, has substance. The argument of learned Senior Advocate that the present case be transferred to Lucknow as per the dictum laid down in the case of ***Sri Nasiruddin (supra)*** *is fallacious.*

The present writ petition is ***dismissed*** *on the ground that this court has no jurisdiction to hear the same.*

However, the petitioner is at liberty to approach the appropriate forum / Court, if so advised.

The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked.

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".

(16) It transpires from perusal of the aforesaid orders that co-accused has been granted the parity of the interim order dated 14.12.2020 passed in Criminal Misc. Writ Petition No. 12605 of 2020. Now, the situation is that the said interim order dated 14.12.2020 has not become enforced as it merges into final order dated 24.03.2021 passed in Criminal Misc. Writ Petition No. 12605 of 2020, whereby this Court at Allahabad, while dismissing the writ petition filed by the petitioner, granted liberty to approach the appropriate forum/court, if so advised. Thereafter, the petitioner has filed the instant writ petition,

claiming the interim orders granted to co-accused.

(17) On due consideration, we are of the view that the petitioner cannot be granted the parity of interim order passed in the case of co-accused for the reason that the basis for passing the interim order in the case of co-accused, as quoted hereinabove, was the interim order dated 14.12.2020 passed in writ petition filed by the writ petitioner himself before this Court at Allahabad, which is in fact not enforced after dismissal of the said writ petition. Thus, the plea of the petitioner in this regard has no force and is rejected.

(18) However, on merit, it has been argued by the learned Senior Counsel appearing on behalf of the petitioner that the petitioner has no concern with the further development/recruitment/ selection/appointment on the post of Assistant Manager & Assistant Manager (Computer) in U.P. Co-operative Bank Ltd., Lucknow as he was transferred to elsewhere at that time, which was vehemently opposed by the learned AGA by saying that the petitioner was involved in making educational qualification for the selection contrary to rules, therefore, it cannot be said that the petitioner has no concern with the said irregularities in the selection.

(19) We have minutely examined the contentions of the learned Counsel for the parties and gone through the impugned F.I.R.

(20) The legal position on the issue of quashing of FIR or criminal proceedings is well-settled that the jurisdiction to quash a complaint, FIR or a charge-sheet should be exercised sparingly and only in exceptional cases. The Courts should not ordinarily interfere with the investigations of cognizable offences. However, where the allegations made in the FIR or the complaint even if 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, the FIR 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.

(21) Recently, in **Neeharika Infrastructure Private Limited vs. State of Maharashtra (Criminal Appeal No. 330 of 2021, decided on 13.04.2021),** a three-judge Bench of the Hon'ble Supreme Court considered the powers of the High Court while adjudicating a petition for quashing of the FIR under Article 226 of the Constitution of India and under Section 482 of the Criminal Procedure Code, 1973. In ***Neeharika Infrastructure Private Limited (supra),*** the appellants challenged an interim order issued by the Bombay High Court, in a quashing petition filed under Section 482 Cr.P.C. and Article 226 of the Constitution. The Bombay High Court issued an interim order directing that *"no coercive measures shall be adopted against the petitioners in respect of the said FIR"*. While examining the correctness of the said interim order, Hon'ble the Supreme Court in para-23 has held as under :

"23. In view of the above and for the reasons stated above, our final conclusions on the principal/core issue, whether the High Court would be justified in passing an interim order of stay of investigation and/or "no coercive steps to be adopted", during the pendency of the quashing petition under Section 482 Cr.P.C and/or under Article 226 of the Constitution of India and in what circumstances and

whether the High Court would be justified in passing the order of not to arrest the accused or "no coercive steps to be adopted" during the investigation or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of/not entertaining/not quashing the criminal proceedings/complaint/FIR in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India, our final conclusions are as under:

i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the "rarest of rare cases (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) Save in exceptional cases where non-interference would result in miscarriage of justice, the Court and the judicial process should not interfere at the stage of investigation of offences;

xi) Extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice;

xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) The power under Section 482 Cr.P.C. is very wide, but conferment of wide power requires the court to be more cautious. It casts an onerous and more diligent duty on the court;

xiv) However, at the same time, the court, if it thinks fit, regard being had to the parameters of quashing and the self-restraint imposed by law, more particularly the parameters laid down by this Court in

the cases of R.P. Kapur (supra) and Bhajan Lal (supra), has the jurisdiction to quash the FIR/complaint;

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) The aforesaid parameters would be applicable and/or the aforesaid aspects are required to be considered by the High Court while passing an interim order in a quashing petition in exercise of powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. However, an interim order of stay of investigation during the pendency of the quashing petition can be passed with circumspection. Such an interim order should not require to be passed routinely, casually and/or mechanically. Normally, when the investigation is in progress and the facts are hazy and the entire evidence/material is not before the High Court, the High Court should restrain itself from passing the interim order of not to arrest or "no coercive steps to be adopted" and the accused should be relegated to apply for anticipatory bail under Section 438 Cr.P.C. before the competent court. The High Court shall not and as such is not justified in passing the order of not to arrest and/or "no coercive steps" either during the investigation or till the investigation is completed and/or till the final report/chargesheet is filed under Section 173 Cr.P.C., while dismissing/disposing of the quashing petition under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. xvii) Even in a case where the High Court is prima facie of the opinion that an exceptional case is made out for grant of interim stay of further investigation, after considering the broad parameters while exercising the powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India referred to hereinabove, the High Court has to give brief reasons why such an interim order is warranted and/or is required to be passed so that it can demonstrate the application of mind by the Court and the higher forum can consider what was weighed with the High Court while passing such an interim order.

xviii) Whenever an interim order is passed by the High Court of "no coercive steps to be adopted" within the aforesaid parameters, the High Court must clarify what does it mean by "no coercive steps to be adopted" as the term "no coercive steps to be adopted" can be said to be too vague and/or broad which can be misunderstood and/or misapplied."

(22) Keeping in mind the aforesaid dictum of the Hon'ble Supreme Court, we find that in the instant case, it transpires from the impugned F.I.R. that specific allegation has been levelled against the petitioner in the F.I.R. with regard to making educational qualification contrary to rules and that too this fact came into light after thorough inquiry conducted in the matter by the Special Investigation Team, therefore, it cannot be said that prima facie, the petitioner cannot be involved in the instant case.

(23) It is well settled that this Court has to eschew itself from embarking upon a roving enquiry into the last details of the case. It is also not advisable to adjudge

whether the case shall ultimately end in submission of charge sheet and then eventually in conviction or not. Only a prima facie satisfaction of the court about the existence of sufficient ingredients constituting the offence is required in order to see whether the F.I.R. requires to be investigated or deserves quashing. The ambit of investigation into the alleged offence is an independent area of operation and does not call for interference in the same except in rarest of rare cases.

(24) Keeping in view the aforesaid law and considering the submissions raised by learned counsel for the petitioner, we are of the considered view that the submissions advanced by the learned Counsel for the petitioner call for determination on questions of fact which may be adequately discerned either through proper investigation or which may be adjudicated upon only by the trial court and even the submissions made on points of law can also be more appropriately gone into only by the trial Court in case a charge sheet is submitted in this case. The perusal of the record makes out, *prima facie*, offences at this stage and there appears to be sufficient ground for investigation in the case.

(25) In view of the aforesaid, considering the allegations made in the FIR and material brought on record, it cannot be said that no *prima facie* case is made out against the petitioner, rather there appears to be sufficient ground for investigation in the matter. Accordingly, we do not find any justification to quash the impugned F.I.R.

(26) The petition lacks substance and is, accordingly, **dismissed.**

(2021)07ILR A619

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.06.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Misc. Bench No. 13298 of 2021

Santosh Batham ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Amit Chaudhary, Pradeep Tiwari, Sonu Shukla

Counsel for the Respondents:
G.A.

Criminal Law - U.P. Gangsters and Anti Social Activities (Prevention), 1986 - Section 2 - 'indulge in anti-social activities' - FIR can be maintained even for single incident of anti-social act & a person, even for a single incident, may be prosecuted under the Gangster Act - under this Act, a person can be accused of an offence only if he had chosen to join a group which indulged in anti-social activities, defined under the Act, with use of force for obtaining material or other advantages to himself or to any person (Para 25)

Case of prosecution is that being in an organized gang as member of the gang, the petitioner is found indulged in offences of serious nature to make economical, material and unlawful gain - there is no rebuttal of this report made by the petitioner in his affidavit by pleading - F.I.R. discloses cognizable offence against the petitioner - no ground exists for quashing of the F.I.R. or staying the arrest of the petitioner - writ petition dismissed.

Dismissed. (E-4)

List of Cases cited :

1. Padma Mishra Vs St. of Uttarakhand & anr. Cri. Appeal No.20/2010 dt 13.02.2020

2. R.P. Kapur Vs St. of Pun. 1960 CriLJ 1239

3. St. of Har. & ors. Vs Bhajan Lal & ors. AIR 1992 SC 81

4. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maha & ors. Cri. Appeal No. 330 of 2021

5. St. ofW.B. & ors. Vs Swapan Kumar Guha & ors. AIR 1982 SC 949

6. Sudha Singh Vs The St. of U.P. & anr. AIR 2021 SC 2149

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

1. The petitioner has filed this writ petition under Article 226 of the Constitution of India, with a prayer to issue writ of Certiorari or direction in the nature of Certiorari to quash the first information report bearing no.0165/2021, under Sections 2/3 of Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act which shall hereinafter be referred as 'Gangster Act' only for the purpose of brevity and convenience.

2. The matter is to be heard before this Court as fresh for hearing through virtual mode. Learned counsel for the petitioner Sri Amit Chaudhary, Advocate and learned A.G.A. for and on behalf of the State Ms. Nand Prabha Shukla, Advocate appear through video conferencing. Heard the learned counsels and perused the record.

3. For the purpose of easy reference, the relief sought in the petition is reproduced hereunder from the prayer part of the petition.

"i) issue a writ of Certiorari or a writ order or direction in the nature of Certiorari to quash the impugned F.I.R. No.0165/2021 Under Sections 2/3 Uttar Pradesh Gangster and Anti-social Activities (Prevention) Act, 1986 Police Station- Ganga Ghat District Unnao, Annexure No.1 to this writ petition.

*ii) issue a writ of Ce*rtiorari or a writ order or direction in the nature of Certiorari to quash the Gang Chart."

4. Consequent upon the aforesaid two main reliefs, an ancillary relief is also sought to issue the writ or direction in the nature of Mandamus commanding the opposite parties not to arrest the petitioner in pursuance to impugned first information report.

5. The petitioner-accused is arraigned alongwith two other co-accused in F.I.R. No.0165/2021 Under Sections 2/3 Uttar Pradesh Gangster and Anti-social Activities (Prevention) Act, 1986 Police Station-Ganga Ghat District Unnao, hereinafter referred as "Gangster Act".

6. The first information report and the gang chart prepared therein is made annexure no.1 to the petition which discloses that the Police Station Ganga Ghat, District Unnao has lodged the impugned First Information Report under Section 2/3 of Gangster Act against the petitioner alongwith two others namely 'Birbal Gujrati' S/o Gangaram R/o 14/7, Champapurva, Ganga Ghat, Unnao, Uttar Pradesh who is assigned the role of gang leader and 'Ram Surat Pandey' S/o Jagdish Prasad, R/o 15/232, Shakti Nagar, Shukla Ganj, Ganga Ghat, Unnao, Uttar Pradesh as member of the gang.

7. The perusal of gang chart shows that Santosh Batham, the petitioner is indulged in Case Crime No.97/2018, under Sections 419, 420, 447 of Indian Penal Code, 1860 and Section 3 of Damage To Public Property Act, Police Station Ganga Ghat, District Unnao.

8. It is also reported that in aforesaid case, charge sheet has already been filed in the trial court on 26.12.2018. In the impugned first information report under Gangster Act, it is reported that the gang leader Birbal Gujarati alongwith his companions and members of gang do the offences to earn for themselves physical and financial gains and basic benefits, grabbing the possession of the land and threaten life and property to the affected person or anyone else if they protest. The manner of commission of their offence is very henious.

9. It is further reported in the first information report that for the reason of committing heinous crime by them as defined in Chapters XVI, XVII and XXII of the Indian Penal Code, 1860 in District Unnao, there is so much fear and terror in the public mind that any person amongst the public has no courage to testify against them. In such a situation, it is not appropriate to let them roam freely.

10. The said first information report in the course of due approval in hierarchy lastly reached to the District Magistrate, opposite party no.3. In their sinonimos opinion as to the report of SHO, they were satisfied with the fact of accused persons' indulgence in crime and their terror in the public. To signify this satisfaction as well to accord approval, District Magistrate also signed the satisfaction recorded to the effect, "I have thoroughly perused the gang chart and resolved that the accused persons shown in the gang chart are an organized gang who are indulged in serious incidents for their economic, material and undue gains, therefore, action under Section 2/3 of Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 are necessary to be taken".

11. Like all other criminal cases instituted against an accused, the prosecution in the present case also is duty bound to initiate investigate and collect the evidence. The investigation culminates into submission of charge sheet. Thereafter charges are framed by the Court providing the opportunity of hearing upon the framing of charges and when the accused are not discharged, the prosecution begins with evidence before the Court competent to try the offences against the accused shown in the gang chart. The incriminating facts in charges are to be testified by prosecution evidence to prove them beyond all reasonable doubt.

12. The defense has to cross-examine the prosecution witnesses so as to test the veracity of the witnesses, this is the only course to assail the case of prosecution as disproved or false, baseless and malafide. Unless the veracity of the prosecution case is tested in the trial, none can speculate, imagine or make a hypotheses of the falsity of the prosecution case. However, on the basis of probability factor, it may be prima facie seen whether the prosecution case is sound or baseless.

13. Hon'ble the Apex Court in a recent judgment of ***Padma Mishra Vs.***

State of Uttarakhand & Anr.1 in Criminal Appeal No.20/2010 decided on 13.02.2020, Hon'ble Ms. Indira Banerjee, J. speaking for the Bench, dismissing the Criminal Appeal preferred against order of the High Court rejecting the prayer in Writ Petition to quash the F.I.R. under Section 2/3 of Gangster Act, held:-

"In proceedings under Article 226 of the Constitution of India, the High Court does not adjudicate the correctness of the allegations in an FIR. The Court may only intervene in exceptional cases, if the allegations made in the FIR ex facie do not disclose any offence at all."

14. Before discussing any more in the facts of the case, the legal position as has been laid down by our High Court and Hon'ble the Supreme Court from time to time in various cases should be referred.

15. In the case of **R.P. Kapur Vs. State of Punjab2,** Hon'ble the Apex Court summarized some category of cases where inherent power can and should be exercised to quash the proceeding, which are as follows:-

(i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings;

(ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

16. Further in **State of Haryana and Ors. Vs. Bhajan Lal and Ors.3** in para 102 some guidelines were formulated relating to the exercise of extra ordinary power of the Court under Article 226 of the Constitution of India from the inherent power under Section 482 Cr.P.C., which are as follows:-

"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 under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under

which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

17. In the light of the aforesaid guidelines issued by the Hon'ble Supreme Court, the grounds taken by the petitioner for quashing of the first information report impugned in this petition are to be seen, which are briefed as under:-

i) No case is made out against the petitioner for the offence under Section 2/3 of 'Gangster Act' because of only one single criminal case no. 97/2018, under Sections 419, 420, 447 of Indian Penal Code, 1860 r/w Section 3 of Damage To Public Property Act is shown in the gang chart.

ii) District Magistrate in approving gang chart did not apply his mind as no reasons are recorded by him and the lodging of F.I.R. under Gangster Act is malafide.

iii) The petitioner has right to life which include to live with honour and dignity and fundamental right of the Article 21 of the Constitution of India cannot be interfered lightly. The petitioner is apprehending his arrest.

18. Sections 2(b) and 2(c) of the Gangsters Act define as : "gang" and Gangster.

"2(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 for himself or any other person, indulge in anti-social Signature Not Verified activities.

2(c)"gangster" means a member or leader or organizer of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities."

19. In judgment of ***Padma Mishra Vs. State of Uttarakhand & Anr. (Supra),*** Hon'ble the Supreme Court held as follows:-

"The definition of gangster is made in the Gangsters Act and includes any person who is a member or leader or organizer of a gang or abets or assists in the activities of a gang, which includes violence, threat, intimediation, coercion with the object of disturbing public order or of going any undue advantage for himself or any other person."

20. The allegations in the complaint/information are always treated as the basis of prosecution. It is admitted fact that petitioner is indulged in Case Crime No. 97/2018, under Sections 419, 420, 447 of Indian Penal Code, 1860 and Section 3 of Damage To Public Property Act, Police Station Ganga Ghat, District Unnao. On perusal of the first information report, there

is clear mention of the aforesaid case and some other cases against the other members of the gang in addition to their indulgence in activities of the like nature is also stated. Their terror and fear in the mind of the public of the locality is also stated by reason of committing offence of land grabbing, taking forcible possession of the land. Their terror is so much that no person from the public has courage to testify against them. The Court without assessing the genuineness and substantive proof supporting the allegations is to consider whether the allegations leveled are possible and they if taken at their face value and accepted in their entirety constituted the cognizable offence.

21. Here in the present case, the allegations in the first information report seems probable as criminal cases of like nature already registered against the members of group and they are reported indulged in criminal activities of like nature. It is established law as laid down by Hon'ble the Supreme Court and High Courts that while examining the first information report/complainant, quashing of which is sought, the Court could not embark upon the enquiry as to the legality or genuineness or otherwise of the allegations made in the FIR/Complaint.

22. The first ground raised for quashing of the F.I.R. has already been decided by our High Court in a Division Bench in ***Criminal Writ Petition No.835 of 1998*** decided on 24.03.1998 in the case of ***Subhash; Gulab Singh; Anish Vs. State of U.P. and Anr.4***

23. Before the Devision Bench of this Court, the issue was raised, "There could not be prosecution under the Act for a **single incident** as the Act spoke of Anti Social Activities. The Devision Bench referred another Full Bench case of ***Ashok Kumar Dixit Vs. State of U.P.5*** at para 22, wherein the object and reason behind the enactment of Gangster Act was quoted. The same is as under:-

"gangsters and anti-social activities were on the increase in the State posing threat to lives and properties of the citizens. The existing measures were not found effective enough to cope with this new menace. With a view to break the gangs by punishing the gangsters and to nip in the bud their conspiratorial designs it was considered necessary to make special provisions for the prevention of, and for coping with gangsters and anti-social activities in the State"

24. The preamble of the Act was also quoted as below:-

"an Act 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".

25. While holding the constitutional validity of the various provisions of the Gangster Act, **the Court was of the view that under this Act, a person can be accused of an offence only if he had chosen to join a group which indulged in anti-social activities,** defined under the Act, with use of force for obtaining material or other advantages to himself or to any person. The element of actuaries was clearly present in the offence created under the statute, as observed by the Full Bench.

26. The Full Bench further observed in paragraph 60 of the judgment that under the ordinary criminal law, it was some

times difficult to bring to book the over lords of crime and under world because they seldom operated in person or in public gaze. They indulged in clandestine operations which threaten to tear apart the very fabric of the society. In the immediate next paragraph again a note of caution was sounded by the Full Bench ob serving "provisions of the Act cannot be used as a weapon to wreck vengeance or harass or intimidate innocent citizens or to settle scores on political or other fronts. The prosecution has to bear in mind that it has to bring home the guilt.

27. On the basis of above discussions, now it is established by law that **a person even for a single incident may be prosecuted under the Gangster Act.**

28. So far as the second ground raised by the petitioner against first information report as to the District Magistrate did not apply it's mind before granting approval to the gang chart is concerned, it seems not correct. In the first information report and the gang chart made annexure by the petitioner himself, it is categorically stated that the petitioner alongwith other co-accused are found indulged in various offences of serious nature and thus there is terror and fear in the mind of public. They are found indulged in the crime in organized manner in the incident of grabbing land forcibly, evicting people from their house. In substance, the first information report contains the allegations that the petitioner and the others are taking recourse of public threats and coercion including physical violence to gang the voices of witness in cases against them. The criminal case shown in the gang chart against the present petitioner as well as his companions, the group members and leader of the gang is evident of this opinion. It is also noteworthy that the gang leader and other members of the group are involved in other offences of like nature shown in the gang chart.

29. It was observed in the ***Ashok Kumar Dixit Vs. State of U.P. (Supra)*** that a person was not liable to be punished under the Act merely because he happened to be a member of the group. The Court was, rather, of the view that a person could be accused of an offence only if he had chosen to join a group which indulges in anti-social activities, defined under the Act, with use of force for obtaining material or other advantages to himself or to any person. The Court was of the view "the element of actuaries is hence clearly present in the offence created under the statute. " Whereon any act or omission covered by Sections 2 and 3 of the Act is reported an offence is made out and as a corollary it may be indicated without any fear of contradiction that unless an allegation is there concerning an act or omission on the part of an accused, covered by the definition of the term "gang" or "gangster", no F. I. R. should be maintainable. Whether the al legations are true or false will be a matter for investigation, but unless the allegations of an offence under the Act are indicated, an F. I. R. may not be justifiable whatever large the number of past acts be alleged against him.

30. In the present case, the first information report and the gang chart, as such, allegations, as indicated in the decision of the Full Bench in ***Ashok Kumar Dixit Vs. State of U.P. (Supra)***, the

apprehension is clearly recorded by the police officers whereupon the District Magistrate after perusal approved the gang chart and first information report, therefore, it can not be said that while approving, the District Magistrate did not apply his mind.

31. In ***Neeharika Infrastructure Pvt. Ltd. vs. State of Maharastra and Ors.6,*** it is held by Hon'ble the Supreme Court in the concluding para of the judgment that police has the statutory right and duty in the relevant provision of the Code of the Criminal Procedure, contains in Chapter XV of the Code to investigate into cognizable offence.

32. Lodging of the first information report, precedes the investigation as provided under Section 154, 155, 156 and 157 of the Cr.P.C. The Station House Officer of Police Station is under duty to reduce into writing, the information given by the informant/victim or as observed by himself into the general diary. The information is not necessary to be much in detail or broad description like encyclopedia rather precise and concise, statements of facts only necessary to disclose the commission of a cognizable offence.

33. At this stage, we can not find out any prima facie assessment of the falsity of the allegations, therefore, in exercise of our extra ordinary power under Article 226 of the Constitution of India, we can not quash the first information on this ground.

34. The argument of learned counsel for the petitioner that the criminal case shown in the gang chart against the name of petitioner placed at serial no.3, is prima facie not found established against the petitioner nor there is any incriminating evidence on the record of the said case against the petitioner is of no avail to assail the instant first information report impugned in the petition.

35. In the aforesaid writ petition, the first information report in Case Crime No. 97/2018, under Sections 419, 420, 447 of Indian Penal Code, 1860 and Section 3 of Damage To Public Property Act, Police Station Ganga Ghat, District Unnao, the aforesaid has not been quashed rather the Hon'ble Court has directed the Investigating Officer to conclude the investigation in it's correct perspective and complete the same expeditiously subject to co-operation in investigation by the petitioner, Santosh Batham, his arrest is stayed by the Court.

36. As such mentioning of the Case Crime No. 97/2018, under Sections 419, 420, 447 of Indian Penal Code, 1860 and Section 3 of Damage To Public Property Act, Police Station Ganga Ghat, District Unnao in the gang chart, is not baseless, that case is still waiting for decision after a complete course of trial in accordance with the procedure envisaged in the Cr.P.C., therefore, this can also not be a ground of malafide on the basis whereof any material injury is apprehended to the petitioner and, therefore, this ground shall also not be treated sufficient to quash the first information report.

37. So far as the allegations as of malafide is concerned, is also baseless, in every criminal case, prosecution stands on it's own legs with supporting facts and evidences. The petitioner has annexed, annexure no.4, the order of the Co-ordinate Bench of this Court passed on 27.02.2018 in a Writ Petition No.5694 (M/B) of 2018, wherein the quashing of the first

information report in Case Crime No. 97/2018, under Sections 419, 420, 447 of Indian Penal Code, 1860 and Section 3 of Damage To Public Property Act, Police Station Ganga Ghat, District Unnao was sought, challenging the said F.I.R.

38. The issue of mala fide decided by the Hon'ble Apex Court in **State of Haryana Vs. Ch. Bhajan Lal (supra)** held as under:-

"At this stage, when there are only allegations and recriminations on no evidence, this Court could not anticipate the result of the investigation and rendered a finding on the question of mala fides on the materials at present available. Therefore, we are unable to see any force in the contentions that the complaint should be thrown over board on the some unsubstantiated plea of mala fides." ***(Emphasis added).***

39. In **Sheo Nandan Paswan Vs. state of Bihar & Ors.7**, the Hon'ble Apex Court while dealing with the issue of mala fides in criminal law observed as under:-

"It is well established proposition of law that a criminal prosecution, if otherwise, justifiable and based upon adequate evidence does not become vitiated on account of mala fides or political vendetta of the first informant or the complainant." ***(Emphasis added).***

40. Similarly, in ***State of Bihar & Anr. Vs. J.A.C. Saldanha & Anr.8,*** Hon'ble the Apex Court has held as under:-

"It must, however, be pointed out that if an information is lodged at the police station and an offence is registered, the mala fide of the informant would be of secondary importance if the investigation produced unimpeachable evidence disclosing he offence." ***(Emphasis added)***.

41. In ***Inder Mohan Goswami and another Vs. State of Uttaranchal and other9***, it is held:-

27. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should normally refrain from giving a prima facie decision in a case where all the facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of such magnitude that they cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage.

42. In view of the facts when tested in the four corners of the guidelines as laid down by Hon'ble the Supreme Court referred hereinabove, the present petition under Article 226 does not emanate us to exercise the extra ordinary power under Article 226 of the Constitution of India to quash the instant impugned first information report.

43. In case of **Neeharika Infrastructure Pvt. Ltd. vs. State of Maharastra and Ors. (Supra),** Hon'ble the Supreme Court of India in concluding part of it's judgment has laid down guidelines for the Court's while exercising power under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India.

44. Some of the relevant conclusion relating to the case in our hands are being quoted hereunder:-

"i) Police has the statutory right and duty under the relevant provisions of the Code of Criminal Procedure contained in Chapter XIV of the Code to investigate into a cognizable offence;

ii) Courts would not thwart any investigation into the cognizable offences;

iii) It is only in cases where no cognizable offence or offence of any kind is disclosed in the first information report that the Court will not permit an investigation to go on;

iv) The power of quashing should be exercised sparingly with circumspection, as it has been observed, in the "rarest of rare cases (not to be confused with the formation in the context of death penalty).

v) While examining an FIR/complaint, quashing of which is sought, the court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint;

vi) Criminal proceedings ought not to be scuttled at the initial stage;

vii) Quashing of a complaint/FIR should be an exception rather than an ordinary rule;

viii) Ordinarily, the courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere;

ix) The functions of the judiciary and the police are complementary, not overlapping;

x) .....

xi) .....

xii) The first information report is not an encyclopaedia which must disclose all facts and details relating to the offence reported. Therefore, when the investigation by the police is in progress, the court should not go into the merits of the allegations in the FIR. Police must be permitted to complete the investigation. It would be premature to pronounce the conclusion based on hazy facts that the complaint/FIR does not deserve to be investigated or that it amounts to abuse of process of law. After investigation, if the investigating officer finds that there is no substance in the application made by the complainant, the investigating officer may file an appropriate report/summary before the learned Magistrate which may be considered by the learned Magistrate in accordance with the known procedure;

xiii) .....

xiv) .....

xv) When a prayer for quashing the FIR is made by the alleged accused and the court when it exercises the power under Section 482 Cr.P.C., only has to consider whether the allegations in the FIR disclose commission of a cognizable offence or not. The court is not required to consider on merits whether or not the merits of the allegations make out a cognizable offence and the court has to permit the investigating agency/police to investigate the allegations in the FIR;

xvi) .....

xvii) .....

xviii)....."

45. Relying on the judgment of Hon'ble the Apex Court State of West Bengal & Ors. Vs. Swapan Kumar Guha & Ors.10, and some other cases, the power of quashing the criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R. or complaint and the extraordinary and inherent powers of Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can "soft-pedal the course of justice' at a crucial stage of investigation/ proceedings.

46. The case of prosecution is that being in an organized gang as member of the gang, the petitioner is found indulged in offences of serious nature to make economical, material and unlawful gain, there is no rebuttal of this report made by the petitioner in his affidavit by pleading, what he does for his livelihood and/or to feed 'belly of his family'.

47. So far as the personal liberty of the accused is concerned, it is not valid in violation or in breach of fundamental right of the other people living under the threat and fear of his gang. Hon'ble the Supreme Court further in the case of ***Sudha Singh Vs. The State of Uttar Pradesh & Anr.11*** held as follows:-

"12. There is no doubt that liberty is important, even that of a person charged with crime but it is important for the courts to recognise the potential threat to the life and liberty of victims/witnesses, if such accused is released on bail."

48. After having examined the submissions advanced by learned counsel for the parties and perused the impugned F.I.R., we are of the opinion that the impugned F.I.R. discloses cognizable offence against the petitioner, hence no ground exists for quashing of the F.I.R. or staying the arrest of the petitioner.

49. The writ petition is, accordingly, **dismissed.**

50. The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked, before the concerned Court/Authority/Official.

51. The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)07ILR A629
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.06.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Misc. Single No. 13312 of 2021

Ghanshyam Verma & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Subodh Kumar Verma

Counsel for the Respondents:
C.S.C., Mohan Singh

A. U.P. Revenue Code (2006) – Section 67- wrongful occupation of Gram Panchayat property - Appeal u/s Section 67(5) - Locus - Issue - whether appeal filed against the order of Assistant Collector u/s 67(4), is maintainable at the instance of a person, if he is not a party in the proceedings, but is aggrieved ? - *'any person' aggrieved* vis-à-vis *'any party' aggrieved* - Held - S. 67(5) uses expression, 'any person' aggrieved, and not 'any party' aggrieved - any 'person' may be the 'party' or may not be a party can maintain an appeal if he is aggrieved from the order of the Assistant Collector - Sub section (5), also includes a non-party to the proceedings if he can show that he is a 'person aggrieved' from the order passed under sub section (3) or sub section (4) (Para 14)

B. U.P. Revenue Code (2006) - wrongful occupation of Gram Panchayat property - Appeal u/s S.67(5) - Locus - any *'person aggrieved'* - *Held* - petitioners being members of the Gaon Sabha & the land being 'Naveen Parti' vested in Gaon Sabha, which have been encroached upon would be 'person aggrieved' from the order of the Assistant Collector by which the notice issued to the alleged encroacher has been withdrawn as by encroachment of Gaon Sabha land the benefits which the members of the Gaon Sabha may be legally entitled to receive, would be deprived of that entitlement (Para 20)

Allowed. (E-4)

List of Cases cited:

1. Gram Sabha Gooma Fatima Jot Vs DDC Balrampur & ors. 2020 (146) R.D. 512 (H.C.)

2. Om Prakash Verma Vs St. of U.P. 2014(5) ADJ 427

3. Dharmraj Vs St.of U.P. & ors. 2009 (27) L.C.D. 1373

4. Jasbhai Motibhai Desai Vs Roshan Kumar, Haji Bashir Ahmed & ors. AIR 1976 SC 578

5. Ayaaubkhan Noorkhan Pathan Vs St. of Maha (2013) 4 SCC 465

6. Delhi Development Authority (2015) 14 SCC 254

7. Peer Mohammad Vs St. of U.P. & ors. W.P. No. 13397 (MB) of 2020 dt 28.08.2020

8. Gram Sabha Komna Balrampur Vs DDC Balrampur 2020 R.D. 512

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Shri Subodh Kumar Verma, the learned counsel for the petitioners, Dr. Krishna Singh, the learned Standing Counsel for the opposite party Nos. 1, 2 and 3 and Shri Mohan Singh, the learned counsel appearing for the opposite party No. 4-Gaon Sabha/ Gram Panchayat, Dadwa, Imliya Yarki, Akbarpur, District Ambedkar Nagar, through video conferencing.

2. For the order proposed to be passed, issuance of notice to the private opposite party No. 5 is hereby dispensed with, but his interest would be secured.

3. This writ petition has been filed challenging the order dated 04.11.2019 passed by the Assistant Collector-First Class/ Tehsildar, Akbarpur, Ambedkar Nagar, by which the notice/ R.C. Form-20, issued to the opposite party No. 5 in the proceedings under Section 67 of the U.P. Revenue Code, 2006, has been withdrawn. Against the said order the petitioners filed an appeal which has also been dismissed by the District Magistrate/Collector,

Ambedkar Nagar by the order dated 27.01.2021 as not maintainable, which is also under challenge.

4. The dispute pertains to an area of 04 Biswa/ 0.051 hectare of Gata No. 2123, situated at Village Yarki Dadwa, Post Yarki, Pargana/ Tehsil Akbarpur, District Ambedkar Nagar, said to be the Gaon Sabha land recorded as Naveen Parti, and allegedly occupied illegally by the opposite party No. 5.

5. Some of the petitioners, previously, filed Petition No. 35328 (MS) of 2018, Shakuntala Verma & Others Vs. State of U.P. and others, for a direction in the nature of mandamus commanding the opposite parties No. 1 to 5 therein to get the land in dispute vacated from illegal occupation of the private opposite parties. In the said petition the learned Standing Counsel informed the Court that the appropriate proceedings under Section 67(1) of U.P. Revenue Code had been initiated against the encroachers and consequently the petition was disposed of with the observations and directions that the proceedings so initiated for removal of illegal encroachment shall be finalized in accordance with law giving opportunity of hearing to the parties concerned by the competent authority, expeditiously, keeping in mind the statutory period prescribed for disposal of such cases under the U.P. Revenue Code. Thereafter, by the order dated 04.11.2019 the notice issued to the opposite party No. 5 was withdrawn by the Assistant Collector/ Tehsildar, Akbarpur, District Ambedkar Nagar, against which the petitioners filed an appeal, which has been dismissed by the order dated 27.01.2021.

6. Learned counsel for the petitioners submits that the petitioners' appeal has been dismissed only on the ground that the appeal at the instance of the petitioners was not maintainable, as the petitioners were not the party in the proceedings before the Tehsildar/ Assistant Collector First Class. His submission is that the land in dispute is Gaon Sabha land and the petitioners being resident of the same Gaon Sabha have interest in the land of Gaon Sabha. In case of encroachment over Gaon Sabha land the petitioners being aggrieved from the order of the Tehsildar, have a right to maintain the appeal, particularly when Section 67(5) of the Revenue Code, 2006 provides for the appeal by the persons aggrieved from the order passed by the Tehsildar. The order withdrawing the notice issued to the opposite party No. 5, who has encroached upon the Gaon Sabha land causes injury to the petitioners who are the persons aggrieved.

7. Learned counsel for the petitioners submits that the appellate authority in rejecting the petitioners' appeal, as not maintainable, has placed reliance on para-12 of the Appendix-II of the U.P. Revenue Code Rules, 2016, and has also placed reliance on the judgment of this Court in the case of **Gram Sabha Gooma Fatima Jot Vs. Deputy Director of Consolidation Balrampur and others,** reported in **2020 (146) R.D. 512 (H.C.),** but those provisions as also the case law are not applicable.

8. Learned counsel for the petitioners has submitted that *Naveen Parti* land is for the benefit of the members of the Gaon Sabha. Initially when the proceedings against the

encroachers were not being initiated by the Gaon Sabha, the petitioners had approached this Court and it was only thereafter, the proceedings were initiated under Section 67(2) of the U.P. Revenue Code, but after the order has been passed against the Gaon Sabha, the Gaon Sabha has not come forward to file the appeal, inspite of petitioners' request to file appeal, whereas, it is the statutory duty of the Gaon Sabha through its Land Management Committee to ensure safety and security of the Gaon Sabha property.

9. Shri Mohan Singh, the learned counsel appearing for the opposite party No. 4-Gaon Sabha, has fairly submitted that Section 67(5) provides for appeal which can be filed by any 'person aggrieved' by the order of Tehsildar. The petitioners, if aggrieved, could maintain the appeal. He has placed reliance on the judgments in the cases of **Om Prakash Verma Vs. State of U.P., 2014(5) ADJ 427,** and **Dharmraj Vs. State of U.P. and others,** reported in **2009 (27) L.C.D. 1373.**

10. Dr. Krishna Singh, has also submitted that from bare reading of Section 67(5) of the U.P. Revenue Code, 2006 it is evident that any person aggrieved has a right to prefer an appeal.

11. I have considered the submissions advanced and also perused the material on record.

12. The short point for consideration is whether an appeal filed against the order of Tehsildar/ Assistant Collector, under Section 67(4) of the U.P. Revenue Code, 2006, is maintainable at the instance of a person if he is not a party in the proceedings, but is aggrieved.

13. Section 67 of the U.P. Revenue Code, 2006 provides as under:

"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 annd 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."

14. It is evident from sub-section (5) of Section 67 of the Code, 2006 that if any person is aggrieved by an order of the Assistant Collector under sub-section (3) or sub-section (4), he may within thirty days from the date of the order, prefer an appeal before the Collector. This uses the expression, 'any person aggrieved', and not 'any party aggrieved'. A bare reading of sub-section (5) shows that any 'person' may be the 'party' or may not be a party can maintain an appeal if he is aggrieved from the order of the Assistant Collector under sub section (3) or sub section (4). Sub section (5), therefore, is not confined to party aggrieved from the order passed under sub-section (3) or sub-section (4) of Section 67, but also includes a non-party to the proceedings if he can show that he is a 'person aggrieved' from the order passed under sub section (3) or sub section (4).

15. The Court, therefore, proceeds to address as to who is a 'person aggrieved' and whether the petitioners in the present case would be the 'person aggrieved' so as to maintain the appeal against the order passed by the Assistant Collector discharging the notice under sub section (4).

16. In the case of **Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and others, AIR 1976 SC 578** the Hon'ble Apex Court held that a person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something. The relevant paragraph Nos. 27, 29, and 33 of the said report are being reproduced as under:

"27. In Bar Council of Maharashtra v. M.V. Dabholkar [1975] 2 SCC 703=(AIR 1975 SC 2092) a Bench of seven learned Judges of this Court considered the Question whether the Bar Council of a State was a 'person aggrieved' to maintain an appeal under Section of the Advocates' Act, 1961. Answering the question in the affirmative , this Court, speaking through Ray C.J. indicated how the expression "person aggrieved" is to be interpreted in the context of a statute, thus:

The meaning of the words "a person, aggrieved" may vary according to

the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "a person aggrieved". Again a person is aggrieved if a legal burden is imposed on him. The meaning of the words "a person aggrieved" is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality. The role of the Bar Council under the Advocates' Act is comparable to the role of a guardian in professional ethics. The words "person aggrieved" in Sections 37 and 38 of the Act are of wide import and should not be subjected to a restricted interpretation of possession or denial of legal rights or burdens or financial interests.

29. Typical of the cases in which a strict construction was put on the expression "person aggrieved", is Buxton v. Minister of Housing and Local Govt. . There, an appeal by a Company against the refusal of the Local Planning Authority of permission to develop land owned by the Company by digging chalk, was allowed by the Minister. Owners of adjacent property applied to the High Court under Section 31(1) of the Town and Country Planning Act, 1959 to quash the decision of the Minister on the ground that the proposed operations by the company would injure their land and that they were 'persons aggrieved' by the action of the Minister. It was held that the expression 'person aggrieved' in a statute meant a person who had suffered a legal grievance; anyone given the right under Section 37 of the Act of 1959 to have his representation considered by the Minister was a person aggrieved, thus Section applied, If those rights were infringed; but the applicants had no right under the statute and no legal rights had been infringed and therefore they were not entitled to challenge the Minister's decision, Salmon J. quoted with approval these observations of James LJ in Re Sidebothem.

"The words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something."

33. This Court has laid down in a number of decisions that in order to have the locus standi to invoke the extraordinary jurisdiction under Article 226 an applicant should ordinarily be one who has & personal or individual right in the subject-matter of the application, though in the case of some of the writs like habeas corpus or quo warranto this rule is relaxed or modified. In other words, as a general rule, infringement of some legal right or prejudice to some legal interest inhering in the petitioner is necessary to give him a locus standi in the matter-(See State of Orissa v. Madan Gopal, 1952 SCR28= (AIR 1952 SC 12); Calcutta Gas Co. v. State of West Bengal, 1962 Supp 1 SCR 1= (AIR 1962 SC 1044); Ram Umeshwari Suthoo v. Member, Board of Revenue Orissa (1967) 1 SCA 413; Gadda Venkateshwara Rao v. Government of Andhra Pradesh, AIR 1966 SC 828; State of Orissa Vs. Rajasaheb Chandanmall, AIR

1972 SC 2112; Dr. Satyanarayana Sinha v. S. Lal & Co. AIR 1973 SC 2720."

17. In the case of **Ayaaubkhan Noorkhan Pathan Vs. The State of Maharashtra and others** reported in **(2013) 4 SCC 465** the Hon'ble Apex Court held as under in Paragraph Nos. 9 to 12 which are being reproduced as follows:

"9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of the aggrieved persons.

Only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the authorities. Therefore, there must be judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking a writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that, the relief prayed for must be one to enforce a legal right. Infact, the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same. (Vide:State of Orissa Vs. Madan Gopal Rungta, AIR 1952 SC 12; Saghir Ahmad & Anr. v. State of U.P. AIR 1954 SC 728; Calcutta Gas Company (Proprietary) Ltd Vs. State of west Bengal & others, AIR 1962 SC 1044; Rajendra Singh v. State of Madhya Pradesh, AIR 1996 SC 2736; and Tamilnad Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar & Others, (2009) 2 SCC 784).

10. A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardised. (Vide: Shanti Kumar R. Chanji v. Home Insurance Co. of New York, AIR 1974 SC 1719; and State of Rajasthan & Others v. Union of India & Others, AIR 1977 SC 1361.

11. In Anand Sharadchandra Oka Vs. University of Mumbai, AIR 2008 SC 1289, a similar view was taken by this Court, observing that, if a person claiming relief is not eligible as per requirement, then he cannot be said to be a person aggrieved regarding the election or the selection of other persons.

12. In A. Subhash Babu v. State of A.P., AIR 2011 SC 3031, this Court held:

"The expression "aggrieved person' denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant."

18. In the case of **Delhi Development Authority, (2015) 14 SCC 254** the Hon'ble Apex Court held as under in Paragraph No. 19 which is being reproduced as follows:

"19. In Director of Settlements, Andhra Pradesh and Ors. vs. M.R. Apparao and Anr., (2002) 4 SCC 638, while considering the scope of the power of High Court to issue a writ of mandamus under Article 226 of the Constitution, this Court has held as under:

"17. ....It is, therefore essentially, a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression "for any other purpose". The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion, they must be exercised along the recognised lines and subject to certain self-imposed limitations. The expression "for any other purpose" in Article 226, makes the jurisdiction of the High Courts more extensive but yet the Courts must exercise the same with certain restraints and within some parameters. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed..."

19. In the case of **Dharmraj (supra)** relied upon by Shri Mohan Singh, learned counsel for the Gaon Sabha, also, the Division Bench of this Court has held that the 'person aggrieved' means a person who is wrongly deprived of his entitlement which he is legally entitled to receive. The 'person aggrieved' is a person who is injured or is adversely affected in a legal sense.

20. In the present case the proceedings were drawn against the opposite party No. 5 with respect to 'Naveen Parti' land which is vested in Gaon Sabha, however, the notice was withdrawn on the ground that the opposite party No. 5 did not encroach over the land. Every member of Gram Panchayat has a right of user over Gaon Sabha land subject to the provisions of law in this regard, which is for the benefit of its members. It is also the duty of every member not only not to encroach but also to see that it is not encroached upon by others to protect the interest of the Gaon Sabha. The petitioners being members of the Gaon Sabha and the land being 'Naveen Parti' vested in Gaon Sabha, which they allege to have been encroached upon would be 'person aggrieved' from the order of the Assistant Collector by which the notice issued to the alleged encroacher has been withdrawn as by encroachment of Gaon Sabha land the benefits which the members of the Gaon Sabha may be legally entitled to receive, would be deprived of that entitlement.

21. In **Peer Mohammad Vs. State of U.P. and others (Writ Petition No. 13397**

(MB) of 2020, decided on 28.08.2020), the order passed under Section 67 of U.P. Revenue Code, 2006 was held to be appealable under sub-section (5) and in view thereof, the petition filed by the person aggrieved from the order of Assistant Collector was dismissed as not maintainable, on the ground of availability of statutory alternative remedy.

22. Thus, this Court is of the considered view that the appeal filed by the petitioners was maintainable and has illegally been dismissed as not maintainable on the ground that the petitioners were not party in the proceedings.

23. In the case of **Gram Sabha Komna Balrampur Vs. Deputy Director of Consolidation Balrampur, 2020 R.D.** 512, it was held that as the writ petition was filed by the Gram Pradhan without there being any resolution of the Land Management Committee or the Gaon Sabha, the same was not maintainable. This Court referred to para-12of Appendix-II of U.P. Revenue Code Rules, 2016, which is reproduced as under:

"12. Institution of suits with consultation of Panel Lawyer- (1) *Gram Panchayat or Gram Sabha will either be a plaintiff instituting or filing a suit, or a defendant contesting such a suit. The Chairman of the Land Management Committee shall not be entitled to take any action in any suit or proceedings unless he consults the Panel Lawyer and obtains order of the Sub-Divisional Officer or the Collector.*

(2) Before instituting a suit or proceeding, the Chairman of the Land Management Committee should report full facts to the tahsildar along with a copy of the resolution of the Land Management Committee for filing the suit or proceeding. The tahsildar shall, after making such enquiry as may be necessary, and after consulting the tahsil Panel Lawyer, submit his report to the Sub-Divisional Officer along with written opinion of the tahsil Panel Lawyer. If the suit or proceeding is to be instituted in a court at tahsil headquarters, the SubDivisional Officer shall take a decision. If the suit or proceeding is to be instituted in a court at the district headquarters, the Sub-Divisional Officer shall submit all the papers to the Collector for orders. The Collector shall then decide whether a suit or proceeding is to be instituted or not. He may, in this connection, consult the headqquarters Panel Lawyer or the District Government Counsel, if he considers necessary.

(3) Where the land of Gram Panchayat has been allotted to the persons under the provisions of U.P. Zamindari Abolition and Land Reforms Act, 1950 or U.P. Revenue Code, 2006 and any suit is instituted or any proceeding is initiated by the influential persons against such allotment the pairvi on behalf of the Gram Panchayat shall be done in such suits or proceedings in as much as the interest of the Gram Panchayat and the State Government is vested in such land."

24. Appendix-II relates to instructions for the conduct of Gram Panchayat litigation. The procedure for litigation which is to be adopted by the Gaon Sabha. It is evident from para-12(1) and (2) that such instructions are for the Chairman of the Land Management Committee where a suit or other proceeding is instituted by or against the Gram Panchat or Gaon Sabha. This Court is of the view that the Appendix-II para-12 is not attracted as in the present case, the appeal was not filed by the Gaon Sabha or the Gram Pradhan. The case of **Gram Sabha Gooma Fatima Jot**

(supra) is, therefore, not attracted to the present case.

25. The judgment in the case of **Om Prakash Verma (supra)** cited by Shri Mohan Singh is not on the point as to whether remedy of appeal is or is not available to a person aggrieved under Section 67(5) against the orders passed under sub section (3) and (4) of Section 67 of the Revenue Code, 2006, if such person is not party.

26. In view of the above, the petition succeeds and is partly allowed. The impugned order dated 27.01.2021 is hereby quashed. The matter is remanded to the opposite party No. 2, District Magistrate/ Collector, District Ambedkar Nagar, for deciding the petitioners' appeal afresh in accordance with law after affording opportunity of hearing to the parties concerned. The opposite party No. 2 shall issue notice to the opposite party No. 5(respondent No. 1 in appeal) to afford him opportunity of hearing. The appeal shall be decided expeditiously, say within a period of four months from the date of production of the copy of this order before the appellate authority. If the appeal is beyond limitation the matter of condonation of delay shall be considered first.

27. It is clarified that this Court has not entered into the merits of the controversy either way. If any observation is made on the merits the same is only to determine the maintainability of appeal under Section 67(5) and shall have no effect on the merits of the appeal.

(2021)07ILR A638

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 01.07.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Misc. Single No. 13416 of 2021

Manoj Kumar Verma ...Petitioner

Versus

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

Counsel for the Petitioner:
Avnish Kumar Singh

Counsel for the Respondents:
C.S.C., Mohan Singh

Fair Price Shop - Allotment - allotment of fair price shop licence on death of original allottee - Subsequent allottee has no right to continue upon setting aside of the order of cancellation of fair price shop of the original allottee - Original allottee having continued till his death, the erstwhile subsequent allottee would have no right to claim to run the fair price shop of the original allottee merely on account of death of the original allottee – however, when the process of allotment of the fair price shop due to death of the original allottee takes place, it is open to the subsequent allottee to participate in such process as per law (Para 14)

Dismissed. (E-4)

List of Cases cited :

1. Poonam Vs St.of U.P. & ors. 2016 (2) SCC 799

2. Mithilesh Kumari Vs St. of U.P. & ors.. W.P. No. 30422 (MS) of 2019, dt 05.11.2019

3. Alok Kumar Vs St. of U.P. & ors.. W.P. No. 4098 (MS), dt 12.07.2018

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Shri Avnish Kumar Singh, the learned counsel for the petitioner, Shri

Hemant Pandey, the learned Standing Counsel for the opposite party Nos. 1 to 4 and Shri Mohan Singh, the learned counsel appearing for the opposite party No. 5-Gaon Sabha, Village Panchayat Songaon, Tehsil Akbarpur, District Ambedkar Nagar.

2. This petition has been filed by the petitioner for the following reliefs:

"(i) To issue a Writ in the nature of certiorari quashing the impugned order dated 12-02-2021 (which is annexed herewith as Annexure No.1) passed by the Opposite Party No. 4.

(ii) Any other alternate remedy which this Hon'ble court deems fit and proper to the circumstances of the case may kindly be awarded in the favour of the petitioners against the Opposite parties."

3. Briefly stated the facts of the case are that the fair price shop in Village Panchayat Songaon, Tehsil Akbarpur, Police Station Akbarpur, District Ambedkar Nagar was originally allotted to one Ram Bahal Verma. His license was cancelled by the order dated 19.07.2016 and the petitioner Manoj Kumar Verma was allotted the shop, with specific stipulation by the order dated 11.11.2016 that such allotment was subject to the orders to be passed in pending appeals/ writ petitions. The appeal filed by the original allottee against the order of cancellation was allowed by the Deputy Commissioner, Faizabad Region, Faizabad by the judgment dated 31.10.2017, setting aside the order of cancellation dated 19.07.2016 and directing to restore his license to run the fair price shop. In pursuance thereof, the Sub Divisional Magistrate, Akbarpur, vide order dated 18.11.2017, restored the fair price shop license of Ram Bahal Verma and cancelled the license of the petitioner and one Rajesh Kumar. Challenging the orders dated 31.10.2017 and 18.11.2017 the petitioner filed Writ Petition No. 817 (MS) of 2018, which was dismissed in default on 28.03.2019. It has been submitted that the petitioner has filed an application for recall of the order dated 28.03.2019, which is pending in the said writ petition.

4. It appears that Ram Bahal Verma died on 10.01.2021 and for allotment of that fair price shop, his son Vijay Bahadur Verma filed a representation. The petitioner also filed a representation for allotment in his favour. By the order under challenge dated 12.02.2021 the representation of the petitioner has been rejected. The representation of the Vijay Bahadur Verma was also rejected, but in this case the Court is concerned with the rejection of representation of the petitioner.

5. A preliminary objection has been raised by Shri Hemant Pandey, the learned Standing Counsel that the petitioner being subsequent allottee, has no locus to maintain this writ petition, and he cannot challenge the order dated 12.02.2021 as the petitioner has no right, nor by the order under challenge any of his right or interest is adversely affected. He has placed reliance on the judgment in the case of **Poonam Vs. State of U.P. and others,** reported in **2016 (2) SCC 799**, as also in the case of **Mithilesh Kumari Vs. State of U.P. and others (Writ Petition No. 30422 (MS) of 2019, decided on 05.11.2019), and Alok Kumar Vs. State of U.P. and others (Writ Petition No. 4098 (MS), decided on 12.07.2018),** in support of his

contention that subsequent allottee has no right to challenge his disengagement consequent upon the revival of license of fair price shop in favour of the original allottee in pursuance of the order passed in appeal or petition.

6. Submission of the petitioner's counsel is that the petitioner is not a subsequent allottee, as according to him, in the village the units being more than four thousand, one additional shop was created. Two shop keepers were given the allotment. One the petitioner and the other Rajesh Kumar. His submission is that the allotment in favour of the petitioner was with respect to the additional shop and not with respect to the shop of the original allottee Ram Bahal Verma and as such the petitioner is not the subsequent allottee.

7. I have considered the submissions advanced and perused the material placed on record.

8. To deal with the preliminary objection as also the rights of the petitioner to run the fair price shop on the death of the original allottee it is necessary to consider if the petitioner is subsequent aloottee, i.e., allotment in place of the original allottee consequent upon cancellation of his allotment, and the petitioner's allotment being subject to the proceedings pending against cancellation.

9. From the submissions advanced as also the perusal of Annexure No. 3 it is clear that the petitioner was allotted the fair price shop, Gram Panchayat Songaon, for the first time, vide order dated 11.11.2016 passed by the Sub Divisional Magistrate, Akbarpur, Ambedkar Nagar, which clearly mentioned that the petitioner's allotment was subject to the orders passed in appeal/ petition instituted in Court. In the writ petition also the petitioner has himself stated in para-24 that he was earlier given the license during cancellation of license of late Ram Bahal Verma. Paragraph-24 reads as under:

"24. That if the new appointments will made then both writ petitioners will become infructuous. It is absolutely suprising that when the claim of Mr. Vijai Bahadur Verma has been rejected then the petitioner become entitled to get the license of fair price shop as he was earlier given the license during cancellation of license of Late Ram Bahal Verma. But in absolute illegal manner & for extraneous consideration the claim of petitioner was rejected by the Opp. Party No. 4, which deserves to be given out rightly otherwise once the new license will be appointed then this petition and earlier petition filed by the petitioner will become infructuous."

10. Learned counsel for the petitioner has tried to emphasize that even as per the impugned order dated 12.02.2021, the number of units in the Gram Sabha exceeding 4000, two fair price shop keepers, the petitioner and Rajesh Kumar were appointed, but the Court finds from reading of the order dated 12.02.2021 that it mentions that on account of cancellation of the allotment of the original allottee Ram Bahal Verma against the vacancy caused, considering the number of units being more than 4000 two fair price shop keepers were appointed, therefore, even if two fair price shop keepers were appointed consequent upon cancellation of license of the original allotee, once the appeal of the original allottee was allowed with direction to restore his allotment, he had to be restored his allotment as it was prior to its cancellation and consequently the

allotments made in favour of the petitioner as also Rajesh Kumar were cancelled vide order dated 18.11.2017, Annexure No. 5.

11. In **Poonam (supra),** the Hon'ble Supreme Court in the following paragraph has held that it is the first allottee who could have continued in law, if his license would not have been cancelled. He was entitled in law to persecute his cause of action and restore his legal right. Restoration of the legal right is pivotal and the prime mover. The eclipse being over, he has to come back to the same position. His right gets revived and that revival of the right cannot be dented by the third party. Paragraph-53 of the case of **Poonam (supra)** reads as under:

"53. We have referred to the said decision in Ramesh Hirachand case [Ramesh Hirachand Kundanmal v. Municipal Corpn. of Greater Bombay, (1992) 2 SCC 524] in extenso as there is emphasis on curtailment of legal right. The question to be posed is whether there is curtailment or extinction of a legal right of the appellant. The writ petitioner before the High Court was trying to establish her right in an independent manner, that is, she has an independent legal right. It is extremely difficult to hold that she has an independent legal right. It was the first allottee who could have continued in law, if his licence would not have been cancelled. He was entitled in law to prosecute his cause of action and restore his legal right. Restoration of the legal right is pivotal and the prime mover. The eclipse being over, he has to come back to the same position. His right gets revived and that revival of the right cannot be dented by the third party."

12. In view of the aforesaid, the petitioner's status is that of a subsequent allottee which also came to an end on revival of the allotment of the original allottee.

13. After the death of the original allottee on 10.01.2021 the petitioner moved a representation to allow him to run the fair price shop again which has been rejected vide impugned order dated 12.02.2021. The petitioner's counsel could not show any right of the petitioner to run the fair price shop on the death of the original allottee. Merely because, the application of son of the deceased, original allottee, has been rejected, the petitioner would not become entitled to run the fair price shop of the deceased, original allottee of his own. If any vacancy is caused due to the death of the original allottee, the allotment will have to be made afresh, subject to the right of the legal heirs of the deceased to get allotment or to run the same fair price shop, under the statutory provisions or the government orders. The authorities may appoint two fair price shop keepers considering the number of units, in their decision, for which the direction has also been given in the order dated 12.02.2021 but on that count the petitioner cannot have any right to claim to run the fair price shop unless appointed with due process of law following the procedure as laid down in the relevant government orders.

14. In **Mithilesh Kumari (supra)** and **Alok Kumar (supra)** as also in the case of **Smt. Jasoda Vs. State of U.P. and others (Writ-C No. 30085 of 2018, decided on 28.05.2020),** it has been held that the right of the subsequent allottee is subject to the decision in appeal filed by the original

licensee. It is thus settled in law that a subsequent allottee has no right to continue upon setting aside of the order of cancellation of fair price shop of the original allottee. This Court is further of the considered view that the original allottee having continued till his death, the erstwhile subsequent allottee would have no right to claim to run the fair price shop of the original allottee merely on account of death of the original allottee.

15. As and when the process of allotment of the fair price shop due to death of the original allottee or/ and for an additional fair price shop, if any, takes place, it is open to the petitioner to participate in such process as per law.

16. The present writ petition is devoid of any merit and is hereby dismissed with the observations made hereinabove.

17. Learned counsel for the petitioner at this stage submits that the Writ Petition No. 817 (MS) of 2018 would be rendered infructuous in view of this judgment. The Writ Petition No. 817(MS) of 2018 has already been dismised in non prosecution on 28.03.2019. It is open to the petitioner to pursue his application for recall of the order dated 28.03.2019 and if that is allowed and that writ petition is restored the law will take its own course.

(2021)07ILR A642
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.07.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 13776 of 2021

Shiv Sagar ...Petitioner

Versus

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

Counsel for the Petitioner:
Satish Kumar Sharma

Counsel for the Respondents:
C.S.C.

Fair Price Shop License - Cancellation - Interim Relief during pendency of appeal - irreparable loss - Petitioner's application for interim relief & stay of the operation of the order cancelling the Fair Price Shop License rejected by appellate authority - Held - if during pendency of the Appeal filed by the petitioner (original allottee) any subsequent allotment is made on account of non-grant of interim relief by the Appellate Authority & the cancellation order remains in operation, no perpetual right would be created in subsequent allottee - on the Appeal of the original allottee being eventually allowed, he shall be entitled to get restoration of his fair price shop - original allottee shall not suffer any irreparable loss and his Appeal would not be rendered infructuous.

Dismissed. (E-4)

List of Cases cited:

1. Mool Chand Yadav & anr. Vs Raza Buland Sugar Company (1982) 3 SCC 484

2. Sukhpal Singh Vs St. of U.P. & ors. Special Appeal No.669/2018

3. Poonam Vs St. of U.P. & ors. 2016 (2) SCC 799

4. Ram Swarup & ors. Vs S.N. Maira & ors. 1999 1 SCC 738

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

(1) Heard the learned counsel for the petitioner.

(2) The petitioner is aggrieved by the order dated 01.07.2021 passed by the Joint Commissioner (Food), Lucknow Division, Lucknow, in so far as he has rejected the application for interim relief and staying the operation of the order passed by the S.D.M. cancelling the Fair Price Shop License of the petitioner.

(3) It has been submitted by the learned counsel for the petitioner that in the case of **Mool Chand Yadav and Another Vs. Raza Buland Sugar Company (1982) 3 SCC 484,** the Supreme Court observed that if the Appeal is admitted then interim order should ordinarily be granted staying the order impugned. In the said case the Supreme Court considering the right of a licensee/allottee/tenant aggrieved by the order of eviction passed by the Authorities. It observed that in case the Appeal is eventually allowed the appellant would be entitled to continue in possession. If the order impugned in the Appeal is not suspended the appellant would have to vacate the premises and hand over the possession to the respondents in obedience to the order passed by the lower court. Hence, judicial approach required that during the pendency of the Appeal, the operation of the order having serious civil consequence must be suspended. In case, the Appeal is admitted and eventually allowed but possession has been already handed over in pursuance of the order passed by the lower court then the Appeal itself would be rendered infructuous. To prevent irreparable loss to the appellant and rendering of the Appeal as infructuous at the time of final decision, interim orders should ordinarily be passed by the Appellate Court staying the operation of the order under challenge.

(4) The arguments raised by the learned counsel for the petitioner although substantiated by a judgment of the Hon'ble Supreme Court in the case of **Mool Chand Yadav and Another (Supra)** is misconceived in view of the fact that the legal possession with regard to the subsequent allottee or of one whose fair price shop card holders may be temporary attached is no longer res-integra. In Special Appeal No.669/2018 **(Sukhpal Singh Vs. State of U.P. and 3 Others)** the Division Bench of this Court in its judgment and order dated 03.08.2018 has observed that once the license of the original allottee stands restored, no legal right exists in the licensee to whom card holders may have been temporary attached.

"The legal position with regard to a subsequent allottee or of one to whose fair price shop card holders may be temporarily attached is no longer res integra. It has been authoritatively held that once the licence of the original allottee stands restored, no legal rights exist in the allottee to whom card holders may have been temporarily attached. The consistent view taken by this Court as well as the Supreme Court on the subject is that the original allottee alone is entitled to continue and that the interim arrangement made by the State-respondents during the period when his licence stood cancelled stands effaced. One may in this connection only refer to the following pertinent observations as entered by the Supreme Court in ***Poonam Vs. State of U.P. And Others; 2016 (2) SCC 799*** *to the following effect:*

"48. In the instant case, shop no.2 had become vacant. The appellant was allotted the shop, may be in the handicapped quota but such allotment is the resultant factor of the said shop falling vacant. The original allottee, that is the respondent, assailed his cancellation and

ultimately succeeded in appeal. We are not concerned with the fact that the appellant herein was allowed to put her stand in the appeal. She was neither a necessary nor a proper party. The appellate authority permitted her to participate but that neither changes the situation nor does it confer any legal status on her. She would have continued to hold the shop had the original allottee lost the appeal. She cannot assail the said order in a writ petition because she is not a necessary party. It is the State or its functionaries, who could have challenged the same in appeal. They have maintained sphinx like silence in that regard. Be that as it may, that would not confer any locus on the subsequent allottee to challenge the order passed in favour of the former allottee. She is a third party to the lis in this context. The decisions which we have referred to hereinbefore directly pertain to the concept of necessary party. The case of Kailash Chand Mahajan makes it absolutely clear. We have explained the authority in J.S. Yadav's case and opined that it has to rest on its own facts keeping in view the declaratory relief made therein, and further what has been stated therein cannot be regarded as a binding precedent for the proposition that in a case of removal or dismissal or termination, a subsequently appointed employee is a necessary party. The said principle shall apply on all fours to a fair price shop owner whose licence is cancelled. We may hasten to add, this concept will stand in contradistinction to a case where the land after having vested under any statute in the State have been distributed and possession handed over to different landless persons. It is because of such allotment and delivery of possession in their favour, that is required under the statute rights are created in favour of such allottees and, therefore, they are necessary parties as has been held in ***Ram Swarup & Ors. vs. S.N. Maira & Ors. 1999 1 SCC 738.*** *The subtle distinction has to be understood. It does not relate to a post or position which one holds in a fortuitous circumstance. It has nothing to do with a vacancy. The land of which possession is given and the landless persons who have received the Pattas and have remained in possession, they have a right to retain their possession. It will be an anarchical situation, if they are not impleaded as parties, whereas in a case which relates to a post or position or a vacancy, if he or she who holds the post because of the vacancy having arisen is allowed to be treated as a necessary party or allowed to assail the order, whereby the earlier post holder or allottee succeeds, it will only usher in the reverse situation" an anarchy in law.*

50. We have referred to the said decision in extenso as there is emphasis on curtailment of legal right. The question to be posed is whether there is curtailment or extinction of a legal right of the appellant. The writ petitioner before the High Court was trying to establish her right in an independent manner, that is, she has an independent legal right. It is extremely difficult to hold that she has an independent legal right. It was the first allottee who could have continued in law, if his licence would not have been cancelled. He was entitled in law to prosecute his cause of action and restore his legal right. Restoration of the legal right is pivotal and the prime mover. The eclipse being over, he has to come back to the same position. His right gets revived and that revival of the right cannot be dented by the third party."

(5) Even if during pendency of the Appeal filed by the petitioner before the Joint Commissioner (Food), Lucknow Division, Lucknow, any subsequent allotment is made on account of non-grant

of interim relief by the Appellate Authority, and the cancellation order passed by the S.D.M. remains in operation, no perpetual right would be created in such subsequent allottee. On the Appeal of the petitioner being eventually allowed, he shall be entitled to get restoration of his fair price shop. He shall not suffer any irreparable loss and his Appeal would not be rendered infructuous as was the case being considered by the Hon'ble Supreme Court in **Mool Chand Yadav Vs. Raja Buland Shahar Company Limited (Supra).**

(6) The writ petition is devoid of merits, it is **dismissed.**

(2021)07ILR A645
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.07.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE RAVI NATH TILHARI, J.

Misc. Bench No. 13838 of 2021

Matsya Jeevi Sahkari Samiti Ltd.
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ramesh Kumar Srivastava, Gufran Siddiqui

Counsel for the Respondents:
C.S.C.

U.P. Revenue Code Rules, 2016 - Lease of Tanks, Rule 57 - Appeal, Rule 59 - appeal prescribed is only against the *grant of lease* - "person aggrieved thereby" in Rule 59 refers to a person aggrieved by grant of lease - Cancellation of fishery lease under Rule 57 (14) - No appeal lies against an order of *cancellation of lease* (Para 5)

Dismissed. (E-4)

(Delivered by Hon'ble Rajan Roy, J.
&
Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Ramesh Kumar Srivastava, learned counsel for the petitioner and Sri Manjeev Shukla, learned Additional Chief Standing Counsel for the State.

2. By means of this writ petition under Article 226 of the Constitution of India, the petitioner is challenging an order of Sub Divisional Magistrate, Sandila, District Hardoi dated 25.01.2021, by which the lease granted to the petitioner for exercising fishery rights over a pond on Gata No. 614ka, 611Ka and 619Gha on 14.06.2016 for five years has been cancelled on the ground inter alia that the petitioner has sublet the pond to villagers. Secondly, it had been given possession of the pond earlier, thirdly the agreement was not got executed by the petitioner, fourthly, the lease consideration had not been deposited by the petitioner for the past three years.

3. The petitioner's counsel says that he was never given possession of the pond, whereas the impugned order as also the report at page 66 says that it was given, therefore, this is a disputed question of fact.

4. Considering the fact that it is a dispute arising out of a contract between the petitioner and opposite parties and it is not possible for the writ court under Article

226 of the Constitution of India to decide disputed questions of fact.

5. No appeal lies against an order of cancellation of such lease under Rule 59 of the U.P. Revenue Code Rules, 2016 and the appeal prescribed therein is only against the grant of such lease and it is to be filed within 30 days from the date of approval of such lease by the Sub Divisional Officer. Any order passed in appeal under Rule 59 is subject to the revisional powers under Section 210. There is no mention of any appeal against an order of cancellation of lease under Rule 57 (14) of the Rules, 2016. The use of the words "person aggrieved thereby" in Rule 59 refers to a person aggrieved by grant of lease and an appeal lies against such grant of lease, which is also evident from the fact that the period of limitation of 30 days is prescribed from the date of approval of such lease by the Sub Divisional Officer, which is not relevant in the case of cancellation of lease.

6. As an appeal does not lie against such cancellation as held here-in-above, we **dismiss** this petition for the reasons aforesaid, but with liberty to the petitioner to avail other remedies prescribed in law.

(2021)07ILR A646
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.07.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Misc. Bench No. 13935 of 2021

Brij Mohan Kushwaha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Akash Dikshit

Counsel for the Respondents:
G.A.

A. Indian Penal Code (45 of 1860) – Section 493 - Cohabitation caused by a man deceitfully inducing a belief of lawful marriage - Ingredients - there must be averment that the accused *deceitfully* made to believe the victim woman *that they have been lawfully married* - accused must induce a woman, who is not lawfully married to him, to believe that he is married to her and as a result of the aforesaid representation, the woman should believe that she was lawfully married to him and there should be cohabitation or sexual intercourse as a result of the deception - where the woman fully knew that no ceremony of marriage took place between then, there is no question of believing otherwise - mere promise to marry & having sexual relationship with the victim does not prove offence u/s 493 I.P.C. (Para 11,12,13)

B. Criminal Law - Criminal Procedure Code, 1973 – Section 198 - Prosecution for offences against marriage. - Scope - No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (which contains S. 493 I. P. C.) except upon a complaint made by some person aggrieved by the offence - F.I.R. cannot be registered for the offence u/s 493 I.P.C. - at the most, if complainant is aggrieved, she ought to have filed a complaint under Section 198 Cr.P.C. before the competent authority (Para 15)

Allowed. (E-4)

List of Cases cited:

1. Moideenkutty Haji & ors. Vs Kunhihoya & ors. AIR 1987 Kerala 184

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

1. The Court has convened through Video Conferencing.

2. Heard Shri Akash Dikshit, learned counsel for the petitioner, Shri S.N. Tilhari, learned AGA for the State-respondent nos.1 and 2 and Shri Anshuman, learned counsel who has put an appearance for the private respondent no.3 and perused the impugned F.I.R. as well as material brought on record.

3. Shri Anshuman, learned counsel is directed to file his power in the Registry of the Court today.

4. The instant writ petition has been filed by the petitioner, **Brij Mohan Kushwaha,** seeking to quash the First Information Report dated 17.07.2021 registered as Case Crime No. 193 of 2021, under Sections 493 IPC, Police Station Hazratganj, District- Lucknow.

5. Learned Counsel for the petitioner submits that as per the prosecution case, the petitioner was in love with the victim woman/respondent no.3 and with the promise to marry, the petitioner was living with victim/woman together with for seven years in one house but later on, the petitioner did not marry with her and as such, she was cheated by the petitioner and finding no other way, she lodged the impugned F.I.R. The case was registered under Section 493 of the Indian Penal Code.

6. Learned counsel for the petitioner has further submitted that the offence under Section 493 IPC is not made out even if the F.I.R. is gone through because there is nothing available in the F.I.R. that the petitioner deceitfully made her to believe that she has lawfully married to the petitioner for which one of the ingredients of the offence under Section 493 IPC is not made out. He further submitted that though Section 493 I.P.C. is a cognizable offence but the complainant ought to have filed a complaint under Section 198 Cr.P.C. before the competent Court as no F.I.R. can be registered for the offence under Section 493 I.P.C.

7. Learned counsel for the petitioner has further submitted that the petitioner and victim woman/respondent no.3 have entered into a written compromise dated 22.06.2021, a copy of which has been annexed as Annexure No.2 to the writ petition, wherein it has been stated that the parties have settled their dispute through mediation and now there is no dispute between them as all the disputes have been settled amicably through their mutual consent. In these backdrops, his submission is that the impugned F.I.R. be quashed.

8. Shri Anshuman, learned counsel for the private respondent No.3 could not dispute the aforesaid fact of compromise being entered into between the petitioner and respondent no.3/complainant.

9. Learned AGA, on the other hand, has argued that on the written complaint of the complainant/victim woman, the impugned F.I.R. was lodged on 17.07.2021, under Section 493 I.P.C. against the petitioner, but he does not dispute the provision of Section 198 Cr.P.C., which provides the complaint is to be filed for the offences mentioned under Chapter XX of I.P.C. and offence under Section 493 I.P.C. is barred in the aforesaid Chapter.

10. Having heard the submissions advanced by the learned Counsel for the

parties and gone through the record, we deem it appropriate to reproduce Section 493 I.P.C., which is as under :-

"*493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.* *Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

11. From perusal of the aforesaid Section 493 I.P.C., it transpires that in order to establish that a person has committed an offence under the said Section, it must be established that a person had deceitfully induced a belief to a woman, who is not lawfully married to him, that she is a lawfully married wife of that person and thereupon she should cohabit or should have had sexual intercourse with that person. Thus it is clear that the accused must induce a woman, who is not lawfully married to him, to believe that he is married to her and as a result of the aforesaid representation, the woman should believe that she was lawfully married to him and there should be cohabitation or sexual intercourse as a result of the deception.

12. The Full Bench of Kerala High Court in **Moideenkutty Haji and others v. Kunhihoya and others :** AIR 1987 Kerala 184 have observed as follows:

" xx x x The essence of the section is therefore the deception caused by a man on a woman in consequence of which she is led to believe that she is lawfully married to him while in fact they are not lawfully married. In order to establish deception there must first be allegations that the accused falsely induced her to believe that she is legally wedded to him. In the complaint in this case there is no allegation of any such deception of inducement. In a case where both the man and woman fully knew that they are not husband and wife and no ceremony of marriage took place between then, there is no question of one of them believing otherwise. Even if the entire allegations in the complaint are taken as true, the section is not being attracted. The allegation is that though they are not husband and wife, they had sexual union during late hours in the night for a pretty long time. What is alleged in the complaint is only a promise to marry in future. The strange part of it is, there is the further allegation that one day they went for registering the marriage, but the petitioner ran away from there and even thereafter she was submitting herself to him regularly for liaison. The facts cannot at any rate attract Section 493, IPC."

13. Thus, it appears that in order to prove the offence under Section 493 IPC, there must be averment that the accused deceitfully made to believe the victim woman that they have been lawfully married. In the instant case, the petitioner has not married to the respondent No.3/complainant. If such ingredient is not proved, mere sexual relationship with the petitioner does not prove any offence under Section 493 I.P.C.

14. From perusal of the impugned F.I.R., it transpires that nothing is revealed except the petitioner promising to marry with the complainant/respondent no.3 and this is not sufficient to prove the ingredients of the offence under Section 493 IPC. Hence, the ingredients of the offence under Section 493 I.P.C. is not

made out in the F.I.R., which is impugned in the instant writ petition.

15. For the aforesaid reasons and also considering the fact that the parties have entered into compromise vide compromise dated 22.06.2021 (Annexure No. 2), we find substance in the submission of the learned Counsel for the petitioner that F.I.R. cannot be registered for the offence under Section 493 I.P.C. as at the most, if the respondent no.3/complainant is aggrieved, she ought to have filed a complaint under Section 198 Cr.P.C. before the competent authority. Even otherwise, we are of the opinion that impugned FIR is not sustainable and the same is liable to be quashed as in the impugned F.I.R., there is no ingredients, which attracts the provisions of Section 493 I.P.C., hence the same is liable to be quashed.

16. Accordingly, we **allow** the instant writ petition and quash the impugned F.I.R. dated 17.07.2020 contained in Annexure no.1 to the writ petition.

17. The party shall file computer generated copy of order downloaded from the official website of High Court Allahabad, self attested by it alongwith a self attested identity proof of the said person(s) (preferably Aadhar Card) mentioning the mobile number(s) to which the said Aadhar Card is linked, before the concerned Court/Authority/Official.

18. The concerned Court/Authority/Official shall verify the authenticity of the computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)07ILR A649
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.07.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE RAVI NATH TILHARI, J.

Misc. Bench No. 14587 of 2021

Balaji Catters & Party, Hardoi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ram Ji Trivedi

Counsel for the Respondents:
C.S.C.

Constitution of India - Art.226 - Contractual matters - Writ petition maintainability - in the matters of contract where the petitioner seeks enforcement of obligation on the part of the State to pay the bills *amount admitted by the State*, the writ petition is maintainable - but where petitioner claim *requires adjudication* by making enquiry into facts and on evidence, then the writ petition is not the proper remedy (Para 8, 9)

Petitioner, engaged in catering work - he did catering work & submitted bills for payment however, payment not made - Held - petitioner has not been able to demonstrate that it is a case of admitted liability of the amount under the bills submitted before the opposite parties - Merely because of the initials of the accountant on some bills it cannot be a case for admitted liability (Para 6)

Dismissed. (E-4)

List of Cases cited :

1. St. of Kerala & ors. Vs T. V. Anil, AIR 2002 Ker 160(F.B.)

2. Life Insurance Corporation of India & ors. Vs Smt. Asha Goyal (2001) 2 SCC 160

(Delivered by Hon'ble R.N. Tilhari, J.)

1. Heard Shri Ram Ji Trivedi, the learned counsel for the petitioner and the learned Standing Counsel for the State opposite parties.

2. The petitioner has filed this writ petition seeking a writ of mandamus directing the opposite party Nos. 2 and 3, i.e., District Magistrate, Hardoi and the District Panchayat Raj Officer, Hardoi respectively, to release the admitted and verified amount of Rs. 6,87,800/- to the petitioner with interest thereon from the date of entitlement of payment of admitted amount till the date of actual payment.

3. Learned counsel for the petitioner has submitted that the petitioner is engaged in catering work. His quotations for providing catering services were accepted in respect of Awasiya C.L.T.S. Training Programme with effect from 06.10.2017 to 10.10.2017, 26.10.2017 to 30.10.2017, 11.12.2017 and 07.03.2018 under Swachh Bharat Mission Scheme(Rural). The petitioner did the catering work and submitted bills for payment from time to time aggregating to Rs. 6,87,800/-, but the payment under those bills has not been made. He submits that the liability for payment of the amount was admitted by the opposite parties as according to him the bills were verified by the Accountant and consequently the non-payment is not justified.

4. Learned counsel for the petitioner has placed reliance on the Full Bench judgment of Kerala High Court in the case of **State of Kerala and others Vs. T. V. Anil, AIR 2002 Ker 160(F.B.)** to submit that in the matters of contract where the petitioner seeks enforcement of obligation on the part of the State to pay the bills amount admitted by the State, the writ petition is maintainable.

5. We have considered the submissions advanced and perused the material on record.

6. From the submissions advanced by the learned counsel for the petitioner as also from perusal of the record of the petition what we find is that the petitioner has not been able to demonstrate that it is a case of admitted liability of the amount under the bills submitted before the opposite parties. By the Letter No. 3402/Pan.-7/Lekhakar/Sa.Ka./2018-19 dated 27.09.2018 of the District Panchayat Raj Officer, Hardoi it was informed to the Prabhari Adhikri (Complaint), Collectorate, Hardoi (Annexure-9) that the file relating to payment of catering charges was sent to the Senior Treasury Officer, Hardoi to make inquiry under the direction of the District Magistrate, Hardoi. By letter No. 4089/Pan.-7/PGPortal/2019-20 dated 30.11.2019, Annexure-8 of the District Panchayat Raj Officer, the petitioner was directed to submit evidence and the work order, etc., to enable to take further action. Nothing has been brought on record to show that the petitioner's claim has been adjudicated upon or admitted by the opposite parties. Merely because of the initials of the accountant on some bills as alleged by the petitioner, we cannot consider it to be a case for admitted liability in view of the above letters dated 27.09.2018 and 30.11.2019 as also nothing has been shown to the effect that the

accountant is the competent authority to admit the claim.

7. The claim as raised requires adjudication by making enquiry into facts and on evidence, for which the writ petition is not the proper remedy. We are not observing that the petitioner is or is not entitled for payment but on the basis of the material placed before us, it could not be shown to be a case of admitted liability.

8. In the case of **Life Insurance Corporation of India and others Vs. Smt. Asha Goyal, (2001) 2 SCC 160,** the Hon'ble Apex Court has held 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 Hon'ble Apex Court has disapproved of a High Court entertaining a petition under Article 226 of the Constitution of India in the 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 enquiry into facts.

9. In **T. V. Anil (supra)** cited by the petitioner's counsel, it has been held that it cannot be said in absolute terms that a writ petition is not maintainable in contractual matters including where the contractors seek enforcement of the obligation on the part of the State to pay the bill amounts admitted by the State. Paragraph-18 of the judgment reads as under:

18. Guided by the salutary principles in the subject-matter and as particularly laid down by the Supreme Court, and applying the same on the issue referred to us, it has to be held that it cannot be said in absolute terms that a writ petition is not maintainable in contractual matters including where the Contractors seek enforcement of the obligation on the part of the State to pay the bill amounts admitted by the State. Though couched in different terms, all the decisions referred by us above lead to the said conclusion. All the activities of the State are in public interest and for public good. There is public law element in contracts where State is a party, and it naturally follows that there is public duty. And above all, any State action is liable to be tested on the touchstone of Article 14 of the Constitution of India. Essentially, the only limitation of the High Court is the self-imposed restriction. A few relevant factors in exercising the self-imposed limitation under Article 226 of the Constitution of India in the matter of payment of Contractors' bills are :

(1) When there is no disputed question of fact requiring adjudication on detailed evidence.

(2) When no alternate form is provided in the resolution of any disputes pertaining to a contract.

(3) When claim by one party is not contested by the other and the contest does not require adjudication requiring detailed enquiry into facts.

10. There is no dispute on the above proposition of law, but in the present case, what we find is that there is nothing on record to show the admitted liability of the State opposite parties for payment of the bills. In **T. V. Anil(supra)** as is evident from para-19 thereof, there was no dispute on the factual position and the State therein

had admitted its liability to pay the bill amount.

11. We are of the considered view that the writ petition is not the proper remedy, which is hereby dismissed on this ground alone but, leaving it open to the petitioner to approach the District Magistrate, Hardoi or/ and the District Panchayat Raj Officer, Hardoi, which had issued letter dated 30.11.2019 to the petitioner calling upon him to submit documentary proof of catering, etc., for redressal of his grievances, upon which the competent authority shall take final decision in the matter, if the matter is still pending, or the petitioner may take recourse to such other remedy as may be open to him under law if so advised.

(2021)07ILR A652
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.06.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DEEPAK VERMA, J.

Income Tax Appeal No. 103 of 2017

Daya Nand Pushpa Devi Charitable Trust
...Appellant
Versus
Addl. Commissioner Income Tax.
...Respondent

Counsel for the Appellant:
Sri Abhinav Mehrotra, Sri Vivek Pratap Singh, Sri Suresh Kumar Maurya

Counsel for the Respondents:
Sri Bhagat Ji Agarwal, Sri Praveen Kumar, S.C.

(a) Income Tax - Charitable Purpose - The Income Tax Act, 1961: Section 2(13), 2(15), 11(4),11(4A), 12-A - The principle activity of the petitioner is pre-dominantly academic and charging of fees for the accommodation provided to the students admitted in the dental education course, is minor, subsidiary and subservient to the principal activity and is an integral part of its academic activity. It cannot be said that the assessee's principal activity is doing "business" in terms of sub-section (4A) of Section 11 and its activity of maintaining hostel and charging fees does not fall within the meaning of "business" under Section 2(13) of the Act. Therefore, **there is no requirement of maintaining separate books of accounts with regard to such activity for seeking benefit of exemption under Section 11(1) of the Act.**(Paras 38,39)

On applying the theory of dominant purpose is applicable in the facts of the present case where it can be safely concluded that the surplus, if any, generated out of the activity of maintaining halls and residents for the students being an integral part of the main object of education, was liable to be treated as income from the property held by the trust wholly for charitable purposes and was, therefore, deductible from the total income of the trust by granting exemption under Section 11 of the Act. (Para 41)

Appeal Allowed. (E-8)

List of Cases cited:-

1. Indian Institute of Technology Vs St. of U.P. 1976 (38) STC 428 (followed)

2. Swadeshi Cotton Mills Vs Sales Tax Officer AIR 1965 All 86 (followed)

3. Mahatma Gandhi Kashi Vidyapeeth Vs St. of U.P. & ors. 2013 (5) ADJ 85 (followed)

4. University of Delhi & anr. Vs Ram Nath & ors. AIR 1963 SC 1873 (followed)

5. Commissioner of Sales Tax Vs Sai Publication Fund 2002 (4) SCC 57

6. T.M.A. Pai Foundation & ors.Vs St. of Karn. & ors.AIR 2003 SC 355

7. Commissioner of Income Tax Vs Tamil Nadu Dairy Development Corporation Ltd. 1995 (213) ITR 535

8. Additional Commissioner of Income Tax Vs Ram Kirpal Tripathi 1980 (125) ITR 408

9. Assistant Commissioner of Income Tax Vs Thanthi Trust 2001 (247) ITR 785

10. Commissioner of Sales Tax. U.P. Vs Modi Sugar Mills Ltd. AIR 1961 SC 1047

11. V.V.S. Sugars Vs Govt. of A.P. & ors.1999 (4) SCC 192

12. Commissioner of Income Tax, Patiala Vs M/s Shahzada Nand & sons & ors.AIR 1966 SCC 1342

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.
&
Hon'ble Deepak Verma, J.)

1. Heard Sri Abhinav Mehrotra learned counsel for the appellant and Sri Praveen Kumar learned Advocate for the revenue.

2. This is an Income Tax Appeal arising out of the order dated 21.09.2016 passed by the Income Tax Tribunal, Delhi Bench, Delhi in I.T.A No.4238/DEL/2015 whereby the appellate order of CIT(A) and the assessment order dated 12.03.2013 passed by the Additional Commissioner of Income Tax, Range-1, Ghaziabad had been affirmed. The appellant Daya Nand Pushpa Devi Charitable Trust, Ghaziabad, U.P. (hereinafter referred as "Assessee") is a registered trust created by the trust deed dated 05.09.1988. As per the objects of the trust, it was created for carrying out the cause of public charity within India; few of the objects stated in the trust deed are as under:-

(ii)"To promote education in commerce, Science, Art, Engineering, Technical subjects, Management Studies, Vocational or Professional subjects and to Establish and Maintain or give aid to Institution or Institutions:-

(a) For giving training in commerce, Trade and Industry and vocational lines and other professions of General Importance.

(b) For imparting education to children boys, Girls and to Men and Women."

(ix) To form, assist, support, establish and maintain libraries and reading Room and to establish and maintain Boarding Houses and Hostels and assist such institutions."

3. The trust is running a Dental College in the name & style of Harsharan Dass Dental College at Ghaziabad. The hostel for residence of the students admitted in the said college is also being run and managed by the trust. The trust claimed that all its activities are covered under Section 2 (15) of the Income Tax Act' 1961(In short referred to as the "Act"); and had applied for the registration under Section 12-A of the Income Tax Act, which had been duly granted by the Commissioner, Income Tax, Meerut vide order C No. 40(40)/Registration /GZB/9902000/CIB/1960 dated 02.05.2000.

4. It has been brought on the record that under the directives of the Dental Council of India by the Gazette notification dated 25.07.2007, it is mandatory for the institutions admitting students in the dental education course (BDS) to provide hostel accommodation, based on the number of admissions, to all the boys and girls in the dental college campus itself. A copy of the said notification is appended with the memo of appeal and the same had also been filed

before the Tribunal along with other papers. The issue herein is with regard to the return of income filed by the trust for the assessment year 2010-11 wherein the assessee had declared its net income as"NIL'. The case was selected under compulsory scrutiny and notices were issued to the assessee. The assessment order records that the books of account, bills and vouchers etc. maintained by the assessee had been produced in reply to the notice and the questionnaire issued by the department/revenue. After providing due opportunity to the assessee, the Assessing Officer concluded that the hostel activities of the trust is separable from its educational activities and the way the hostel and mess activities are being carried on they would fall within the meaning of "business"under section 2(13) and can not be treated as "Charitable purposes' under Section 2(15) of the Income Tax Act. The benefit of Section 11 of the Act cannot be given to the assessee, in as much as, it has not maintained separate books of accounts which is one of the pre-conditions mentioned in Section 11(4A) for grant of such benefits. It was concluded in the assessment order that the total hostel receipt of the trust was excessively high and the receipt and payment details furnished by the assessee showing net deficit of 68,198/- was nothing but a cooked up story. It was concluded that the expenditures towards generator, electricity and security were also excessively high. As per the covered area of the hostel building as compared to the whole campus only 10% of total expenses could be allowed. The assessing officer,thus, held that all the figures in the ledger filed by the assessee were presumptive, without any justification and unsupported by evidence. As regards the expenses towards salary, the Assessing Officer did not accept the figures shown in the ledger observing that the work of a Hostel Warden is only a part time job. While concluding that only special allowance is to be given to a warden, the amount shown as expenditure for salary of four wardens of the hostel was disallowed.

5. Similarly, the expenditures shown towards the payment of salary to the caretaker, driver were also disallowed. Income from the hostel activity in view of the section 11(4A) of the Income Tax Act was, thus, computed as under:-

"Total Hostel Fees received during the year Rs.66,20,000/-
Expenditure claimed Rs.66,88,198/-
Less: Expenditure disallowed as discussed above Rs. 34,88,089/-
Allowable Expenditure Rs.32,00,109/- Rs.32,00,109/-
Net surplus as calculated u/s 11 (4A) Rs. 34,19,891"

6. The net surplus income arrived at by the Assessing Officer after deduction of allowable expenditure was subjected to tax at the appropriate rate under Section 11 (4A) of the Act. With regard to the other income of the trust, it was observed that it will continue to enjoy exemption under Section 11 of the Act. The assessment order had been affirmed in the appeals both by the CIT(A) and the Tribunal.

7. The appeal had been admitted on the substantial questions of law. During the course of hearing, the substantial question of law has been re-framed as under:-

"(A) Whether under the provisions of Section 11(4A), the Hostel activity of a charitable institution engaged in imparting education in a residential institution such as the assessee will be included in the expression "business" in the said subsection; and the income generated from such Hostel activity can be said to be business income so as to attract the pre-conditions of the said sub-

section in a claim of exemption under Section 11 (1) of the Act?

8. Learned counsel for the appellant /assessee argued that the assessee being under statutory obligation to maintain a hostel for the students admitted in the institution, its activity of maintaining the hostel by charging hostel fees is an integral part of the objects of the trust, which is essentially charitable in nature being education. Even if the collected hostel fees has created some surplus as per the analysis of the Assessing Officer but that surplus by itself cannot be said to be profit and gains of a business within the meaning of Section 11(4A) of the Act, as the hostel activity is not independent to the main object of imparting education (Dental education). The benefit of Section 11 of the Act, therefore, has to be granted to the assessee for exemption of the income from liability of the Income Tax under the Act. The Assessing Officer on irrelevant considerations had rejected the details of receipt and payment account furnished by the assessee in the form of a ledger. The findings returned by the Assessing Officer of the hostel fees charged by the assessee being excessive is based on the comparison of the expenditures claimed by some other society namely Laksh Educational Society located in Ghaziabad. The Assessing Officer had erred in holding that the hostel fee charged by the assessee is more than the market rate or the fee charged by other institutions, private or government. The submission is that such a comparison was not permissible while dealing with the claim of exemption under Section 11 of the Income Tax Act. The contention is that the assessee is giving hostel facility to only those students who are admitted in the dental college. The provision of hostel facility is for advancement of education and also in order to meet the statutory requirement and as such it cannot be said to be an activity having limbs of business such as carrying on in an organised manner with the motive of earning profit so as to fall within the meaning of "business" under the Act.

9. It is vehemently argued that in the facts and circumstances of the case, sub-section (4A) of Section 11 of the Act has no application and, therefore, the requirement of the said provision to maintain separate books of accounts would be wholly inapplicable. The incidental activity of the trust in providing hostel facility to its students could not be construed as a business unless intention to do independent business or any element of business such as continuous activity with profit motive are present in the same. Since the hostel facility cannot be constituted as an activity independent to the main object of imparting dental education treating the same as business within the meaning of Section 11 (4A) was erroneous.

10. Reliance is placed on the decision of this Court in **Indian Institute of Technology Vs. State of U.P.1** to submit that the division bench of this Court taking note of the principal activity of the petitioner therein had held that running of visitor's hostel to provide temporary accommodation to research scholars, research fellows students and teachers cannot be said to be the activity which can be said to be business in a commercial way. Rather the principal activity of the petitioner institute being academic or charitable, the sale of food stuff in the visitors' hostel run by it was minor, subsidiary and incidental to the principal activity and being an integral part of its academic activity, the petitioner's institute cannot be dubbed as a dealer within the meaning of Section 2(c) of the U.P. Sales Tax Act. It was,thus, held that the Sales Tax Officer had no jurisdiction to initiate proceeding for levy of sales tax with regard to the said activity.

11. Learned counsel for the appellant had further invited the attention of the Court

to a decision of this Court in **Swadeshi Cotton Mills Vs. Sales Tax Officer2** to urge that in the similar situation, sale of food and refreshments in the dining hall of the Aligarh Muslim University which was subjected to sales tax, was held to be a non-commercial activity. It was held therein that the supply of food to students in the dining hall was incidental to the main academic activity of the University as the dining hall service was an integral part of the hostel facility while imparting education to the students.

12. He further placed the Division Bench judgement of this Court in **Mahatma Gandhi Kashi Vidyapeeth Vs. State of U.P. & others3** wherein question was as to whether the petitioner therein was a dealer within the meaning of U.P. Vat Act' 2008 and was carrying on business. The term business in the context of Section 2(h) of the U.P. Vat Act' 2008 was examined by the Division Bench and taking note of the decisions of the Apex Court in the **University of Delhi and another Vs. Ram Nath and others4, Commissioner of Sales Tax Vs. Sai Publication Fund5,** it was held that if the main activity of the assessee concerned was not business, any business activity incidental or ancillary thereto which is infinitesimal or small part of the main activity cannot bring it within the scope of the term 'dealer'. It was, thus, held that if the main activity is not commercial then any other activity which forms integral part of the non-commercial activity would also not be the business so as to include the person carrying on such activity in the definition of dealer. In the facts and circumstances of the said case, it was held that the main activity of the petitioner therein was education and the activity of printing admission form and realising price for the same will not bring it into the ambit of the term 'dealer' as defined under the Act.

13. The decision of the Apex Court in **Commissioner of Sales Tax5** was placed before the Court to assert that the test is that when the transactions which are related to the main activity are only a infinitesimal or small part of the main activity and if the main activity is not business, then the connected, incidental or ancillary activity of sale would not normally amount to business unless an independent intention to conduct "business" in these connected incidental or ancillary activity is established by the revenue. It was clarified therein that in case where the connected incidental transactions are so high so as to render the main activity infinitesimal or very small, then of-course the case would fall under the category of 'business' within the meaning of the Act.The decision of this Court in **Swadeshi Cotton Mills2, Indian Institute of Technology1** and of Apex Court in the University of Delhi4 were taken note of by the Apex Court while taking the aforesaid view.

14. With the help of these decisions, it was vehemently argued by the learned counsel for the appellant that in the instant case looking to the objects of the trust and the statutory mandate for establishment of boarding houses for the residence of the student admitted in the institute, the hostel activity of the trust cannot be said to be business activity so as to bring the case of the assessee within the scope of Section 11 (4A) of the Act. As the said provision is not applicable, the computation made by the Assessing Officer in arriving net surplus taxable income from the hostel fee receipt is erroneous. The exemption under Section 11 of the Act was available to the assessee in view of the Section 2(15) of the Act

which include "education"within the meaning of "charitable purposes".

15. Sri Praveen Kumar learned counsel for the revenue, on the other hand, argued that the word "business" in Section 11 (4A) of the Act has been used in the context of any activity which is undertaken by a trust or an institution, such activity is covered under the definition of the word "business"in Section 2 (13) of the Act as the definition being inclusive, the expression business has to be interpreted it its widest amplitude. The Webster Encyclopedic Unabridged Dictionary of the English Language defines "business" as an occupation, profession or trade and, thus, any kind of occupation which may or may not be profitable in nature is a "business". The Apex Court in the case of **T.M.A. Pai Foundation & others Vs. State of Karnataka & others6** has held that education falls within the expression "occupation" employed under Article19(1) (g).The private educational institutions' right to establish and administer its institutions has thus been recognised as a fundamental right guaranteed under Article 19 (1)(g) of the Constitution of India. It is, thus, argued that even running of an educational institution is business though under the provision of the Income Tax Act its income has been exempted treating it to be part of charitable purposes. It was, therefore, incumbent on the assessee to maintain separate books of accounts and produce it before the Assessing Authority for the purpose of computation of benefits under Section 11 of the Act. Reliance is placed on the decisions of **Commissioner of Income Tax Vs. Tamil Nadu Dairy Development Corporation Ltd.7 and Additional Commissioner of Income Tax Vs. Ram Kirpal Tripathi8** to submit that the profit motive of the assessee is not a pre-condition for treating its as activity as business. The opinion of the revenue that the income of the trust derived from the hostel run by is from a commercial activity is supported by the material on record. It is, thus, argued that even if the hostel activity is incidental to the objects of the trust, compliance of the second condition of maintaining separate books of accounts for claiming exemption under Section 11 of the Act was mandatory.

16. Having heard learned counsels for the parties and perused the record. The undisputed facts of the case are that the assessee which is a trust has been registered as charitable trust by the Sub-Registrar, Ghaziabad. The trust has also been recognised and registered under the Income Tax Act as an institution whose objects are charitable in nature. The registration certificate has been issued by the competent Commissioner under Section 12 (A) of the Act and the same is operative till date. The trust runs the above named dental college which is a residential institution. As per the statutory scheme, all the students of the institutions have to necessarily reside in the halls of residence or hostel built by the institute within its campus.

17. In pursuance of this statutory obligation imposed by the Dental Council of India, the assessee is running hostel for residence of the students (both boys and girls) admitted in the institute. The hostel fees is charged from the students which includes mess fee. Section 2(15) of the Act defines "Charitable Purposes" as :-

"2(15)Charitable purpose" includes relief of the poor, education, yoga, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places

or objects of artistic or historic interest, and the advancement of any other object of general public utility:

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity, unless

(i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and

(ii) the aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent. of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year;"

Section 2(13) defines that "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture;

18. Section 11 of the Act relates to the income from property held for charitable or religious purposes which provides that :-

*'11. **Income from property held for charitable or religious purposes.** (1) Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income*

(a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of fifteen per cent. of the income from such property;

(b) income derived from property held under trust in part only for such purposes, the trust having been created before the commencement of this Act, to the extent to which such income is applied to such purposes in India; and, where any such income is finally set apart for application to such purposes in India, to the extent to which the income so set apart is not in excess of 4 fifteen per cent. of the income from such property;

(c) Income derived from property held under trust

(i) created on or after the 1st day of April, 1952, for a charitable purpose which tends to promote international welfare in which India is interested, to the extent to which such income is applied to such purposes outside India, and

(ii) for charitable or religious purposes, created before the 1st day of April, 1952, to the extent to which such income is applied to such purposes outside India:

Provided that the Board, by general or special order, has directed in either case that it shall not be included in the total income of the person in receipt of such income;

(d) income in the form of voluntary contributions made with a specific direction that they shall form part of the corpus of the trust or institution.

Explanation1. For the purposes of clauses (a) and (b), (1) in computing the fifteen per cent. of the income which may be accumulated or set apart, any such voluntary contributions as are referred to in section 12 shall be deemed to be part of the income;.

19. Sub-section (4) of Section 11 says that:-

"For the purposes of this section property held under trust includes a business undertaking so held, and where a claim is made that the income of any such undertaking shall not be included in the total income of the persons in receipt thereof, the Assessing Officer shall have power to determine the income of such undertaking in accordance with the provisions of this Act relating to assessment; and where any income so determined is in excess of the income as shown in the accounts of the undertaking, such excess shall be deemed to be applied to purposes other than charitable or religious purposes."

20. Sub-section (4-A) provides as under:-

"(4-A) Sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the trust or, as the case may be, institution, and separate books of account are maintained by such trust or institution in respect of such business."

21. A careful reading of the above provisions shows that under the Act the "business" means to include any adventure or concern in the nature of trade, commerce or manufacture whereas the words "charitable purposes" include "education". The word "education" in Section 2(15) of the Act is not qualified by any restrictions. It has been used in its widest amplitude so as to include education of all level to all classes of the society or category. Clearly, it can not been confined to any section or class of the society or any particular type or level of Education. Meaning thereby any activity which includes or relates to education would be for charitable purposes within the meaning of Section 2(15) of the Act. Section 11(1)(a) provides that the income derived from property held the trust, wholly for charitable or religious purposes shall be exempted from the total income to the extent to which such income is applied for such purposes and where any such income is accumulated or set apart for application to such purposes, to the extent to which the income so accumulated or set apart is not in excess of 15% of the income from such property. The assessee herein is seeking benefit of Section 11(1)(a) of the Act with the assertion that the income derived from the hostel facility, a property held under the trust, had been wholly utilised for charitable purposes for imparting education and hence the same has to be excluded from the total income and the Assessing Officer cannot treat the surplus, if any, on account of the hostel receipt as taxable income by applying the conditions of Section 11(4A) of the Act.

22. It is argued that the hostel income being subservient to the main object of the education, the Assessing Officer has gravely erred in treating the same as business income for disallowing the exemptions under Section 11(1) of the Act.

23. Sub-section (4A) of Section 11 is the bone of contention between the parties. A careful reading of the said provision indicates that it talks of any income of the trust or an institution which is in the nature

of "profit and gains of business" and states that sub-section (1) of Section 11 would not apply unless two conditions mentioned therein are fulfilled, i.e (i) such business is incidental to the attainment of the objectives of the trust;(ii) and separate books of accounts are maintained by such trust or institutions in respect of such business.

24. Sub-section (4) of Section 11 states that for the purpose of Section 11 "property held under the trust" includes "business undertaking so held".

25. The crucial word in sub-section (4A) is "business" which has to be understood as per the meaning provided under Section 2(13) of the Act. The "business" in sub-section (4A) can mean any activity including any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce, or manufacture. A business undertaking of the trust may also be included as property held under the trust in view of the sub-section (4) of Section 11. But for getting the benefit of sub-section (1) of Section 11, the income derived from property held under the trust whether wholly or in part, must be used for charitable or religious purposes. Under sub-section (4A) of Section 11, income of any business of the trust in the nature of profit and gains of such business can be exempted under sub-section (1) of Section 11 only if two pre-conditions mentioned in the said sub-section are fulfilled. The first condition is that the business must be incidental to the attainment of objectives of the trust.

26. While considering the scope of sub-section (4A) of Section 11 which came into effect by the Finance (No.2) Act 1991 w.e.f. 01.04.1992, in **Assistant Commissioner of Income Tax Vs. Thanthi Trust9**, the Apex Court had noted that the substituted sub-section (4A) gave trust and institution a wider latitude than the earlier sub-section (4A). In the wide language of sub-section (4A),a trust is entitled to the benefit of Section 11, if it utilises the income of its business for the purpose of achieving its charitable objects. In this way, the trust is allowed to create a corpus by indulging in business activity to feed the charity. As the provision stands, all that is required for the business income of the trust or institutions to be exempted from the tax is that the business should be incidental to the attainment of the objectives of the trust or institution. A business whose income is utilised by the trust or the institution for the purpose of achieving the objectives of the trust or the institutions, is, surely, a business which is incidental to the attainment of the objectives of the trust. It was, thus, held that the substituted sub-section (4A) is more beneficial to a trust or institution than the original provision.

27. It can, thus, be seen that sub-section (4A) of Section 11 presupposes a business venture of the trust or institution which is though independent to its main activity but incidental to the attainment of the objectives of the trust. The "business" as mentioned in the said sub-section can be an adventure or concern in the nature of trade, commerce or manufacture.

28. Having held that the applicability of the sub-section (4A) of Section 11 presupposes income from a business, being profit and gains of the business, the test applied is whether the activity which is pursued is integral or

subservient to the dominant object or is independent /ancillary/incidental to the main object or forms a separate activity in itself. The issue whether the institution is hit by sub-section (4A) of Section 11 of the Act will essentially depend upon the individual facts of the case of the institutions where considering the nature of the individual activity, it will have to be tested whether the same forms incidental, ancillary, connected activity (ies) and whether the same was carried out pre-dominantly with the profit motive in the nature of trade, commerce etc.

29. The question, therefore, would be whether the hostel activity of the trust which is imparting dental education in the institution established by it is a business activity incidental to the attainment of its objectives or it is an activity which is an integral and inseparable part of the main activity(education) carried on by the assessee. The determinative test shall be the theory of dominant purpose which has all through the years, been upheld to be the determining factor laying down whether the Institution is Charitable in nature or not.

30. In the instant case, however, there is no dispute about the nature of the institution/trust being charitable in nature. The main activity of the trust being education is covered within the meaning of 'Charitable purposes' defined under Section 2(15) and it has been registered under Section 12-A of the Income Tax Act. In our considered opinion, running of hostel constitutes an integral and inseparable part of the academic activities carried on by the assessee and it is not possible to isolate or insulate it from the main activity and treat as business within the meaning of Section11(4A).

31. It has to be noticed that the hostel is being run in discharge of a statutory obligation as institution in question cannot impart dental education without providing for the hostel. There is no dispute about the fact that the assessee has provided hostel and mess facilities only to those students who are attached with the educational institution. It is not the case of the revenue that the income generated out of the hostel fees is not used for the educational purposes. Only reason given by the Assessing Officer to deny exemption under sub-section (11)(1) of the Income Tax Act is that the income from the hostel fee is excessive and disproportionate to the income derived by other educational institutions which indulge in similar activity i.e. maintaining hostel for the students admitted in the institution, whether government or private. According to us, such a comparison was not open, in as much as, whether a venture or activity of the assessee is a business venture separable from its main activity and whether such activity constitutes an integral and inseparable part of the main activity, are matters to be decided on the facts and circumstances of the individual case,i.e. looking to the nature of establishment and its activities. The issues as to whether the fee charged is excessive or what should be the reasonable amount of hostel fee are wholly extraneous to the dominant purpose test. The hostel fee charged would obviously depend upon the facility provided to the students.

32. Having regard to the object and purpose for which the institution in question has been established by the trust and the mandate of the Dental Council of

India in the gazette notification of the year 2007, we find that it is one of the primary duties and objects of the trust to establish, maintain and managed halls and hostel for the residence of the students studying in the institutions established by it. The institution in question being a residential institution, its activity in maintaining the hostel by charging hostel fee (for its maintenance and providing mess facility) is an integral part of the main activity "education" of the assessee. The hostel and mess facility subserves the main object and purpose of the trust and and are inseparable part of its academic activity. It would be unrealistic to segregate the said activity and treat the same as business. A clear distinction is to be made between the activity which is though ancillary or incidental to the main activity but a distinct activity and the one which is an integral or incidental part of the main activity as one single activity.

33. Such a distinction has been drawn by the Division bench of this Court in **Swadeshi Cotton Mills2** wherein this Court was dealing with the batch of cases where different bodies were running canteens. One of the cases was concerned with the Aligarh Muslim University which was maintaining dining halls where it was serving food and refreshments to its resident students. Referring to the observations of the Apex Court in **University of Delhi4** It was held therein that it was incongruous to call educational activities of the University same as "carrying on business". The activity of serving food in the dining hall was a minor part of the overall activity of the University. The dining hall service was held to be an integral part of the university while imparting education to the students. It was observed that the dining hall service is indissolubly blended with, and is an inseparable component of educational activity of the university. On the said reason, it was held that the activity of the Aligarh Muslim University of providing food to its residential students is such a minor, subordinate and insignificant part that it would be unreasonable to allow this work to lend a business colour to the university so as to make it an institution carrying on the business of sale of food, for holding it liable to be taxed.

34. Similarly in the **Indian Institute of Technology1,** the Division Bench of this Court considering the two above noted decisions has held that:-

"19.The distinction laid down in the aforesaid decisions between a case, on the one hand, where the principal activity of an institution is doing business in a commercial way, and, on the other hand, a case where its principal activity is predominantly academic or charitable and an activity which may appear to have some incidents of business is only minor, subsidiary and incidental to the principal activity and is an integral part of it, is apposite and affords valuable guidance."

35. In the said case, the sale of foods stuff to the residents of the visitor's hostel maintained by the Institution (IIT) was subjected to tax under the U.P. Sales Tax. It was observed that it could not be said that the principal activity of the assesse was doing business in a commercial way of buying and selling food stuff. It was, thus, held that the principal activity of the assessee being predominantly academic and the supply of food stuff in its hostel was minor, subsidiary and incidental to the principal activity, it was an integral part of its academic activity.

36. The Apex Court in **Commissioner and Sales Tax5** has held

that the question of profit motive or non-profit motive would be relevant only where a person carries on trade, commerce, manufacture or adventure in the nature of trade, commerce etc. It was held that the sole object of the assessee trust therein was to spread the message of Saibaba of Shirdi. The books and literature etc. containing the message of Saibaba were distributed by the trust to the devotees of Saibaba at the cost price. There was no dispute that the primary and dominant activity of the trust was to spread the message of Saibaba. This main activity does not amount to "business". The activity of publishing and selling literature, books and other literature obviously, could not be business as such even without profit motive and it was in a way a means to achieve the object of the trust through which message of Saibaba was spread.

37. In **Mahatma Gandhi Kashi Vidyapeeth3,** the Division Bench of this Court had considered the question as to whether the activity of the assessee therein amounted to business as defined under the U.P. Vat Tax Act' 2003. While interpreting the term "business" which includes any trade, commerce, or manufacture etc.in the definition under the said Act, the Court had held therein that if the main activity was not business then any transaction incidental or ancillary would not normally amount to business unless an independent intention to carry on the business activity, incidental or ancillary, was established. It was held that emphasis has to be laid on the main activity of the person to fall within the definition of business. The inclusion of incidental or ancillary activity in the definition of business presupposes the existence of trade, commerce etc.

38. In the light of the above discussion, considering the definition of "business" under Section 2(13) of the Act ; "Charitable purposes" under Section 2(15) as also the provisions of Section 11, 11(4A) and 12-AA of the Act, in the fact and circumstances of the case, it is apparent that the principal activity of the petitioner is pre-dominantly academic and charging of fees for the accommodation provided to the students admitted in the dental education course, is minor, subsidiary and subservient to the principal activity and is an integral part of its academic activity. It cannot be said that the assessee's principal activity is doing business in a commercial way of letting out the accommodation.

39. Consequently, the petitioner cannot be said to be doing "business" in terms of sub-section (4A) of Section 11 and its activity of maintaining hostel and charging fees does not fall within the meaning of "business" under Section 2(13) of the Act. The hostel fee cannot be said to be income derived from the "business" of the trust. The said integral activity being directly linked to the attainment of the main objectives of the trust, the requirement of maintaining separate books of accounts with regard to such activity for seeking benefit of exemption under Section 11 (1) of the Act , therefore, not attracted.

40. The element of trade and commerce in the hostel activity cannot be found so as to bring the same within the meaning of "business". The grounds taken by the revenue that the assessee was carrying on the commercial activity which is not incidental to the objects of the trust and that the assessee has not complied with the provisions under Section 11 (4A) of the

Act by not maintaining separate books of accounts of the income of the said business even if said business is said to be incidental to the objectives of the trust, are found faulty. The revenue has committed wrong in holding that the business carried on by the assessee having no direct relationship with the objectives of the trust, the mandate of Section 11(4A) of the Act had to be complied with. There was no material on record with the revenue to hold that the hostel activity is a separate business. From any angle, it could not be proved by the revenue that the income from the hostel fee can be treated as profit and gains of the separate business or commercial activity and that it is not an integral part and parcel of education, which is the main objective of the trust.

41. Applying the theory of dominant purpose in the facts of the present case it can be safely concluded that the surplus, if any, generated out of the activity of maintaining halls and residents for the students being an integral part of the main object of education, was liable to be treated as income from the property held by the trust wholly for charitable purposes and was, therefore, deductible from the total income of the trust (person in receipt of the income) by granting exemption under Section 11 of the Act.

42. The argument of the assessee further is that the balance as shown in the ledger of income and expenditure account of the hostel fees was in negative. There was no surplus over receipt. The assessee had not gained any profit out of the hostel activity. To prove the said point, the assessee had filed the balance sheet showing loss in the said activity.

43. As regards, the contention of Sri Praveen Kumar learned Advocate for the revenue that the profit motive or profit earning is not an element of any activity to be termed as business. He contends that in the literal parlance, business means any "occupation" and education being an industry or occupation as held in **T.M.A Pai Foundation & others6,** even an activity relating to or incidental to education has to be treated as business.

44. This contention of learned counsel for the revenue does not impress the Court, in as much as, it is settled that the taxing statute cannot be interpreted on any presumption or assumption. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what it clearly expressed; it cannot imply anything which is not expressed; it cannot import provision in the statute so as to supply any assumed deficiency. [Reference **Commissioner of Sales Tax, U.P. Vs. Modi Sugar Mills Ltd.10]** (para 11).

45. The rule of construction of a taxing statute as discussed in **Commissioner of Income Tax, Patiala Vs. M/s Shahzada Nand & sons & others11** is relevant:-

"In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

46. We may also note the statement of Hon'ble S.P. Bharucha, J. (as the Hon'ble Judge then was) speaking for the bench in **V.V.S. Sugars Vs. Govt. Of A.P. & others12** as a guiding principle. Relevant paragraph No.4 is quoted as under:-

"4. The said Act is a taxing statute and a taxing statute must be interpreted as it reads, with no additions and no subtractions, on the ground of legislative intendment or otherwise."

47. In view of the above noted legal position, any interpretation or meaning given to the word "business" in the literal parlance cannot be read into the Income Tax Act as the word "business" has been defined in the Act itself. The Court has to read the statute namely the Income Tax Act to find out as to whether the activity of the assessee in maintaining the hostel would be exempted under Section 11(1) of the Act and whether the provisions of Section 11(4A) would be attracted in the facts and circumstances of the case.

48. Having held that the activity of running the hostel is not a separate business activity and surplus income from the hostel fee cannot be treated as profit and gains of a separate business or commercial activity of the trust, it is held that the exemption under Section 11(1) of the Act cannot be disallowed to the assessee.

49. In the result, the substantial question of law is answered in favour of the assessee.

50. The assessment order dated 12.03.2013 passed by the Additional Commissioner, Income Tax Range-1 Ghaziabad and the orders of affirmation of the same in the appeals dismissed by CIT(A) and Income Tax Appellate Tribunal are, therefore, liable to be set aside. The matter is remitted back to the Assessing Officer with the direction to examine the same afresh in the light of the observations made above, treating the hostel fee income, subservient to the main object of the education and not as a business income but income derived from the charitable activity of education.

51. The appeal is **allowed**, accordingly.

(2021)07ILR A665
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.07.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 1410 of 2021

Shyam Sundar Yadav ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Awadhesh Kumar Singh, Sri Abhai Kumar Singh

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

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 125 - Provisions of Section 125 of Cr.P.C are beneficial provisions which are enacted to stop the vagrancy of a destitute wife and provide some succour to them, who are entitled to get the maintenance which has been wrongly denied.(Para - 6)

Judgement and order passed by Family Court under Section 125 of Cr.P.C. - opposite party no.2 (wife) awarded Rs.3500/-per month as maintenance allowance - Criminal revision by revisionist.

HELD:- The amount fixed for maintenance was Rs. 3500/- for the opposite party no. 2

which in the present days of high price rise cannot be said to be either excessive or disproportionate . The impugned order does not require any interference. There is no illegality, impropriety and incorrectness in the impugned order and also there seems to be no abuse of court's process. (Para - 6,7)

Criminal Revision dismissed. (E-6)

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

1. Heard Sri Abhai Kumar Singh, learned counsel for the revisionist through video conferencing, learned A.G.A. for the State and perused the record.

2. This criminal revision has been filed by the revisionist against the impugned judgement and order dated 3.3.2021 passed by Additional Principal Judge IInd, Family Court Jaunpur in Case No.628 of 2014, under Section 125 of Cr.P.C. by which opposite party no.2 was awarded Rs.3500/-per month as maintenance allowance.

3. Submission made by the counsel for the revisionist is that the revisionist is a very poor person having no source of income and he has been unable to pay Rs. 3500/- per month. He further submitted that the court below has not considered that the opposite party no.2 (wife) is living separately from the revisionist without any reasonable reason so she is not liable to get any maintenance from the revisionist. After recording the statements of the contesting parties, without considering the facts and evidence on record allowed the application of opposite party no.2 and awarded her Rs. 3500/- per month as maintenance allowance.

4. Per contra learned A.G.A. stated that the court below passed the impugned order after considering the facts and circumstances of the case and the statements of the revisionist and opposite party no.2, in such circumstances to meet the ends of justice, the impugned order does not require any interference. There is no illegality, impropriety and incorrectness in the impugned order and also there seems to be no abuse of court's process.

5. I have heard learned counsel for the parties and perused the record.

6. Counsel for the revisionist has not been able to point out any such illegality or impropriety or incorrectness in the impugned order which may persuade this Court to interfere in the same. The amount fixed for maintenance was Rs. 3500/- for the opposite party no. 2 which in the present days of high price rise cannot be said to be either excessive or disproportionate. The provisions of Section 125 of Cr.P.C are beneficial provisions which are enacted to stop the vagrancy of a destitute wife and provide some succour to them, who are entitled to get the maintenance which has been wrongly denied. The fact that the revisionist is the husband of opposite party no.2, has not been denied.

7. In such circumstances to meet the ends of justice, the impugned order does not require any interference. There is no illegality, impropriety and incorrectness in the impugned order and also there seems to be no abuse of court's process.

8. In view of the above, the revision lacks merit and stands **dismissed**.

(2021)07ILR A667
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.06.2021

BEFORE

THE HON'BLE SANJAY YADAV, C.J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 9534 of 2021

Tejal Uppal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Kumar Sharma

Counsel for the Respondents:
C.S.C.

A. Civil Law – Land acquisition - Land Acquisition Act, 1894: Section 4(1), 11(a), 17, 48; Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013: Section 24(2) - In case a person has been tendered the compensation as provided u/s 31(1) of the Act of 1894, it is not open to him to claim that acquisition has lapsed u/s 24(2) due to non-payment or non-deposit of compensation in Court. Once award has been passed on taking possession u/s 16 of the Act of 1894, the land vests in State, there is no divesting provided u/s 24(2) of the Act of 2013, as once possession has been taken there is no lapse u/s 24(2). (Para 14)

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 land acquisition. S. 24 applies to a proceeding pending on the date of enforcement of the Act of 2013, i.e., 1.1.2014. (Para 14)

In the present case, the petitioner has challenged the order dated 12.11.2020 on the ground that the abadi land of the petitioner has been acquired by invoking the provisions of S. 17. The provision of S. 11(a) of Act of 1894 has not been followed, as such the acquisition proceedings lapsed and the order dated 12.11.2020 is bad in eye of law and the petitioner is entitled for return of her land. (Para 10)

B. Filing of successive Writ Petitions on the same ground with identical relief is nothing but an abuse of process of law. A previous writ petition challenging the impugned order (dated 12.11.2020) was dismissed as withdrawn without granting any liberty to the petitioner. Moreover, two other petitions, one challenging the acquisition on the same grounds and other praying for the same relief have also been dismissed vide orders dated 31.05.2016 and 10.12.2019 respectively. (Para 11)

C. A clear finding has been recorded by the Authority in the impugned order that the possession of the land has been taken and transferred to the Noida Development Authority on 03.09.2003. The award was made on 29.01.2010. The amount of compensation has been deposited in the Court by challan on 14.2.2017, thus the entire proceedings has been concluded. It is further recorded in the impugned order that the Noida Development Authority has informed to the State Government that the part of the land is under road in Sector 96, 97 & 98 of Noida. (Para 12)

D. The findings recorded in the order dated 12.11.2020 have not been challenged in the writ petition rather the petitioner has admitted that he had been dispossessed in the year 2003 by demolishing the construction over the land in dispute. (Para 13)

Writ petition dismissed. (E-3)

Precedent followed:

1. Indore Development Authority Vs. Manohar Lal Yadav, (2020) 8 SCC 129 (Para 14)

(Delivered by Hon'ble Prakash Padia, J.)

1. The petitioner has preferred the present writ petition with the following relief:

"A. Issue a writ order or direction in the nature of MANDAMUS or appropriate directions to issue commanding and/or set aside the order dated 12/11/2020 and directed to passed the fresh speaking order after having in the matter ***(Annexure no. 1).****"*

B. Issue a writ, order or direction in the nature of MANDAMUS commanding and directed to the respondent no. 1 to remitted back the possession as well as title of the land in question to its owner.

C. Issue a writ, order or direction in the nature of MANDAMUS commanding the respondent no. 1 to consider and passed appropriate order on the representation dated 19/02/2021 submitted by the petitioner expeditiously within a suitable period. ***(Annexure no. 16)****.*

D. Issue a writ, order or direction in the nature of MANDAMUS commanding the respondent no. 2 to consider and passed appropriate order on the representation dated 12/10/2020 under section 17 of the Uttar Pradesh Urban Planning and Development Act, 1973 submitted by the petitioner expeditiously within a suitable period. ***(Annexure no. 17).****"*

2. The facts as stated in the writ petition are that the petitioner and her husband, namely Inder Bir Singh Uppal has purchased certain land, including the land of Khata no. 310, Khasra no. 305M, area 02-05-00 Bigha Pukhta i.e., 0.5580 Hectare situated in village Sadarpur, Pargana & Tehsil Dadri, District Gautam Budh Nagar.

3. It is stated in the writ petition that the dispute in the present writ petition relates only with the land of Khata no. 310, Khasra no. 305M area 02-05-00 Pukhta i.e. 0.5580 Hectare having old khasra nos. 429 & 504. It is further stated by the petitioner that after purchasing the aforesaid land, the petitioner has established a Girls School, in the name and style of Suman Girls Junior High School in the year 1997. In the year 2002, a notification dated 30.3.2002 under section 4(1) read with section 17 of the Land Acquisition Act, 1894 (hereinafter referred to as "Act of 1894") was issued. The said notification was published on 15.4.2002 in various news-papers. It is further stated in the writ petition that in view of the urgency clause invoked by the State Government, no objections were invited however the petitioner filed his objection that respondent authorities threatened to demolish the school building. Thereafter a writ petition being Writ Petition No. 20783 of 2002 was filed with a prayer to quash the notification dated 30.3.2002 and to restrain the respondents and their agents from demolishing the school building and taking the possession of the land. The aforesaid writ petition was finally disposed off by the judgment and order dated 20.5.2002.

4. By the aforesaid order dated 20.5.2002 this Court has been pleased to order the State Government to decide the applications of the petitioner for exemption as provided under section 48 of Act of 1894. It is further stated that the aforesaid order was not complied with and the construction of school building was demolished. Thereafter a contempt petition being Contempt Petition No. 3431 of 2002 (Capt. Inder Veer Singh Uppal Vs. Hemant Rao and others) was filed before this Court and notice was issued to the opposite parties on 18.11.2003. In reply to the contempt notice, the reply was filed by the opposite parties enclosing letter dated 03.06.2002 and 25.07.2003. Thereafter the order dated 8.1.2004 passed by the Special Secretary was brought on record, by which the application of the petitioner was rejected and the finding was recorded that the possession of Khasra nos. 302, 305/2 & 306 has already been transferred to the Noida Development Authority on 3.9.2003. A further finding was recorded that there is no school building in the land in dispute. With these

findings, the Special Secretary, rejected the application of the petitioner for release of his land from the acquisition. The said order is annexed as annexure-9 to the writ petition.

5. It is further stated by the petitioner that the order dated 8.1.2004 was challenged by the petitioner's husband before this Court by way of filing Writ Petition No. 21364 of 2004 (Capt. Inder Bir Singh Uppal Vs. State of U.P. and 3 others). The said writ petition had been dismissed in default on 31.5.2016 and no recall application for recalling the order dated 31.5.2016 has been filed. It is further stated in the writ petition that the petitioner along with her husband filed a detailed representation/application dated 14.11.2019 claiming benefit of section 11(a) of the Act of 1894. The petitioner along with her husband filed Writ Petition no. 40276 of 2019. The aforesaid writ petition was dismissed by this Court vide order dated 10.12.2019, with a finding that the petitioner has earlier filed writ petition no. 21364 of 2004 with regard to the direction that the acquisition proceedings have lapsed under section 11(a) of the Act of 1894, therefore, his land be exempted under section 48 of the Act of 1894. Since, the said writ petition was dismissed on 31.5.2016, the second writ petition was not maintainable. Further findings has been recorded by the Court that the scope of Section 11(a) has been considered in the case of **Gajraj Singh,** as the notification dated 30.5.2002 for Village Sadarpur, District Gautam Budh Nagar was also subject matter of Gajraj Singh case and objection to section 11(a) of the Act of 1894 has been dealt with in that judgment.

6. It is further stated in the writ petition that the award under section 11 of the Act of 1894 was made on 29.1.2010 and no information for the same was given to the petitioner under section 12(2) of Act of 1894. It is further stated that the amount awarded by award dated 29.1.2020 has been deposited by the Noida Development Authority through challan on 14.2.2017.

7. It is claimed in the writ petition that as this Court in its order dated 10.12.2019 has observed that the petitioner's case is covered by the decision of the case of Gajraj Singh, as such, he is entitled for additional compensation and other benefits, hence she made representations dated 25.12.2019 by registered post on 26.12.2019. It is further stated in the writ petition that the petitioner in his representation has also claimed benefit of section 24(2) of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as "Act of 2013'), as the said representation was not being considered by the State, as such, the petitioner again filed Writ Petition No. 8536 of 2020 (Tejpal Uppal vs. State of U.P. and 3 Others) which was finally disposed of by order dated 6.3.2020 with a direction to the respondent no. 1, i.e., the State Government to decide the representation of the petitioner dated 11.2.2020. The order dated 6.3.2020 was not complied with as such a Contempt Application No. 4051 of 2020 was filed. It is further stated that the respondent no. 1, after the order of contempt petition dated 20.10.2020 has passed the order impugned in the present writ petition dated 12.11.2020 in a cursory manner without providing opportunity of hearing to the petitioner.

8. Challenging the aforesaid order, a Civil Misc. Writ Petition No. 2240 of 2021 (Tejpal Uppal vs. State of U.P. and Others) was filed which was dismissed as withdrawn by order dated 28.1.2021. After the order dated 28.1.2021 passed in writ petition no. 2240 of 2021, the petitioner

submitted another representation dated 19.2.2021 by registered post for recalling the order dated 12.11.2020, as the said order was passed without providing opportunity of hearing to the petitioner.

9. Heard learned counsel for the parties.

10. The petitioner has challenged the order dated 12.11.2020 on the ground that the abadi land of the petitioner has been acquired by invoking the provisions of section 17. The provision of section 11(a) of Act of 1894 has not been followed, as such the acquisition proceedings lapsed and the order dated 12.11.2020 is bad in eye of law and the petitioner is entitled for return of her land.

11. It is pertinent to mention that the order dated 12.11.2020 was challenged by filing Writ Petition No. 2240 of 2021. The said writ petition was dismissed as withdrawn without granting any liberty to the petitioner, as such, another writ petition challenging the order dated 12.11.2020 is not maintainable. In so far as the grounds of challenge of order dated 12.11.2020 on the basis of section 11(a) of Act of 1894 is concerned, the Writ Petition No. 21364 of 2004 challenging the acquisition has already been dismissed by order dated 31.5.2016 and another writ petition for the same relief has also been dismissed by this Court by order dated 10.12.2019 being Writ Petition No. 40276 of 2019. Filing of successive Writ Petitions on the same ground with identical relief is nothing but an abuse of process of law.

12. It appears that in the order impugned a clear finding has been recorded by the Authority that the possession of the land has been taken and transferred to the Noida Development Authority on 3.9.2003. The award was made on 29.1.2010. The amount of compensation has been deposited in the Court by challan on 14.2.2017, thus the entire proceedings has been concluded. It is further recorded in the impugned order that the Noida Development Authority has informed to the State Government that the part of the land is under road in Sector 96, 97 & 98 of Noida.

13. The findings recorded in the order dated 12.11.2020 have not been challenged in the writ petition rather the petitioner in this writ petition has admitted that he had been dispossessed in the year 2003 by demolishing the construction over the land in dispute.

14. Five Judges Bench of the Apex Court in the case of **Indore Development Authority Vs. Manohar Lal Yadav**, reported in (2020) 8 SCC 129 has considered the scope of Sub-Section (2) of Section 24 of the Act of 2013 along with the law related to Act of 1894 and has recorded its conclusion, is as under:

"365. 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 Sree Balaji Nagar Residential Association (supra) cannot be said 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 to Section 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.

366. In view of the aforesaid discussion, we answer the questions as under:

366.1. Under the provisions of Section 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.

366.2. 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 under Section 24(1)(b) of the Act of 2013 under the Act of 1894 as if it has not been repealed.

366.3. The word "or' used in Section 24(2) between possession and compensation has to be read as "nor' or as "and'. The deemed lapse of land acquisition proceedings under Section 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 not been 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.

366.4. The expression 'paid' in the main part of Section 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 to Section 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 under Section 4 of the Act of 1894 shall be entitled to compensation in accordance with the provisions of the Act of 2013. In case the obligation under Section 31 of the Land Acquisition Act of 1894 has not been fulfilled, interest under Section 34 of 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 under Section 4 of the Act of 1894.

366.5. In case a person has been tendered the compensation as provided under Section 31(1) of the Act of 1894, it is not open to him to claim that acquisition has lapsed under Section 24(2)due to non-payment or non-deposit of compensation in court. The obligation to pay is complete by tendering the amount under Section 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 under Section 24(2) of the Act of 2013.

366.6. The proviso to Section 24(2) of the Act of 2013 is to be treated as part of Section 24(2) not part of Section 24(1)(b).

366.7. The mode of taking possession under the Act of 1894 and as contemplated under Section 24(2) is by drawing of inquest report/ memorandum. Once award has been passed on taking possession under Section 16 of the Act of 1894, the land vests in State there is no divesting provided under Section 24(2) of the Act of 2013, as once possession has been taken there is no lapse under Section 24(2).

366.8. The provisions of Section 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.

366.9. 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 land acquisition. Section 24 applies 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."

15. In view of the above, the writ petition is wholly misconceived and abuse of process of law, as successive writ petitions are being filed challenging the same acquisition proceedings. Thus, the writ petition is hereby dismissed with cost of Rs. 25,000/.

(2021)07ILR A672
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.06.2021

BEFORE

THE HON'BLE SANJAY YADAV, C.J.
THE HON'BLE PRAKASH PADIA, J.

Writ C No. 11445 of 2021

Vijaypal & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Manish Kumar, Sri Manoj Kumar

Counsel for the Respondents:
C.S.C., Anjali Upadhya, Sri Ramendra Pratap Singh

A. Civil Law – Land acquisition – Land Acquisition Act, 1894: Section 16, 17(1), 48(1), 48(2).

Constitution of India: Article 14 – Scope - There is no concept of negative equality u/Art. 14. If any wrong order was passed earlier, petitioners can't seek the benefit of the same. The concept of equality as envisaged under Art. 14 is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals, others cannot claim the same illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits. (Para 11 to 14)

B. Land Acquisition Act, 1894 - Section 48 - Once possession has been taken and land has not been utilised, there cannot be withdrawal from the acquisition of any land. Land cannot be restituted to the owner after the stage of possession is over. (Para 17)

U/s 48 of the 1894 Act, withdrawal of the land acquisition proceedings was permissible only if the possession has not been taken u/s 16 or 17(1). (Para 15 to 20)

It appears from perusal of the averment made in the present writ petition as well as in the representations that petitioners have only prayed for release of their land from acquisition proceedings. No averment whatsoever has been in the entire writ petition or in the representations made before the Authorities that the possession of the land has not been taken. (Para 22)

In view of the aforesaid, the Hon'ble Court opined that the possession of the land has been taken by the Authorities. Once the possession has been taken, the petitioners are not entitled for any benefit as provided u/s 48(2) of the Act of 1894. (Para 23)

Writ petition dismissed.(E-3)

Precedent followed:

1. St. of Bihar Vs Kameshwar Prasad Singh, AIR 2000 SC 2306 (Para 11)

2. Gursharan Singh & ors. Vs NDMC & ors., 1996 (2) SCC page 459 (Para 12)

3. Secretary, Jaipur Development Authority, Jaipur Vs Daulat Mal Jain & ors., 1997 (1) SCC page 35 (Para 13)

4. State of Haryana & ors. Vs Ram Kumar Mann, 1997 (3) SCC page 321 (Para 14)

5. Chandragauda Ramgonda Patil Vs St. of Mah., (1996) 6 SCC 405 (Para 18)

6. C. Padma Vs St. of T.N., (1997) 2 SCC 627 (Para 19)

7. Sita Ram Bhandar Society Vs State (NCT of Delhi), (2009) 10 SCC 501 (Para 20)

8. Leelawanti & ors. Vs St. of Har. & ors., (2012) 1 SCC 66 (Para 21)

(Delivered by Hon'ble Prakash Padia, J.)

1. Matter is taken up through video conferencing.

2. The petitioners have preferred the present petition Under Article 226 of the Constitution of India inter-alia with the following prayer:-

"I. Issue a writ, order or direction in the nature of writ of mandamus directing the respondents to release the Gata No. 89/0.560 hectare and 92/0.0492 hectare from the Land Acquisition, Village Thapkhera, Pargana and Tehsil Dadri, District Gautam Buddha Nagar.

II. Issue a writ, order or direction in the nature of writ of mandamus directing the respondent no. 2 District Magistrate, District Gautam Buddha Nagar to decide the application dated 15.02.2021 of the petitioners which is still pending.

III. Issue any other suitable writ, order or direction, which this Hon'ble Court may deem fit and proper in the present circumstances of the case."

3. Facts in brief as contained in the writ petition are that the petitioners are recorded tenure holders in respect of their land situated at Gata No. 89 area 0.0560 hectare and Gata No. 92 area 0.0492 hectare situated in village Thapkhera, Pargana and Tehsil Dadri, District Gautam Buddha Nagar. It is stated in paragraph-5 of the writ petition that applications dated 20.05.2010 and 05.06.2010 were moved by the petitioners before the Chief Executive Officer, Greater Noida, Industrial Development Authority, District Gautam Buddha Nagar/respondent no. 3 stating therein that the petitioners are farmers, the land which was acquired be returned to them as has been returned by the Authority in favour of other similarly situated persons.

4. It is further stated in the writ petition that since no action was taken on the aforesaid representation, a fresh representation was made by the petitioners on 15.02.2021 before the District Magistrate, District Gautam Buddha Nagar with the same prayer.

5. In this view of the matter, it is argued that the land which was acquired by the Authorities be released in favour of the petitioners as has been done in respect of Gata No. 95, 88, 102 and 104. It is further argued that the petitioners belong to jatav caste and they are doing their farming upon this land. It is further argued that except the aforesaid land, the petitioners have no other land for farming as such the land which was acquired by the respondent be released in their favour.

6. In this view of the matter, it is argued that the respondent be directed to decide the representation submitted by the petitioners.

7. On the other hand, it is argued by the counsel for the respondents that the petitioners are not entitled for the relief as prayed for by them in the present petition. It is further argued that the writ petition is misconceived and the same is liable to be dismissed.

8. Heard counsel for the parties and perused the record.

9. It appears from perusal of the record that the land of the petitioners were acquired by the respondents. In order to release the same from Acquisition proceedings, representations were submitted by the petitioners and since no action was taken on the same, the petitioners have preferred the present petition.

10. Nothing has been stated in the entire writ petition that when the notifications were issued by the respondent as per the procedure prescribed under the Land Acquisition Act, 1894. It further reveals from perusal of the record that no action whatsoever has been taken by the petitioners to release their land for more than 10 years from the date of the acquisition of land, in so far as the representations made in the year 2010 are concerned. It is clear from perusal of the remarks made on the same that the same was submitted personally with the authorities but the copies of the receiving were never provided to the petitioners. It further reveals that after more than 10 years a fresh representation was made by the petitioners on 15.02.2021 and immediately thereafter they approach this Court by filing the present petition. Nothing has been stated in the entire writ petition that what action has been taken by the petitioners for about 10 years for releasing of their land.

11. In this view of the matter, the Court is of the opinion that the writ petition is liable to be dismissed on the ground of latches. In so far as the arguments raised by the counsel for the petitioners that the land which was acquired by the authorities along-with the petitioners were released by the Authorities and as such the petitioners are also entitled for the similar benefit, it is clear that if any wrong order was passed earlier, petitioners can't seek the benefit of the same. There is no concept of negative equality under Article 14 of the Constitution of India. The Hon'ble Supreme Court in the case of **State of Bihar v Kameshwar Prasad Singh AIR 2000 SC 2306** held that:-

"The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favour of any individual or group of individuals other cannot claim the same

illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favour of one individual does not entitle others to claim similar benefits."

12. In this regard the Hon'ble Supreme Court in the case of **Gursharan Singh & Ors. v. NDMC & Ors. 1996 (2) SCC page 459** held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed:

"Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination."

13. Again in the case of **Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain & Ors. 1997 (1) SCC page 35** the Hon'ble Supreme Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding:

"Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents."

14. The similar view was again taken by the Hon'ble Supreme Court in the case of **State of Haryana & Ors v. Ram Kumar Mann 1997 (3) SCC page 321** wherein it was observed that:

"The doctrine of discrimination is founded upon existence of an enforceable right. He was discriminated and denied equality as some similarly situated persons had been given the same relief. Article 14 would apply only when invidious discrimination is meted out to equals and similarly circumstanced without any rational basis or relationship in that behalf. The respondent has no right, whatsoever and cannot be given the relief wrongly given to them, i.e., benefit of withdrawal of resignation. The High Court was wholly wrong in reaching the conclusion that there was invidious discrimination. If we cannot allow a wrong to perpetrate, an employee, after committing mis-appropriation of money, is dismissed from service and subsequently that order is withdrawn and he is reinstated into the service. Can a similarly circumstanced person claim equality under Section 14 for reinstatement? The answer is obviously

"No". In a converse case, in the first instance, one may be wrong but the wrong order cannot be the foundation for claiming equality for enforcement of the same order. As stated earlier, his right must be founded upon enforceable right to entitle him to the equality treatment for enforcement thereof. A wrong decision by the Government does not give a right to enforce the wrong order and claim parity or equality. Two wrongs can never make a right."

15. A procedure has been prescribed for the withdrawal of the land from the acquisition. It is provided under Sub Section (1) of Section 48 of the Act of 1894 that the Government shall be at liberty to withdraw from the acquisition of any land of which **Possession has not been taken.** It is further provided under Sub-Section (2) of Section 48 that whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings there under, and shall pay such amount to the person interested, together with all costs.

16. Under Section 48 of the 1894 Act, withdrawal of the land acquisition proceedings was permissible only if the possession has not been taken under Section 16 or 17(1). Section 48 of the Land Acquisition Act, 1894 is extracted hereunder:-

"48. Completion of acquisition not compulsory, but compensation to be awarded when not completed. - *(1) Except in the case provided for in section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.*

(2) Whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings there under, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.

*(3) The provision of Part III of this Act shall ap*ply, so far as may be, to the determination of the compensation payable under this section.

17. It has been held by the Hon'ble Supreme Court in large number of decisions that that once possession has been taken and land has not been utilised, there cannot be withdrawal from the acquisition of any land. Land cannot be restituted to the owner after the stage of possession is over.

18. In the case of **Chandragauda Ramgonda Patil v. State of Maharashtra, (1996) 6 SCC 405** when restitution of land was sought, on the basis of some Government resolutions, after possession had been taken, following observations were made by the Hon'ble Supreme Court:

"2... Since he had sought enforcement of the said government resolution, the writ petition could not be dismissed on the ground of constructive res judicata. He also seeks to rely upon certain orders said to have been passed by the High Court in conformity with enforcement of the government resolution. We do not think that this Court would be justified in making direction for restitution of the land to the erstwhile owners when the land was taken way back and vested in the

Municipality free from all encumbrances. We are not concerned with the validity of the notification in either of the writ petitions. It is axiomatic that the land acquired for a public purpose would be utilised for any other public purpose, though use of it was intended for the original public purpose. It is not intended that any land which remained unutilised, should be restituted to the erstwhile owner to whom adequate compensation was paid according to the market value as on the date of the notification. Under these circumstances, the High Court was well justified in refusing to grant relief in both the writ petitions." (emphasis supplied)

19. Again, in **C. Padma v. State of T.N.** reported in **(1997) 2 SCC 627**, the Hon'ble Supreme Court stated that:

"4. The admitted position is that pursuant to the notification published under Section 4(1) of the Land Acquisition Act, LA (for short "the Act") in GOR No. 1392 Industries dated 17-10-1962, total extent of 6 acres 41 cents of land in Madhavaram Village, Saidapet Taluk, Chengalpattu District in Tamil Nadu was acquired under Chapter VII of the Act for the manufacture of Synthetic Rasina by Tvl. Reichold Chemicals India Ltd., Madras. The acquisition proceedings had become final and possession of the land was taken on 30-4-1964. Pursuant to the agreement executed by the company, it was handed over to Tvl. Simpson and General Finance Co. which is a subsidiary of Reichold Chemicals India Ltd. It would appear that at a request made by the said company, 66 cents of land out of one acre 37 cents in respect of which the appellants originally had ownership, was transferred in GOMs No. 816 Industries dated 24-3-1971 in favour of another subsidiary company. Shri Rama Vilas Service Ltd., the 5th respondent which is also another subsidiary of the Company had requested for two acres 75 cents of land; the same came to be assigned on leasehold basis by the Government after resumption in terms of the agreement in GOMs No. 439 Industries dated 10-5-1985. In GOMs No. 546 Industries dated 30-3-1986, the same came to be approved of. Then the appellants challenged the original GOMs No. 1392 Industries dated 17-10-1962 contending that since the original purpose for which the land was acquired had ceased to be in operation, the appellants are entitled to restitution of the possession taken from them. The learned Single Judge and the Division Bench have held that the acquired land having already vested in the State, after receipt of the compensation by the predecessor-in-title of the appellants, they have no right to challenge the notification. Thus the writ petition and the writ appeal came to be dismissed.

5. Shri G. Ramaswamy, learned Senior Counsel appearing for the appellants, contends that when by operation of Section 44-B read with Section 40 of the Act, the public purpose ceased to be existing, the acquisition became bad and therefore, the GO was bad in law. We find no force in the contention. It is seen that after the notification in GOR 1392 dated 17-10-1962 was published, the acquisition proceeding had become final, the compensation was paid to the appellants' father and thereafter the lands stood vested in the State. In terms of the agreement as contemplated in Chapter VII of the Act, the Company had delivered possession subject to the terms and conditions there under. It is seen that one of the conditions was that

on cessation of the public purpose, the lands acquired would be surrendered to the Government. In furtherance thereof, the lands came to be surrendered to the Government for resumption. The lands then were allotted to SRVS Ltd., 5th respondent which is also a subsidiary amalgamated company of the original company. Therefore, the public purpose for which acquisition was made was substituted for another public purpose. Moreover, the question stood finally settled 32 years ago and hence the writ petition cannot be entertained after three decades on the ground that either original purpose was not public purpose or the land cannot be used for any other purpose.

6. Under these circumstances, we think that the High Court was right in refusing to entertain the writ petition."

20. In **Sita Ram Bhandar Society v. State (NCT of Delhi)** reported in **(2009) 10 SCC 501** the Hon'ble Supreme Court observed that:

"28. A cumulative reading of the aforesaid judgments would reveal that while taking possession, symbolic and notional possession is perhaps not envisaged under the Act but the manner in which possession is taken must of necessity depend upon the facts of each case. Keeping this broad principle in mind, this Court in ***T.N. Housing Board v. A. Viswam, (1996) 8 SCC 259*** *after considering the judgment in* ***Balwant Narayan Bhagde v. M.D. Bhagwat, (1976) 1 SCC 700,*** *observed that while taking possession of a large area of land (in this case 339 acres) a pragmatic and realistic approach had to be taken. This Court then examined the context under which the judgment in* ***Narayan Bhagde*** *case had been rendered and held as under:*

"9. It is settled law by series of judgments of this Court that one of the accepted modes of taking possession of the acquired land is recording of a memorandum or panchnama by the LAO in the presence of witnesses signed by him/them and that would constitute taking possession of the land as it would be impossible to take physical possession of the acquired land. It is common knowledge that in some cases the owner/interested person may not be cooperative in taking possession of the land."

40. In Narayan Bhagde case one of the arguments raised by the landowner was that as per the communication of the Commissioner the land was still with the landowner and possession thereof had not been taken. The Bench observed that the letter was based on a misconception as the landowner had re-entered the acquired land immediately after its possession had been taken by the Government ignoring the scenario that he stood divested of the possession, under Section 16 of the Act. This Court observed as under:

"29. ... This was plainly erroneous view, for the legal position is clear that even if the appellant entered upon the land and resumed possession of it the very next moment after the land was actually taken possession of and became vested in the Government, such act on the part of the appellant did not have the effect of obliterating the consequences of vesting.'

To our mind, therefore, even assuming that the appellant had re-entered the land on account of the various interim orders granted by the courts, or even otherwise, it would have no effect for two reasons,

(1) that the suits/petitions were ultimately dismissed and

(2) that the land once having vested in the Government by virtue of

Section 16 of the Act, re-entry by the landowner would not obliterate the consequences of vesting."

21. The Hon'ble Supreme Court in **Leelawanti & Ors. v. State of Haryana & Ors reported in (2012) 1 SCC 66** held as under:

"19. If Para 493 is read in the manner suggested by the learned counsel for the appellants then in all the cases the acquired land will have to be returned to the owners irrespective of the time gap between the date of acquisition and the date on which the purpose of acquisition specified in Section 4 is achieved and the Government will not be free to use the acquired land for any other public purpose. Such an interpretation would also be contrary to the language of Section 16 of the Act, in terms of which the acquired land vests in the State Government free from all encumbrances and the law laid down by this Court that the lands acquired for a particular public purpose can be utilised for any other public purpose.

22. The approach adopted by the High Court is consistent with the law laid down by this Court in ***State of Kerala v. M. Bhaskaran Pillai, (1997) 5 SCC 432 and Govt. of A.P. v. Syed Akbar, (2005) 1 SCC 558.*** *In the first of these cases, the Court considered the validity of an executive order passed by the Government for assignment of land to the erstwhile owners and observed:*

"4. In view of the admitted position that the land in question was acquired under the Land Acquisition Act, LA by operation of Section 16 of the Land Acquisition Act, it stood vested in the State free from all encumbrances. The question emerges whether the Government can assign the land to the erstwhile owners? It is settled law that if the land is acquired for a public purpose, after the public purpose was achieved, the rest of the land could be used for any other public purpose. In case there is no other public purpose for which the land is needed, then instead of disposal by way of sale to the erstwhile owner, the land should be put to public auction and the amount fetched in the public auction can be better utilised for the public purpose envisaged in the Directive Principles of the Constitution. In the present case, what we find is that the executive order is not in consonance with the provision of the Act and is, therefore, invalid. Under these circumstances, the Division Bench is well justified in declaring the executive order as invalid. Whatever assignment is made, should be for a public purpose. Otherwise, the land of the Government should be sold only through the public auctions so that the public also gets benefited by getting a higher value.

24. For the reasons stated above, we hold that the appellants have failed to make out a case for issue of a mandamus to the respondents to release the acquired land in their favour. In the result, the appeal is dismissed without any order as to costs."

22. It appears from perusal of the averment made in the writ petition as well as in the representations that only prayer made by the petitioners to release their land from Acquisition proceedings, no averments whatsoever has been in the entire writ petition or in the representations made by the petitioners before the Authorities that the possession of the land has not been taken.

23. In view of the aforesaid, we are of the opinion that the possession of the land has been taken by the Authorities. Once the possession has been taken, the petitioners are not entitled for any benefit as provided under Sub-Section (2) of Section 48 of the Act of 1894.

24. In view of the above, the petitioners are not entitled for the relief as claimed. Petition devoid of merits and is accordingly dismissed.

(2021)07ILR A680
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.06.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE GAUTAM CHOWDHARY, J.

Writ C No. 13336 of 2021

Jaiprakash Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Krishna Kumar Chaurasia

Counsel for the Respondents:
C.S.C.

A. Civil Law – Social Welfare - Maintenance And Welfare of Parents And Senior Citizens Act, 2007 - Section 22(1)(3) - Uttar Pradesh Maintenance And Welfare of Parents and Senior Citizens Rules, 2014 - Rule 21(2)(i) Rule 21(1) Sub-Rule 2 and 3 - Code of Criminal Procedure - Section 107/116 - The Act, 2007 does not confer power to the Authorities to decide partition dispute and share of parties in an immovable property. (Para 8)

Petitioner has prayed for protection for his life and property and has also prayed to be put in possession of that portion of the property which falls in his share. For the protection of life and property an action u/s 107/116 Cr.P.C. is said to have been taken by the State-respondents to ensure that breach of law and order does not take place. (Para 6, 7)

Whereas, regarding possession, the Hon'ble Court held that the disputed property is an ancestral property in which the parties have undivided share. Such a dispute is pure and simple a dispute of share and possession of the disputed property, which can be decided in a partition suit. (Para 5, 8, 9)

Writ petition dismissed.(E-3)

(Delivered by Hon'ble Surya Prakash Kesarwani, J.
&
Hon'ble Gautam Chowdhary, J.)

1. Heard Shri Krishna Kumar Chaurasia, learned counsel for the petitioner and Shri B.P. Singh Kachwaha, learned Additional Chief Standing Counsel for the respondents.

2. The petitioner claims himself to be a senior citizen and has filed the present writ petition praying for the following relief :-

(i) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2/ District Magistrate, Allahabad to decide the application dated 13.3.2021 filed Under Section 22(1)(3) of THE MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007 read with Rule 21(2)(1) Rule 22(1) Sub-Rule 2 and 3 of UTTAR PRADESH MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS RULES, 2014 within a specific

period which may kindly be fixed by this Hon'ble Court.

(ii) Issue a wirt, order or direction in the nature of mandamus directing the respondent no.2/ District Magistrate, Allahabad to restrain respondent no. 6 to 9 from raising any construction further over the share of the petitioner.

(iii) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2/ District Magistrate, Allahabad to provide security of life and property to the petitioner from respondent no. 6 to 9 and from the other anti social elements who are with the respondent no.6 to 9 at this time.

(iv) Issue a writ, order or direction in the nature of mandamus directing respondent no.5/ Station House Officer, P.S. Karchhana, Prayagraj not to interfere in peaceful possession of the petitioner by himself as well as by his agent in pursuance of the application filed Under Section 22(1)(3) of THE MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007 read with Rule 21(2)(1) Rule 22(1) Sub-Rule 2 and 3 of UTTAR PRADESH MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS RULES, 2014.

(v) to issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(vi) to award the cost of this writ petition to the petitioner.

3. In his aforesaid application/ complaint dated 13.3.2021 submitted before the District Magistrate, Prayagraj, under Section 22(1)(3) of The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter referred to as the Act, 2007) read with Rule 21(2)(i) Rule 21(1) Sub-Rule 2 and 3 of Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 (hereinafter referred to as the U.P. Rules), the petitioner has alleged that in the village abadi, there is an ancestral house which was owned by his father and is now occupied by him and his two brothers who all are residing in the same house and each brother has a share of 14 x 20 sq. ft. in the said house. But his brothers are trying to encroach over his share. The petitioner in the aforesaid complaint dated 13.3.2021 has prayed for protection of his life and property and to give him possession over that portion of the property which has been encroached by his brothers.

4. According to the petitioner, since no action has been taken by the District Magistrate, Prayagraj on his aforesaid complaint dated 13.3.2021, therefore the petitioner has filed the present writ petition praying for the aforenoted reliefs.

5. Learned counsel for the petitioner submits that life and property of the petitioner be protected and he be put in possession of that portion of the property which falls in his share.

6. Learned Additional Chief Standing Counsel submits on the basis of instructions that the said property was inspected by the Authorities and on 17.6.2021 action under section 107/116 Cr.P.C. was taken so as to ensure that breach of law and order does not take place. He further submits on the basis of instructions that the disputed property is an ancestral one in which the petitioner and his two brothers have undivided shares and partition has not yet taken place.

7. We have carefully considered the submissions of learned counsel for the parties and we find that an action under section 107/116 Cr.P.C. has already been taken by the State- respondents.

8. So far as the contention of the petitioner that he be put in possession in a particular portion of the disputed property is concerned, we find that such a matter shall not be covered by the provisions of Section 22(1) of the Act, 2007 read with Rule 21(2)(i) Rule 21(1) Sub-Rule 2 and 3 of the U.P. Rules, 2014. Such a dispute is pure and simple a dispute of share and possession of the disputed property which can be decided in a partition suit.

9. For the reasons aforestated, we do not find any good reason to grant relief as sought by the petitioner, inasmuch as the Act, 2007 does not confer power to the Authorities to decide partition dispute and share of parties in an immovable property. Admittedly, the disputed property is an ancestral property in which the parties have undivided share. Thus, the petitioner cannot ask for mandamus to the Authority under the Act, 2007 to put him in possession in a particular portion of the disputed property. Therefore, no mandamus as prayed, can be issued.

10. With the aforesaid observations and without expressing any opinion on the merits of the claim of the petitioner, the writ petition is dismissed leaving it open for the petitioner to avail such remedy as may be available to him under law.

(2021)07ILR A682
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 6670 of 2021

Bablu @ Vishnu Dhar Dubey ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Atul Kumar Shahi, Sri Anoop Trivedi (Senior Adv.)

Counsel for the Opposite Parties:
A.G.A., Sri Irfanul Huda

A. Criminal Procedure Code, 1973 – Section 319(4)(a) - Power to proceed against other persons appearing to be guilty of offence – proceedings in respect of such person to be commenced a fresh & the witnesses re-heard - the moment, an accused, who has been summoned u/s 319 Cr.P.C., is produced before Court, trial revert back to first stage of trial - trial has to be a de novo trial, which would include re-recording of evidence of all witnesses in presence of newly summoned accused (Para 18)

After conclusion of statement of P.W. 1, on application u/s 319 Cr.P.C. accused applicant was summoned – charges were framed against the accused - thereafter witness P.W.1 was proposed to be re-examined - but counsel for the said accused applicant gave in writing that the examination-in-chief of P.W. 1 had already been recorded & therefore, he was ready to cross-examine P.W.1 and whatever P.W. 1 stated in examination-in-chief, before summoning of the accused applicant, can be taken to be an examination-in-chief recorded against the accused applicant - Held - not recording examination-in-chief of P.W. 1 in presence of the applicant accused and his counsel against the provision of law - Trial court directed to give opportunity to the accused applicant for recording of Examination-in-Chief of the P.W. 1 in his presence and, thereafter to cross-examine the said witness (Para 18, 20)

B. Practice and procedure - Evidence Act, 1872 - Section 115 - Estoppel against law

- Concession - Wrong concession made by parties - Concession of Lawyer - Binding effect - there can be no estoppel against law - if law lays down that a particular procedure has to be followed while conducting a de novo trial, it has to be followed in letter and spirit - no deviation can be allowed to happen even at the concession/concurrence given by counsel or party of any side (Para 18)

Allowed. (E-4)

List of Cases cited :

1. Shashikant Singh Vs Tarkeshwar Singh & ors .(2002) 5 SCC 738

2. U.O.I. & ors Vs Mohanlal Likumal Punjabi & ors. (2004) 3 SCC 628

3. U.O.I. & anr. Vs S.C. Parashar (2006) 3 SCC 167

4. Director of Elementary Education, Orissa & ors. Vs. Pramod Kumar Sahoo 2019 (10)SCC 674

5. Harinarayan G. Bajaj Vs St. of Maha & ors. (2010)11 SCC 520

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

1. Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Atul Kumar Shahi, learned counsel for the applicant, Sri Irfanul Huda, learned counsel for the O.P. No. 2 and Sri Rishi Chaddha, learned A.G.A. for the State are present.

2. The prayer is made for quashing the order-sheet dated 12.02.2021 passed by Additional Sessions Judge/ Special Judge (Prevention of Corruption Act), Court No. 1, District, Gorakhpur passed in S.T. No. 19 of 2015 (State Vs. Govind Yadav and others) arising out of Case Crime No. 463 of 2014 under Sections 147, 148, 149, 307, 302, 386, 396 and 504 I.P.C., P.S. Khorabad, District Gorakhpur.

3. By the impugned order, Application 136 (kha) moved by the accused applicant, has been rejected under Section 319 (4)(a) Cr.P.C. wherein prayer was made that prosecution witness, P.W. 1 should be re-summoned for recording his examination-in-chief as said provision required de novo trial. Further it was mentioned in the said Application that provision of Section 319 (4)(a) was not followed by the court below as it did not record the examination-in-chief of the said witness. The said witness is informant of this case who has given an Application/F.I.R. at the police station (Exhibit Ka-1) which was proved by him.

4. From the side of prosecution, objection was submitted before the court below stating that charge-sheet was not submitted against the accused applicant and after the conclusion of statement of P.W. 1, Shiv Pratap Yadav @ Sadhu Yadav, on 17.08.2015, an Application under Section 319 Cr.P.C. was given whereon the Court had passed an order on 18.07.2016 summoning the said accused i.e. Vidyadhar Dubey @ Bablu Dubey finding prima-facie case made out against him and issued N.B.W. against the said accused for his appearance before the Court on 26.09.2016, thereafter the trial court in consonance with the provisions provided under Section 319 (4)(a) and (b), framed charges against the accused and, thereafter the said witness, Shiv Pratap Yadav @ Sadhu Yadav (P.W.1) was proposed to be re-examined but learned counsel for the said accused i.e. applicant gave in writing that the

examination-in-chief of Shiv Prasad Yadav @ Sadhu Yadav had already been recorded on 17.08.2015 and, therefore, he was ready to cross-examine the said witness. Pursuant to that, the court below provided the accused applicant opportunity to cross-examine the said witness and the same was concluded. The said fact is evident from the order-sheet dated 22.11.2016 and order-sheets of subsequent dates. Therefore, it was submitted from the side of prosecution before the Court below that no legal error was committed of the principles of law laid down under Section 319 (1)(4) (a) and (b) and, therefore, the said application ought to be dismissed having no force.

5. After having heard both the sides, the court below has recorded in the impugned order that on 22.11.2016, P.W. 1, Shiv Prasad Yadav @ Sadhu Yadav was present in Court and accused Bablu Dubey @ Vidyadhar Dubey (applicant) also remained present in Court and his learned counsel had endorsed on the order-sheet in Hindi that he was ready to cross-examine the informant on the basis of his earlier recorded examination-in-chief dated 17.08.2015. Therefore, in pursuance of that undertaking/written endorsement, learned counsel for the accused applicant started cross-examination of P.W. 1, which could not be concluded the same day, therefore, on the next date also, his cross-examination was recorded and concluded. Thereafter P.W. 2 to P.W. 9 were also recorded fully in presence of the accused applicant and during the entire evidences of nine witnesses having been recorded, counsel for the accused applicant remained present, therefore, it cannot be said that provisions of Section 319 (4)(a) Cr.P.C. was not followed and, hence Application under Section 136 (kha) was found without force and was recorded that there was no need for recording the examination-in-chief of P.W. 1 again i.e. de novo trial with respect to recording of statement of P.W. 1 was not needed. It is also recorded by the trial court that two accused in this case were detained in prison for long and argument of the prosecution has been concluded on 8.01.2021 and for the argument of the defense side, four dates had been fixed but despite various efforts having been made by Court, defense side was not advancing its arguments and, hence it was apparent that only with a view to delaying the disposal of this case, the said application had been moved and accordingly, the same was rejected.

6. Learned counsel for the applicant has vehemently argued that trial court's order is erroneous because it has rejected the Application 136 (kha) whereby prayer was made for re-summoning the P.W. 1 again because the provision under Section 319 (4)(a) Cr.P.C. clearly states that proceedings in respect of such person shall be commenced afresh and witnesses re-heard and, therefore, the provision is very much clear that P.W. 1 ought to have been re-summoned and re-examined in presence of the accused applicant despite the fact that there was concurrence/concession given from the side of learned counsel for the accused before the court below that he was ready to cross-examine the said witness on the basis of his earlier recorded examination-in-chief. For proving his point, he has relied upon the judgement of Hon'ble Apex Court in ***Shashikant Singh Vs. Tarkeshwar Singh and Ors. (2002) 5 SCC 738***, para 9 of which is quoted herein below:

"9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it

appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words "could be tried together with the accused" in Section 319(1), appear to be only directory. "Could be" cannot under these circumstances be held to be "must be". The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court."

7. It is apparent from the above position of law that in case, an accused is summoned under Section 319 Cr.P.C. to be tried with other accused, fresh examination-in-chief was required to be taken/recorded in his presence and that it was not sufficient to allow only the cross-examination of such witness whose examination-in-chief had been recorded earlier.

8. Learned A.G.A. as well as learned counsel for the informant vehemently opposed the argument stating that once the concession/concurrence has been given by learned counsel for the accused that he was ready to treat earlier recorded examination-in-chief of P.W.1 to be the examination-in-chief, to be read against the accused applicant and on that basis, he proceeded to cross-examine the said witness and not only that, even thereafter, he allowed eight more witnesses to be examined in totality, now it cannot be raised by him again to say that there was lacuna left in the case that it did not meet the requirement of the provision of Section 319 (4)(a) of Cr.P.C. which required de novo trial i.e. trial afresh and further it was stressed by him that in the impugned order, court below has recorded that not only learned counsel for the accused applicant had noted in the order-sheet that he was ready to cross-examine P.W. 1 but it was written on the order-sheet in presence of the party (applicant), therefore, applicant as well as his counsel shall be treated to be estopped by their earlier statements.

9. In support of the said view point, law was required by the Court to be cited from the side of learned A.G.A. but he could not provide any such law which would substantiate the above argument rather the law which has been cited by him appears to place the position of law that a wrong concession made by counsel before

the Court on pure question of law, would not be treated to be binding upon the party and it appears that counsel would also include party because in the present case not only counsel but party was also present and any concurrence by even party that he did not require P.W. 1 to be re-examined while law has mandated that witness ought to be re-heard (his statement in chief as well as cross-examination both were recorded in presence of the accused), the said provision ought to have been followed as per the mandate. Even party cannot be allowed to give any concession/ concurrence which is not in consonance with the law.

10. Citation which has been provided from the side of learned A.G.A. are as follows:-

Union of India and Others Vs. Mohanlal Likumal Punjabi and Others (2004) 3 SCC 628, para nos. 8 and 9 are as follows:-

"8. We shall first deal with the effect of concession, if any, made by learned counsel appearing for the present appellants before the High Court. Closer reading of the High Court's order shows that the High Court took the view that in view of the revocation of the order on 19-12-1994 and the order passed by the High Court on 11-1-1995, no further order could have been passed under Section 7 of the SAFEMA. After having expressed this view, the so-called concession is recorded. In our view the concession, if any, is really of no consequence, because the wrong concession made by a counsel cannot bind the parties when statutory provisions clearly provided otherwise. It was observed by a Constitution Bench of this Court in Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd. [(1983) 1 SCC 147] that courts are not to act on the basis of concession but with reference to the applicable provisions. The view has been reiterated in Uptron India Ltd. v. Shammi Bhan [(1998) 6 SCC 538 : 1998 SCC (L&S) 1601] and Central Council for Research in Ayurveda & Siddhav. Dr K. Santhakumari [(2001) 5 SCC 60 : 2001 SCC (L&S) 772] . In para 12 of Central Council case [(2001) 5 SCC 60 : 2001 SCC (L&S) 772] it was observed as follows: (SCC p. 64, para 12).

"12. In the instant case, the selection was made by the Departmental Promotion Committee. The Committee must have considered all relevant facts including the inter se merit and ability of the candidates and prepared the select list on that basis. The respondent, though senior in comparison to other candidates, secured a lower place in the select list, evidently because the principle of 'merit-cum-seniority' had been applied by the Departmental Promotion Committee. The respondent has no grievance that there were any mala fides on the part of the Departmental Promotion Committee. The only contention urged by the respondent is that the Departmental Promotion Committee did not follow the principle of 'seniority-cum-fitness'. In the High Court, the appellants herein failed to point out that the promotion is in respect of a 'selection post' and the principle to be applied is 'merit-cum-seniority'. Had the appellants pointed out the true position, the learned Single Judge would not have granted relief in favour of the respondent.If the learned counsel has made an admission or concession inadvertently or under a mistaken impression of law, it is not binding on his client and the same cannot enure to the benefit of any party." (italicized for emphasis)

9. In Uptron India Ltd. v. Shammi Bhan [(1998) 6 SCC 538 : 1998 SCC

(L&S) 1601] it was held that a case decided on the basis of wrong concession of a counsel has no precedent value. That apart, the applicability of the statute or otherwise to a given situation or the question of statutory liability of a person/institution under any provision of law would invariably depend upon the scope and meaning of the provisions concerned and has got to be adjudged not on any concession made. Any such concessions would have no acceptability or relevance while determining rights and liabilities incurred or acquired in view of the axiomatic principle, without exception, that there can be no estoppel against statute."

11. It is apparent from the above citation that wrong concession made by counsel before the Court cannot bind the parties when statutory provision clearly provides otherwise.

12. ***Union of India and Another Vs. S.C. Parashar (2006) 3 SCC 167,*** para nos. 11,12 and 13 are as follows:-

"11. Before adverting to the said question, we may record that wrong concession of a counsel on a pure question of law is not binding upon a party. It is furthermore trite that non-mentioning or wrong mentioning of a provision in an order may be held to be irrelevant if it is found that the requisite ingredients thereof were available on records for passing the same. We may further notice that the High Court proceeded on the basis that the penalty imposed upon him was a major penalty.

12. The penalty imposed upon the respondent is an amalgam of minor penalty and major penalty. The respondent has been inflicted with three penalties: (1) reduction to the minimum of the timescale of pay for a period of three years with cumulative effect; (2) loss of seniority; and (3) recovery of 25% of the loss incurred by the Government to the tune of Rs 74,341.89p. i.e. Rs 18,585.47p. on account of damage to the Gypsy in 18 (eighteen) equal monthly instalments. Whereas reduction of timescale of pay with cumulative effect is a major penalty within the meaning of clause (v) of Rule 11 of the CCS Rules, loss of seniority and recovery of amount would come within the purview of minor penalty, as envisaged by clauses (iii) and (iii)(a) thereof. The disciplinary authority, therefore, in our opinion acted illegally and without jurisdiction in imposing both minor and major penalties by the same order. Such a course of action could not have been taken in law.

13. However, there cannot be any doubt whatsoever that the disciplinary authority never intended to impose a minor penalty. The concession of the learned counsel appearing for the appellant before the High Court was apparently erroneous. It is now well settled that wrong concession made by a counsel before the court cannot bind the parties when statutory provisions clearly provide otherwise. (See Union of India v. Mohanlal Likumal Punjabi[(2004) 3 SCC 628 : 2004 SCC (Cri) 844] .) The penalty imposed upon the respondent, in our considered view, therefore, should be kept confined to the reduction to the minimum of the timescale of pay for a period of three years with cumulative effect. The effect of such a penalty has been considered by this Court in Shiv Kumar Sharma v. Haryana SEB [1988 Supp SCC 669 : 1989 SCC (L&S) 51 : (1988) 8 ATC

792 : AIR 1988 SC 1673] in the following terms: (SCC pp. 671-72, para 6)

"6. We are unable to accept the above contention. The penalty was imposed on 15-4-1968 and, as a result of which, he was deprived of the monetary benefit of one increment for one year only. The penalty by way of stoppage of one increment for one year was without any future effect. In other words, the appellant's increment for one year was stopped and such stoppage of increment will have no effect whatsoever on his seniority. Accordingly, the Board acted illegally and most arbitrarily in placing the juniors of the appellant above him in the seniority list and/or confirming the appellant in the post with effect from 1-12-1969, that is, long after the date of confirmation of the said Respondents 2 to 19. The question of seniority has nothing to do with the penalty that was imposed upon the appellant. It is apparent that for the same act of misconduct, the appellant has been punished twice, that is, first, by the stoppage of one increment for one year and, second, by placing him below his juniors in the seniority list."

13. It is apparent from the above citation that wrong concession made by counsel before Court on pure question of law, was not binding upon the party.

14. ***Director of Elementary Education, Orissa and Others Vs. Pramod Kumar Sahoo 2019 (10)SCC 674*** para 11 of which is as follows:-

"11. The concession given by the learned State Counsel before the Tribunal was a concession in law and contrary to the statutory rules. Such concession is not binding on the State for the reason that there cannot be any estoppel against law. The rules provide for a specific grade of pay, therefore, the concession given by the learned State Counsel before the Tribunal is not binding on the appellant."

15. It is apparent from the above citation that concession made by advocate contrary to statutory rules, is not binding on State as there cannot be estoppel against law.

16. Another ruling, ***Harinarayan G. Bajaj Vs. State of Maharashtra & Others (2010)11 SCC 520*** relates to Complaint Case but Principle of Law with respect to Section 319 Cr.P.C. would remain the same, hence, relevant para 20 of this ruling is as follows:

"20.Therefore, the situation is clear that under Section 244 CrPC the accused has a right to cross-examine the witnesses and in the matter of Section 319 CrPC when a new accused is summoned, he would have similar right to cross-examine the witness examined during the inquiry afresh. Again, the witnesses would have to be reheard and then there would be such a right. Merely presenting such witnesses for cross-examination would be of no consequence. This Court has already held so in Shashikant Singh v. Tarkeshwar Singh [(2002) 5 SCC 738 : 2002 SCC (Cri) 1203] ."

17. It is apparent from the above citation that merely providing a witness in such a situation for cross-examination would be of no consequence because witness has to be re-heard keeping in view the principle of de novo trial which includes examination-in-chief as well.

18. After having gone through the arguments of rival sides, this Court is of the view that the law is very clear in respect of

an accused who has been summoned to face trial under Section 319 Cr.P.C. that the moment he has been produced as an accused before Court, the trial would revert back to the first stage of trial and the entire evidence has to be recorded again afresh in keeping with the mandate of law that trial has to be a de novo trial and on the basis of citations which have been relied upon by the learned A.G.A. quoted above, it is also very clear that there can be no estoppel against law, therefore, if law lays down that a particular procedure has to be followed while conducting a de novo trial, it has to be followed in letter and spirit as mandated under law and no deviation can be allowed to happen even at the concession/ concurrence given by counsel or party of any side. In the case at hand, it appears that learned counsel for the applicant/ accused when facing trial before the court below, had given in writing that he was ready to cross-examine P.W. 1 and whatever he had stated in examination-in-chief before summoning of the accused applicant can be taken to be an examination-in-chief recorded against the accused applicant but that would be against the principle of law laid down under Section 319 (4) (a) of Cr.P.C. as it mandated de novo trial which would include re-recording of evidence of all witnesses. In the present case, there is no dispute with respect to recording of statements of other witnesses of prosecution i.e. P.W. 2 to P.W. 9 in presence of accused applicant in totality but dispute is there only with regard to not recording the statement (examination-in-chief) of P.W. 1 in presence of the applicant and his counsel because of the written consent having been given on their part that they were ready to cross-examine the said witness, therefore, same is being found against the provision of law.

19. The impugned order suffers from infirmity and present Application under Section 482 Cr.P.C. deserves to be allowed and is, accordingly allowed. Application of the applicant has been wrongly dismissed by the court below, hence impugned order needs to be set-aside and is, accordingly set-aside.

20. It is directed that the trial court shall give opportunity to the accused applicant for recording of Examination-in-Chief of the P.W. 1 in his presence and, thereafter he shall also be provided full opportunity to cross-examine the said witness in order to meet the mandate of law.

21. Looking to the fact that this case is very old and the stage of argument is already reached but this infirmity has been pointed out very late, therefore this Court expects that the trial court shall fix specific date for recording the statement (examination-in-chief) of P.W. 1 and would try to conclude the entire evidence of the said witness on the same date or on subsequent consecutive dates till the statement of P.W. 1 is concluded without giving any undue adjournment to either side and would try to conclude this case at the earliest expeditiously.

(2021)07ILR A689
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.07.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 6747 of 2021

Shiksha Educational Trust & Ors.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Deepak Kumar Jaiswal, Sri Sanjay Kumar Gupta

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

Negotiable Instrument Act, 1881 - Section 138 - Dishonour of cheque for insufficiency, etc., of funds in the account - Criminal Procedure Code, 1973 - Section 482 - Inherent powers - Quashing of complaint - If relevant aspects deserves to be investigated, same cannot be circumvented u/S.482 of Cr.P.C. - when there are serious allegations, they cannot be quashed under Section 482 when prima facie case is made out - (Para 12, 14)

Summoning order was issued on 28.04.2019 - Applicant purposefully not appeared before the Court below - summoning order cumulated into bailable and non-bailable warrants - Summoning order not challenged - Petition was after thought of challenging non-bailable warrant - belated challenge filed after a period of two years - All facts which applicants have mentioned before High Court could have been mentioned before the Court below after appearing before the Court below - grounds urge and the annexures annexed cannot be perused under Section 482 Cr.P.C. as Prima facie ingredients of offence are made out from papers on record – Applicant granted liberty to before the Court below and the Court below directed to consider their applications for cancellation of non-bailable warrants - No case u/S.482 Cr.P.C. made out - Complaint not liable to be quashed - Application dismissed with exemplary costs of Rs. 5,000/-. (Para 18, 19, 21)

Dismissed. (E-4)

List of Cases cited :

1. St. of Telangana Vs Habib Abdullah Jeelani & ors. (2017) 2 SCC 799

2. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maha AIR 2021 SC 1918

3. Bhajan Lal 1992 Supp (1) SCC 335

4. A. H. Patel Vs St. of Guj 2014 (1) GLR 766

5. St. of Ori Vs Ujjal Kumar Burdhan 2012 (1) GLH 875 (SC)

6. Sathis Mehra Vs St. of N.C.T. Of Delhi & anr AIR 2013 SC 506

7. Rajiv Thapar Vs Madan Lal Kapoor AIR 2013 (3) SCC 330

8. Ompal Singh & ors. Vs St. Of U.P. & ors. Cri. M.W.P. No. 14852 of 2017

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

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

2. The present application under Section 482 Cr.P.C. has been filed by the applicant with the prayer to quash the proceeding of Criminal Complaint No.1860 of 2019 (old No. 1057/2019) Bank of India Vs. Shiksha Educational Trust and others pending in the Court of Additional Chief Judicial Magistrate II, Varanasi, under Section 138 of Negotiable Instrument Act, 1881, P.S.- Kotwali, Varanasi, including Summoning Order dated 29.04.2019 (Annexure-5) as well as N.B.W. dated 09.07.2020 (Annexure-6) and dismiss the Criminal Complaint No. 1860; Bank of India Vs. Shiksha Educational Trust and others dated 11.03.2019 (Annexure-3).

3. It appears that the applicant nos. 2 and 3 have challenged the proceedings more particularly after the non-bailable warrant came to be issued on them. They had not challenged the summoning order at the first instance.

4. As far as averments made in the application are concerned it has been submitted by the learned A.G.A., are not such which would permit this Court to quash the proceedings. The provisions of Section 482 of Cr.P.C. for quashing are not made out.

5. Facts as narrated in brief are that a proposal for O.T.S. was submitted by Pratima Singh, Chair Person with an application to Chief Manager, Bank of India Lohatia Branch, Varanasi; Bank of India accepted the O.T.S. proposal on certain conditions which are accepted by the applicants; A resolution was passed giving number of 4 Cheques No. 7405, 7406, 7407 and 7408 dated 30.11.2018, 30.12.2018, 30.01.2019 and 01.02.2019; Letter mentioning Cheque Nos. and dated were submitted before the Chief Manager by the Trust; Letter for renewal of O.T.S. by giving 4 new Cheques No. 7419, 7420, 7417 and 7418 dated 20.01.2019, 08.02.2019, 28.02.2019 and 25.03.2019 which was submitted before Zonal Manager; Letter for payment of dues under O.T.S. by giving 4 new Cheques nos. 7419, 7420, 7417, 7418 dated 20.01.2019, 08.02.2019, 28.02.2019 and 25.03.2019 which was submitted before Chief Manager; Cheque No.7406 for Rs. 100 Lacs was issued in the name of Bank of India; Return Memo was issued by Union Bank of India with remark **"funds insufficent'** ; Legal Notice in respect of dishonor of Cheque No.7406 dated 30.12.2018 for Rs.100 Lac was allegedly given; Letter of Chief Manager cancelling O.T.S. proposal dated 14.07.2018 sanctioned on 19.11.2018; Complaint U/S 138 N.I. Act, was filed by Bank of India through Chief Manager which was registered as Criminal Complaint No.1860 of 2019 (old No. 1057 of 2019); statement of complainant, Chief Manager U/s 200 Cr.P.C. in the form of affidavit was recorded; the summoning order was never challenged before this Court.

6. The averments and complaint by the complainant will also not permit this Court to exercise jurisdiction under Section 482 Cr.P.C. I am fortified in my view by the decision rendered in State of **Telangana Vs. Habib Abdullah Jeelani and others, (2017) 2 SCC 799**. There are serious allegations against the accused. Therefore it cannot be said that this is a case which requires to be entertained. The Court as per the contours of Section 482 Cr.P.C. cannot grant indirectly which cannot be granted directly. I am even fortified in my view by the decision rendered in **Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra AIR 2021 SC 1918.**

7. At the stage the High Court is not justified in embarking upon an enquiry as to the probability, reliability or genuineness of the allegations made therein. Of course it has been pointed out in **Bhajan Lal cases, 1992 Supp (1) SCC 335**, an F.I.R. or a complaint may be quashed if the allegations made therein are so absurd and inheretently improbable that no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused but the High Court has not recorded such a finding, obviously because on the allegation in the F.I.R. it was not possible to do so. Therefore, it must be held that the High Court has committed a gross error of law in quashing the F.I.R. and the complaint. Accordingly, the impugned judgment is set aside and the petition filed by the respondent in the High Court under Section 482 Cr.P.C. is dismissed.

8. After coming to know that the non-bailable warrant has been issued this is a clear device of challenging the entire proceedings under Section 482 Cr.P.C. It is

not known if the police has already arrested the accused as the warrants were issued long back before one year. The summoning order is dated 29.04.2019 which means that for a period of two years the respondents have not appeared before the learned Magistrate.

9. It is submitted by learned A.G.A. that the present application is devoid of merits just because there are litigation pending before DRT and DRAT Allahabad and complaint cannot be quashed. It cannot be said that the proceedings are bad. No case is made out for interference under Section 482 Cr.P.C. at this juncture.

10. Hence, the application is required to dismissed. However if the applicants choose, they may appear before the Court below and if the non-bailable yet not served on them, they may request the Court for recalling of non-bailable warrants.

11. It is a after thought only after the non-bailable warrants were issued that the applicants have approached this Court, they did not appear before the Court below nor challenge the summoning order were issued. The summoning order were never challenged. The submission of Sri Deepak Kumar Jaiswal that dual proceedings cannot take place both under DRAT and under Section 138 of N.I. Act is not tenable as there is no bar if the cheque is bounced on the basis of insufficiency of funds, may be because of one time settlement or rejection of the same cannot be countered under Section 482 Cr.P.C..

12. I have heard the parties and have perused the entire record. Prima facie ingredients of the offence are made out from the papers on record. On the touchstone of the decision of the Apex Court and in a recent decision of High Court of Gujarat in case of **A. H. Patel vs. State of Gujarat reported in 2014 (1) GLR 766** as the facts are similar to this case the said decision and the parameters fixed in the recent decision has holding that if the relevant aspects deserves to be investigated, the same cannot be circumvented under Section 482 of the Code.

13. The Apex Court in case of **State of Orissa vs. Ujjal Kumar Burdhan reported in 2012 (1) GLH 875 (SC)** has observed that:

"7. It is true that the inherent powers vested in the High Court under Section 482 of the Code are very wide. Nevertheless, inherent powers do not confer arbitrary jurisdiction on the High Court to act according to whims or caprice. This extraordinary power has to be exercised sparingly with circumspection and as far as possible, for extraordinary cases, where allegations in the complaint or the first information report, taken on its face value and accepted in their entirety do not constitute the offence alleged. It needs little emphasis that unless a case of gross abuse of power is made out against those incharge of investigation, the High Court should be loath to interfere at the early/premature stage of investigation.

8. In State of West Bengal and Ors. Vs. Swapan Kumar Guha and Ors.(1982) 1 SCC 561: 1982 SCC (Cri) 283, emphasising that the Court will not normally interfere with an investigation and will permit the inquiry into the alleged offence, to be completed, this Court highlighted the necessity of a proper investigation observing thus: An investigation is carried on for the purpose of gathering necessary materials for

establishing and proving an offence which is disclosed . When an offence is disclosed, a proper investigation in the interests of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation in a case where an offence is disclosed , the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the court normally does not interfere with the investigation of a case where an offence has been disclosed.... Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case.... If on a consideration of the relevant materials, the court is satisfied that an offence is disclosed, the court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence."(emphasis supplied)."

14. It is held that High Court should be loath in exercise of jurisdiction under Section 482 of Code to enter into the process of determining the veracity of complaint. In case of **Sathis Mehra vs. State of N.C.T. Of Delhi and anr** reported in **AIR 2013 SC 506** it is held by the Apex Court that when there are serious allegations, they cannot be quashed under Section 482 when prima facie case is made out.

15. The Apex Court in case of **Rajiv Thapar vs. Madan Lal Kapoor** reported in **AIR 2013 (3) SCC 330** has held that :

"29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have farreaching consequences inasmuch as it would negate the prosecution's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the

prosecution /complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiable refuted, being material of sterling impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

As observed by Hon'ble Apex Court, the powers vested in the High Court under Section 482 of the Code, when exercised, have far reaching consequences, most important being the consequence that it would negate the prosecution's/ complainant's case without allowing the prosecution/ complainant to lead evidence and that, therefore, the exercise of the said powers should be with utmost caution, care and circumspection. This is a case which cannot be said to be one where extraordinary power require to be exercised as basic ingredients of the alleged offences are there.

16. In view of the above, I do not feel that this petition requires to be entertained. The petition is devoid of merits and is dismissed. Interim relief is vacated forthwith. The police shall take action immediately regarding non-bailable warrants. Writ be sent to the concerned police station to take further action.

17. Moreover recently the Division Bench while exercising a broader jurisdiction under Article 226 of the Constitution of India in **Criminal Misc. Writ Petition No. 14852 of 2017 (Ompal Singh And 3 Ors Vs. State Of U.P. And 2 Ors.)** has rejected the petition for quashment.

18. This petition is after thought of challenging the non-bailable warrant, the application is devoid of merits and is dismissed with exemplary costs of Rs. 50,000/- to be deposited with the Legal Service Authority which can be utilized for the patients of Covid-19 as officers of such institutions after falling to appear before the Court below have come up with this challenge which is a belated challenge filed after a period of two years. They have purposefully not appeared before the Court below. The summoning order was issued on 28.04.2019. All these facts which the applicants have mentioned herein, they could have mentioned before the Court below after appearing before the Court below.

19. From these factual data, it is submitted that two proceedings cannot simultaneously be proceeded. All these are in the realms evidence. The liabilities were prima facie there and therefore it cannot be said that the issuance of summons is bad. The amount of cheque and and contours of Section 138 of N.I. Act, cannot be said to have been prima faice not made out. The summoning order cumulated into bailable and non-bailable warrants. The grounds urge and the annexures annexed cannot be perused under Section 482 Cr.P.C. when prima facie case is made out.

20. It cannot be said that the complaint bared by SARFAESI Act, 2002. If it was against the O.T.S., the O.T.S. is not bounty but there a meritorious for

liability and therefore both the proceedings can simultaneously be carried out because of the Pandemic the matter remain pending here. If the accused are still not arrested the only indulgence which can be shown. They may appear before the Court below and the Court below may consider their applications for cancellation of non-bailable warrants.

21. No case for under Section 482 Cr.P.C. is made out. The application is dismissed with exemplary costs of Rs. 50,000/-.

F. Order

On oral request before this order is signed, the cost is reduced to Rs.5,000/- (five thousand).

(2021)07ILR A695
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 6947 of 2021

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

Counsel for the Applicants:
Sri Shri Krishna Mishra, Sri Shri Krishna Mishra

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

The Protection of Women from Domestic Violence Act, 2005 - Criminal Procedure Code, Section 482 - Quashing of proceedings - Court below merely registered the complaint filed by opp. party no. 2 under DV Act - Applicant sought quashing on ground that parties not living in 'shared household' therefore proceedings under DV Act not maintainable - *Held* - whether parties are living or not not living together in a shared household, would require adjudication by the competent court, based upon a consideration of the case in its entirety - question of maintainability would require proper appreciation of facts of case and thorough deliberation of issues raised - Claim for protection under DV Act may not be thrown out at threshold - applicants can raise his defence in the proceedings before the court below - Proceedings, not liable to be quashed. (Para 12, 15)

Dismissed. (E-4)

List of Cases cited :

1. Krishna Bhattacharjee Vs Sarathi Choudhur (2016) 2 SCC 705

2. Vaishali Abhimanyu Joshi Vs Nanasaheb Gopal Joshi (2017) 14 SCC 373

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

1. Heard Sri Shri Krishna Mishra, learned counsel for the applicants through video link and Ms. Sushma Soni, learned Additional Government Advocate for the State-opposite party.

2. The present application seeks to challenge the order dated 7.11.2020, by means of which, the complaint registered as Complaint Case No. 1777 of 2020 (Shambhavi Kesharwani vs. Nivesh Gupta) filed by the opposite party no. 2, has been directed to be registered fixing a date and

the subsequent orders, in terms of which, further dates have been fixed in the case. The applicants have also sought quashing of the proceedings of the complaint case.

3. The only ground, which is sought to be canvassed to challenge the order registering the case and also seeking quashing of the proceedings, is that the applicants are not living with the opposite party no. 2 in a 'shared household' and, therefore, the proceedings under 'The Protection of Women from Domestic Violence Act, 2005', would not be maintainable.

4. Learned A.G.A., appearing for the State-opposite party, submits that the contention, which is sought to be raised by the applicants with regard to the parties not living together in a shared household, would require adjudication by the competent court and the applicants can raise their defence in the proceedings before the court below. Learned A.G.A. further submits that in the facts of the present case, the complaint filed by the opposite party no. 2 has merely been registered, and the present application seeking quashing of the proceedings, is clearly premature and is not liable to be entertained at this stage.

5. The proceedings, which are sought to be challenged in the present case relate to 'The Protection of Women from Domestic Violence Act, 20051, which was enacted to provide for a more effective protection of the rights of women guaranteed under the Constitution, who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.

6. The Statement of Objects and Reasons of the enactment contains reference to the Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995), wherein domestic violence was acknowledged as a human right issue and serious deterrent to development. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) also recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

7. The provisions under the DV Act seek to cover those women, who are or have been in a relationship with the abuser, where both parties have lived together in a 'shared household' or related by consanguinity or marriage or through a relationship in the nature of marriage or adoption. Relationship with family members living together as a joint family are also included. In addition, women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection.

8. The expression 'domestic violence' under the Act has been defined in a manner so as to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands have also been covered under the definition. In order to effectively ensure the protection of women, the DV Act empowers the Magistrate conerned to pass protection orders, residence orders, custody orders, compensation orders and also issue directions for mandatory reliefs. The Magistrate is further empowered to grant an ex-parte order and also to pass such ad-interim order as he may deem just and proper.

9. The DV Act was enacted keeping in view the rights guaranteed under Articles

14, 15 and 21 of the Constitution to provide for a remedy under the civil law intended to protect the women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

10. The beneficial and affirmative nature of the legislation was considered in ***Krishna Bhattacharjee v. Sarathi Choudhury***2, wherein it was held that regard being had to the nature of the legislation, the courts are expected to have a sensitive approach and before throwing a petition at the threshold on the ground of maintainability, there has to be an apposite discussion and thorough deliberation on the issues raised. The relevant observations made in the judgement are as follows :-

"3. Regard being had to the nature of the legislation, a more sensitive approach is expected from the courts whereunder the 2005 Act no relief can be granted, it should never be conceived of but, before throwing a petition at the threshold on the ground of maintainability, there has to be an apposite discussion and thorough deliberation on the issues raised. It should be borne in mind that helpless and hapless "aggrieved person" under the 2005 Act approaches the court under the compelling circumstances. It is the duty of the court to scrutinise the facts from all angles whether a plea advanced by the respondent to nullify the grievance of the aggrieved person is really legally sound and correct. The principle "justice to the cause is equivalent to the salt of ocean" should be kept in mind. The court of law is bound to uphold the truth which sparkles when justice is done. Before throwing a petition at the threshold, it is obligatory to see that the person aggrieved under such a legislation is not faced with a situation of non-adjudication, for the 2005 Act as we have stated is a beneficial as well as assertively affirmative enactment for the realisation of the constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence."

11. Taking a similar view in ***Vaishali Abhimanyu Joshi vs. Nanasaheb Gopal Joshi***3, it was held that looking to the beneficial nature of the provisions contained under the DV Act, its interpretation should be in a manner to effectuate its objects and purpose. The observations made in the judgement while interpreting Section 26 of the Act are as follows :-

"40. Section 26 of the 2005 Act has to be interpreted in a manner to effectuate the very purpose and object of the Act. Unless the determination of claim by an aggrieved person seeking any order as contemplated by the 2005 Act is expressly barred from consideration by a civil court, this Court shall be loath to read in bar in consideration of any such claim in any legal proceeding before the civil court."

12. The question as to whether a woman would be entitled to claim protection of right in a 'shared household', would be required to be adjudicated taking into view the meaning of the expression as defined under Section 2(s) of the Act, which would go to show that while considering a claim for protection of the right to live in a 'shared household', the words 'lives' or 'at any stage has lived', in a domestic relationship, would have to be

included within the purview. The question as to whether a claim for protection of right in a 'shared household' can be sustained, would have to be, therefore, based upon a consideration of the case in its entirety.

13. The DV Act has been held to be a beneficial and an affirmative legislation for more effective protection of constitutional rights of women and to ensure that they do not become victims of any kind of domestic violence and while interpreting the provisions of the Act, a sensitive approach towards the rights of women is required to be taken.

14. It would be obligatory on the Court in a given case to scrutinise the facts from all angles so as to examine whether the plea advanced with regard to maintainability is on a sound legal basis or has been raised solely with a view to nullify the grievance of the aggrieved person. The beneficial and the affirmative object of the enactment would be required to be taken into view while dealing with such questions relating to maintainability and a narrow interpretation, which may leave the aggrieved woman in distress, remediless or in a situation of non-adjudication, would have to be eschewed.

15. Having regard to the aforesaid and looking to the beneficial nature of the statute and its affirmative purpose, a claim for protection under the DV Act may not be thrown out at the threshold and the question of maintainability would require a proper appreciation of facts of the case and a thorough deliberation of the issues raised.

16. Learned counsel for the applicants, at this stage, fairly submits that the applicants would appear before the court below and file their objections and contest the case on merits.

17. Having regard to the aforesaid facts and circumstances of the case, this Court is not inclined to exercise its inherent jurisdiction, at this stage.

18. It is made clear that the observations made hereinabove, are *prima facie* in nature and the dismissal of the present application would not preclude the applicants from raising all objections, which may be available to them, including the point with regard to maintainability of the proceedings.

19. Subject to the aforesaid observations, the application stands dismissed.

(2021)07ILR A698
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.06.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 12955 of 2021

Vijay Laxmi Yadav ...Petitioner
Versus
State of U.P & Ors. ...Respondents

Counsel for the Petitioner:
Ganga Prasad Srivastava, Rishi Kumar Tripathi

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate appointment - Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 - Rule 5 - Delay in making a claim for compassionate grounds appointment dilutes the case of

immediate financial penury and consequently negates the entitlement for appointment on compassionate grounds. (Para 25)

Appointments on compassionate grounds cannot wait for the claimants to attain majority or to enable them to acquire additional qualifications and get a better deal in appointments. In fact, such grounds militate against claim for compassionate grounds appointment. (Para 26, 32 to 34)

B. The purpose of compassionate appointments provides their justification. The death of a bread winner forces the family of the deceased into penury. The immediacy of the financial crisis creates the requirement for urgent redressal. The concept of compassionate appointments is created only to enable the bereaved family to tide over the immediate financial crisis. (Para 13 to 15, 20)

C. Compassionate ground appointments are an exception and cannot be made the rule. The exception can be maintained only by strictly adhering to the preconditions of the appointment in a strict fashion. A relaxation in the aforesaid pre-conditions would open a floodgate of appointments on compassionate grounds. It will turn the compassionate ground appointments into a regular source of recruitment. The constitutionally accepted mode of appointment to public office or any other post under the State Government or its instrumentalities is by open and transparent recruitment process, consistent with the mandate of Article 14 and Article 16 of the Constitution of India. (Para 16 to 18)

The criteria of financial hardship faced by the family of the deceased caused by his death, provides a thin membrane of legitimacy to compassionate appointments. Bereft of this thin cover of legitimacy or if any other criteria is employed to make compassionate appointments, the appointments would become vulnerable to a constitutional challenge. Appointments based on descent or claims of appointment which rest on heredity, invite the wrath of Article 16 of the Constitution of India. (Para 21, 23, 24)

D. Emotional distress occasioned by the death of the employee is not material for appointment on compassionate grounds. Emotional distress and financial penury are two distinct facts. Immediate financial penury, caused to the family by the death of the employee, is the only relevant consideration for appointment under dying-in-harness rules. (Para 35)

Writ petition dismissed.(E-3)

Precedent followed:

1. Umesh Kumar Nagpal Vs St. of Har., (1994) 4 SCC 138 (Para 14)

2. Director of Education (Secondary) Vs Pushpendra Kumar, (1998) 5 SCC 192 (Para 15)

3. Mumtaz Yunus Mulani Vs St. of Mah., (2008) 11 SCC 384 (Para 17)

4. St. of Har. Vs Ankur Gupta, (2003) 7 SCC 704 (Para 18)

5. Bhawani Prasad Sonkar Vs U.O.I. & ors., (2011) 4 SCC 209; [2011] 4 SCR 630 (Para 23)

6. V. Sivamurthy Vs St.of A.P., (2008) 13 SCC 730 (Para 24)

7. Sanjay Kumar Vs St. of Bihar & ors., 2000 (7) SCC 192 (Para 27)

8. Smt. Sonal Lavaniya & anr. Vs U.O.I. & anr., 2003 (5) AWC 4070 (Para 28)

9. Sanjeev Kumar Vs Food Corporation of India & ors., Writ A No. 11083 of 2018, order dated 03.05.2018 (Para 29)

10. Shiv Kumar Dubey Vs St. of U.P., 2014 (2) ADJ 312 (Para 30)

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

1. In view of COVID-19 pandemic, this case is being heard through video conferencing.

2. Heard learned counsel for the petitioner and learned ACSC for the respondent - State.

3. Brief fact of the case is that petitioner's father died on 22.07.1985 while holding the post of Constable. At that time the petitioner was minor as her date of birth is 03.02.1984 and after attaining majority on 02.02.2002, she moved an application on 02.02.2005 for grant of compassionate appointment under Dying in Harness Rules, 1974.

4. Learned counsel for the petitioner submitted that the petitioner is repeatedly requesting to the respondents to ensure appointment on the compassionate ground in accordance with her qualification, however, the respondents are sitting tight over the matter and are not taking decision in the matter.

5. A query was made to learned counsel for the petitioner that why the petitioner approached to this court after a long spell of time of almost 15 years, he submitted that after attaining majority, the petitioner was continuously making applications before the respondent department but the same could not be decided and now she has filed the present writ petition before this court. He submitted that in case direction is issued for consideration of claim of the petitioner, ends of justice would be met.

6. On the other hand, learned ACSC submitted that there are latches of more than 15 years on the part of the petitioner in approaching this court from the date she attained majority and moved an application for grant of compassionate appointment, therefore, she is not entitled for grant of appointment on compassionate ground under Dying in Harness Rules, 1974.

7. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

8. Relevant fact for consideration before this Court is that father of the petitioner was working as Constable under Civil Police and was posted under Superintendent of Police, Azamgarh. He died on 22.07.1985 by sustaining a bullet injury while an encounter with dacoits in district Azamgarh and at that time the petitioner was minor. She attained majority on 02.02.2002 and moved an application for grant of compassionate appointment under Dying in Harness Rules, 1974 on 02.02.2005 and reminder to the same was moved on 02.09.2020.

9. Grant of appointment on compassionate grounds in the respondent - department is regulated and governed by the Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974.

10. The concept of dying in harness is unique to Service Law Jurisprudence.

11. The validity of the concept of appointments on the basis of an employee dying in harness was called in question before the courts. The constitutional validity of the aforesaid appointments soon came to be tested. The compassionate ground appointments passed the test of constitutional validity by a slender margin. The justification to make compassionate ground appointments was provided on the

footing that the kin of the deceased stood on the brink of financial penury or faced an immediate financial crisis on account of the death of working member of the family. This feature alone constituted the kin of a deceased employee into one class and on the footing alone the rationale of compassionate ground appointments was justified.

12. It would be apposite to reinforce the narrative with good authority.

13. The purpose of compassionate appointments provides their justification. The death of a bread winner forces the family of the deceased into penury. The immediacy of the financial crisis creates the requirement for urgent redressal. The concept of compassionate appointments is created only to enable the bereaved family to tide over the immediate financial crisis.

14. The Hon'ble the Supreme Court in the case **of Umesh Kumar Nagpal Vs. State of Haryana,** reported at **(1994) 4 SCC 138**, explained the purpose of compassionate appointment as under:

"2. The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the

object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

15. A similar sentiment was echoed by the Hon'ble Supreme Court in the case of Director of Education (Secondary) vs. Pushpendra Kumar, reported at (1998) 5 SCC 192 in the following terms:

"8. The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependants of the deceased who may be eligible for such appointment. Such a provision makes a departure from the general provisions providing for appointment on the post by following a particular procedure. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of other persons who are eligible for appointment to seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependant of a deceased employee. In Umesh Kumar Nagpal Vs. State of Haryana [(1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] this Court has taken note of the object underlying the rules providing for appointment on compassionate grounds and has held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. In that case the Court was considering the question whether appointment on compassionate grounds could be made against posts higher than posts in Classes III and IV. It was held that such appointment could only be made against the lowest posts in non-manual categories. It was observed: (SCC p. 140, para 2) "The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the

public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

16. However, there is a caution. Compassionate ground appointments are an exception and cannot be made the rule. The exception can be maintained only by strictly adhering to the pre-conditions of the appointment in a strict fashion. A relaxation in the aforesaid pre-conditions would open a floodgate of appointments on compassionate grounds. It will turn the compassionate ground appointments into a regular source of recruitment. The constitutionally accepted mode of appointment to public office or any other post under the State Government or its instrumentalities is by open and transparent recruitment process. Such recruitment process would invite eligible persons from the open market to compete for appointment. This process is consistent with the mandate of Article 14 and Article 16 of the Constitution of India.

17. It was with this constitutional mandate in mind that the Hon'ble Supreme Court in the case of **Mumtaz Yunus Mulani Vs. State of Maharashtra**, reported at (2008) 11 SCC 384 cautioned that compassionate appointment were not an alternative mode of recruitment to public employment, by laying down as under:

"However, it is now a well-settled principle of law that appointment on compassionate grounds is not a source of recruitment. The reason for making such a benevolent scheme by the State or the public sector undertaking is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to get over the sudden financial crisis."

18. The Hon'ble Supreme Court reiterated the purpose and limitations of compassionate ground appointment in the case of **State of Haryana Vs. Ankur Gupta,** reported at (2003) 7 SCC 704 and held as under:

"6. As was observed in State of Haryana Vs. Rani Devi [(1996) 5 SCC 308 : 1996 SCC (L&S) 1162 : JT (1996) 6 SC 646] it need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the premise that he was dependent on the deceased employee. Strictly, this claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16. Appointment on compassionate ground cannot be claimed as a matter of right. Die-in-Harness Scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee. InRani Devi case [(1996) 5 SCC 308 : 1996 SCC (L&S) 1162

: JT (1996) 6 SC 646] it was held that the scheme regarding appointment on compassionate ground if extended to all types of casual or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. in LIC of India Vs Asha Ramchhandra Ambekar [(1994) 2 SCC 718 : 1994 SCC (L&S) 737 : (1994) 27 ATC 174] it was pointed out that the High Courts and Administrative Tribunals cannot confer benediction impelled by sympathetic considerations to make appointments on compassionate grounds when the regulations framed in respect thereof do not cover and contemplate such appointments. It was noted in Umesh Kumar Nagpal Vs. State of Haryana [(1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] that as a rule, in public service appointments should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis. But such appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased.

7. In the case of Director of Education (Secondary) Vs. Pushpendra Kumar [(1998) 5 SCC 192 : 1998 SCC (L&S) 1302] it was observed that in the matter of compassionate appointment there cannot be insistence for a particular post. Out of purely humanitarian consideration and having regard to the fact that unless some source of livelihood is provided the family would not be able to make both ends meet, provisions are made for giving appointment to one of the dependants of the deceased who may be eligible for appointment. Care has, however, to be taken that provision for grant of compassionate employment which is in the nature of an exception to the general provisions does not unduly interfere with the right of those other persons who are eligible for appointment to seek appointment against the post which would have been available, but for the provision enabling appointment being made on compassionate grounds of the dependant of the deceased employee. As it is in the nature of exception to the general provisions, it cannot substitute the provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision."

19. It was in the experience of the State Government that a large number of applications for compassionate ground appointments were made much after the death of the government servants. Rule 5 of the said Rules provides for the said contingency. Rule 5 authorizes the State Government to condone the delay in making of an application for an appointment on compassionate grounds. The State Government undoubtedly has the power to condone the delay in filing of an application for appointment on compassionate grounds. However, while considering the scope of such power, purpose of compassionate ground appointments can not be lost sight of. The stated purpose which is the only justifiable ground for such appointments, is that the family which is facing immediate financial

crisis, should be supported by providing an employment to a member of such family to tide over the crisis.

20. Only present and imminent financial crisis provides the sole justification for making appointments on compassionate grounds. Delay in making such applications for appointment on compassionate grounds raises a presumption that the immediate financial crisis has been tided over. Lifting of the immediate financial penury, denies the justification for making an appointment on compassionate grounds.

21. The criteria of financial hardship faced by the family of the deceased caused by his death, provides a thin membrane of legitimacy to compassionate appointments. Bereft of this thin cover of legitimacy or if any other criteria is employed to make compassionate appointments, the appointments would become vulnerable to a constitutional challenge. Appointments based on descent or claims of appointment which rest on heredity, invite the wrath of Article 16 of the Constitution of India.

22. It would be apposite to fortify the narrative with good authority.

23. The Hon'ble the Supreme Court set its face against appointments based on descent in the case **of Bhawani Prasad Sonkar Vs Union of India and Others** and spoke as under:

"Now, it is well settled that compassionate employment is given solely on humanitarian grounds with the sole object to provide immediate relief to the employee's family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to our constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of the Constitution of India. No other mode of appointment is permissible. Nevertheless, the concept of compassionate appointment has been recognised as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, the scheme has to be strictly construed and confined only to the purpose it seeks to achieve."

"In Umesh Kumar Nagpal vs. State of Haryana [(1994) 4 SCC 138 : 1994 SCC (L&S) 930 : (1994) 27 ATC 537] , while emphasising that a compassionate appointment cannot be claimed as a matter of course or in posts above Classes III and IV, this Court had observed that: (SCC p. 140, para 2)

1. "2. ... The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the

family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved viz. relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

"Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the breadwinner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts."

24. A similar view against impermissibility of appointments based on descent was taken at an earlier point in time in the case of **V. Sivamurthy Vs. State of Andhra Pradesh,** reported at (2008) 13 SCC 730, wherein it has been provided as under:

"18. (a) Compassionate appointment based only on descent is impermissible. Appointments in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution of India. Though no other mode of appointment is permissible, appointments on compassionate grounds are a well-

recognised exception to the said general rule, carved out in the interest of justice to meet certain contingencies."

25. Delay in making a claim for compassionate grounds appointment dilutes the case of immediate financial penury and consequently negates the entitlement for appointment on compassionate grounds.

26. Appointments on compassionate grounds cannot wait for the claimants to attain majority or to enable them to acquire additional qualifications and get a better deal in appointments. In fact, such grounds militate against claim for compassionate grounds appointment.

27. The Hon'ble Supreme Court in the case of Sanjay Kumar Vs. State of Bihar and Others reported at 2000 (7) SCC 192 reiterated the purpose of a compassionate grounds appointments to tide over the sudden crisis resulting from the death of the earner in a family. However, the reservation of a vacancy to enable such person to attain majority was negatived by the Hon'ble Supreme Court by holding thus:

"3. We are unable to agree with the submissions of the learned Senior Counsel for the petitioner. This Court has held in a number of cases that compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the breadearner who had left the family in penury and without any means of livelihood. In fact such a view has been expressed in the very decision cited by the petitioner in Director of Education Vs. Pushpendra Kumar [(1998) 5 SCC 192 : 1998 SCC (L&S) 1302 : (1998) 2 Pat LJR 181] . It is also significant to notice that on the date when the first application was made by the petitioner on 2-6-1988, the petitioner was a minor and was not eligible for appointment. This is conceded by the petitioner. There cannot be reservation of a vacancy till such time as the petitioner becomes a major after a number of years, unless there are some specific provisions. The very basis of compassionate appointment is to see that the family gets immediate relief."

28. A Division Bench of this Court after citing good authority, also concluded that financial penury ceased to exist in case an application was made long years after the death of the employee in the case of Smt. Sonal Lavaniya and another Vs. Union of India and another reported at 2003 (5) AWC 4070 has been held as under:

"38. The purpose of providing such an employment has been to render the financial assistance to the family, which has lost the bread earner immediately after the death of the employee. If the application has been filed after expiry of 9 years the element of immediate need stood evaporated and there was no occasion for the respondents to consider the case of the petitioner for such a relief. The observation made by the learned Tribunal are in consonance with the law laid down by the Hon'ble Apex Court and no exception can be taken out."

29. A similar view was taken by learned Single Judge of this Court in the case of **Sanjeev Kumar Vs. Food Corporation of India and Others**; Writ A No. 11083 of 2018, order dated 03.05.2018, wherein it has been held as under:

"In a case of compassionate appointment, it is the immediacy of appointment that is of prime consideration to ameliorate the financial hardship be falling the bread winner of the family. If the family of the bread winner or the claimant has managed to survive for 27 years after the death of the government servant, it cannot be said that there is any immediacy of the appointment. Compassionate appointment is an exception to the well established Rule of equality in the matter of recruitment to government service and therefore exceptional grounds must exist to justify such appointment."

30. The question of delay in filing applications for appointment under Dying-in-harness Rules and the consequences of such delay on the right to be appointed on compassionate grounds was posed to a Full Bench of this Court in the case of **Shiv Kumar Dubey Vs. State of U.P**. reported at 2014 (2) ADJ 312. For ease of reference, the relevant part of the judgment is reproduced hereunder:

"29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

[emphasis supplied]

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

[emphasis supplied]

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

[emphasis supplied]

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the

deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;

[emphasis supplied] Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family." (emphasis supplied).

31. The facts of the case found earlier shall now be considered in the light of the judicial authority stated in the preceding part of the judgment.

32. The father of the petitioner died in harness on 22.07.1985. The petitioner made an application for grant of appointment on compassionate grounds on 02.02.2002. Delay in making the application for appointment on compassionate grounds, is defended on the sole ground, that on the date of death of the father of the petitioner, the petitioner was minor. The petitioner applied for appointment on compassionate grounds when she attained majority.

33. The petitioner has approached this Court more than 15 years after the cause of action arose. The issue of delay and laches on the part of the petitioner, raised by learned Additional Standing Counsel, shall now be considered. The writ petition is barred by delay and laches. The petitioner has approached this Court almost after more than 15 years from the date of death of her father. There is no satisfactory explanation for laches and the delay in filing the petition on the part of the petitioner.

34. In view of the delay in filing the application, for grant of appointment on compassionate grounds, this Court consistent with the narrative in the earlier part of the judgment, finds that the financial crisis, if any, occasioned by the death of the father of the petitioner, was not existing when the application for grant of compassionate grounds appointment was made by the petitioner. There is no lawful basis for grant of appointment on compassionate grounds to the petitioner.

35. Emotional distress and financial penury are two distinct facts. Emotional distress occasioned by the death of the employee is not material for appointment on compassionate grounds. Immediate financial penury, caused to the family by the death of the employee, is the only relevant consideration for appointment under dying-in-harness rules.

36. The courts have consistently observed that delay and laches on part of the litigant will lead to denial of relief. In this regard the Hon'ble Supreme Court has settled the law with clarity and observed it with consistency.

37. In the wake of preceding discussion, the writ petition is devoid of merit and is hereby **dismissed.**

(2021)07ILR A710
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.07.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE HON'BLE DINESH KUMAR SINGH, J.

Service Bench No. 14047 of 2021

Sub Inspector (Civil Police) Amol Kumar Sharma ...Petitioner
Versus
State of U.P & Ors. ...Respondents

Counsel for the Petitioner:
Sushil Kumar Pathak, Rakesh Kumar Srivastava

Counsel for the Respondents:
C.S.C., Shikhar Anand

A. Service Law – Representation against order of punishment – Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 - Rule 20, 23, 25 - A delinquent employee without exhausting the statutory remedy of appeal and revision as provided under Rules 20 and 23 of Rules of 1991 cannot avail the powers of State Government u/Rule 25 of Rules of 1991 by making a representation. (Para 9, 13)

It was not a statutory representation preferred by the petitioner and the period of limitation shall be counted from the date of punishment orders and not from the date on which the representation of the petitioner was rejected. Therefore, the learned Tribunal has rightly come to the conclusion that the claim petition preferred by the petitioner was time barred and, as such, is liable to be rejected. (Para 9, 16)

Writ petition dismissed. (E-3)

Precedent cited:

1. S.S. Rathor Vs St. of M.P. & ors., (1989) 4 SCC 582 (Para 16)

2. Dr. Anil Kumar Agrawal Vs St. of U.P. & ors., Writ Petition No. 28869 (S/B) of 2017 (Para 16)

Present petition assails judgment dated 28.06.2021, passed by U.P. State Public Service Tribunal, Lucknow and order dated 11.06.2018.

(Delivered by Hon'ble Ritu Raj Awasthi, J.
&
Hon'ble Dinesh Kumar Singh, J.)

1. The case is taken up through Video Conferencing.

2. Heard Mr. Rakesh Kumar Singh, learned counsel for the petitioner as well as Mr. Shikhar Anand, learned Counsel appearing on behalf of opposite party no.1 and learned Standing Counsel appearing on behalf of opposite parties no.2, 3 and 4.

3. The instant writ petition has been filed challenging the impugned judgment and order dated 28.06.2021, passed by U.P. State Public Service Tribunal, Lucknow in Claim Petition No.2321 of 2018*; Amol Kumar Sharma Vs. State of U.P. and others* and the order dated 11.06.2018, passed by opposite party no.3, whereby the claim petition preferred by the petitioner has been rejected being time barred.

4. As per the facts of the case in brief, the petitioner while working on the post of

Sub Inspector in U.P. Police was awarded minor punishments of five censure entries for the incidence relating to the year 2012-13. The petitioner did not file departmental appeals against the order of punishment. He had moved a representation dated 20.10.2017 before the State Government. The State Government did not decide the representation of the petitioner. Thereafter the petitioner filed Writ Petition No.6378 (SS) of 2018; *Amol Kumar Sharma Vs. State of U.P. and others*. The said writ petition was disposed of vide order dated 28.02.2018 by the High Court with a direction to the State Government to consider and decide the representation of the petitioner within a period of three months. The State Government thereafter in compliance of High Court's order decided the representation and rejected the same vide order dated 11.06.2018.

5. It was thereafter that the petitioner preferred a claim petition challenging the order dated 11.06.2018 and seeking a direction not to take into consideration the impugned punishment of censure entries for the purpose of his promotion. Learned Tribunal considering the submissions made by the petitioner as well as counsel for the opposite parties rejected the claim petition holding that the representation preferred by the petitioner was not statutory representation and, as such, the period of limitation shall be counted from the date of punishment orders and accordingly the claim preferred by the petitioner was time barred and therefore liable to be rejected.

6. Learned counsel for the petitioner submits that the representation of the petitioner dated 20.10.2017 was preferred under Rule 25 of Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as 'Rules of 1991) and, as such, it was a statutory representation. Once it was rejected the period of limitation shall be counted from the date of rejection of that order i.e. 11.06.2018. The claim petition was preferred within the prescribed period of limitation of one year from 11.06.2018 and, as such, it was not time barred. Learned Tribunal has grossly erred in rejecting the claim petition treating it to be time barred.

7. Learned Standing Counsel appearing on behalf of the opposite parties no.2, 3 & 4, on the other hand, submits that as per the Rules of 1991 a delinquent employee who is awarded minor punishments of censure entries under Rule 4 (b) can file an appeal under Rule 20 of Rules of 1991 within a period of three months. Even after exhausting the remedy of appeal the delinquent employee can prefer a revision under Rule 23 of Rules of 1991. In the present case the petitioner did not avail the statutory departmental remedy of appeal under Rule 20 of Rules of 1991 and revision under Rule 23 of Rules of 1991 and preferred a representation, that too, after approximately four years from the date of punishment order.

8. It is also submitted that Rule 25 of Rules of 1991 empowers the State Government to act on its own motion or otherwise call for and examine the records of any case decided by an authority, subordinate to it in the exercise of any power conferred on such authority by these rules and against which no appeal has been preferred under these rules.

9. Submission is that Rule 25 of Rules of 1991 would not be attracted in the

present case as the petitioner cannot take the benefit of filing representation without exhausting the remedy of appeal and revision, as provided under the said Rules. It was not a statutory representation preferred by the petitioner and, as such, the period of limitation shall be counted from the date of punishment orders and not from the date on which the representation of the petitioner was rejected.

10. We have considered the submissions made by parties' counsel and gone through the records.

11. As per the admitted facts of the case, the punishments of censure entries was awarded to the petitioner under Rules of 1991, particularly Rule 4 which reads as under:

"4. Punishment-- (1) The following punishments may, for good and sufficient reasons and as hereinafter provided, be imposed upon a Police Officer, namely :--

(a) Major Penalties :--

(i) Dismissal from service.

(ii) Removal from service.

(iii) Reduction in rank including reduction to a lower-scale or to a lower stage in a time scale.

(b) Minor penalties :--

(i) With-holding of promotion.

(ii) Fine not exceeding one month's pay.

(iii) With-holding of increment, including stoppage at an efficiency bar.

(iv) Censure."

12. Rules 20 and 23 of Rules of 1991 clearly stipulates the provision of appeal as well as revision against the punishments awarded under Rule 4 of Rules of 1991. It also provides the limitation under which the said appeal and revision can be filed. The provision of Rule 20 and 23 of Rules of 1991 are reproduced as under:

"20. Appeals.--[(1) Every Police Officer, against whom an order of punishment mentioned in sub-clauses (i) to (iii) of Clause (a) and sub-clauses (i) to (iv) of Clause (b) of rule 4 shall be entitled to prefer an appeal against the order of such punishment to the authority mentioned below:

(a) to the Police Officer who is the immediate jurisdictional superior authority to the Police Officer who passed the order of punishment;

(b) to the Director General of Police who may either decide the appeal himself or nominate any Additional Director General for deciding it;

(c) to the State Government against the order passed under Clause(b).

(2) No appeal shall lie against an order inflicting any of the petty punishments enumerated in sub-rules (2) and (3) of Rule 4.

(3) Every officer desiring to prefer an appeal shall do so separately.

(4) Every appeal, preferred under these rules shall contain all materials, statements, arguments relied on by the Police Officers preferring the appeal, and shall be complete in itself, but shall not contain disrespectful or improper language. Every appeal shall be accompanied by a copy of final order which is the subject of appeal.

(5) Every appeal, whether the appellant is still in service of Government or not, shall be submitted through the Superintendent of Police of the district or in the case of Police Officers not employed in district work through the head of the office to which the appellant belongs or belonged.

(6) An appeal will not be entertained unless it is preferred within three months from the date on which the Police Officer concerned was informed of the order of punishment:

Provided that appellate authority may. at his discretion, for good cause shown extend the said period up to six months.

(7) If the appeal preferred does not comply with the provisions of sub-rule (4) the appellate authority may require the appellant to comply with the provisions of the said sub-rule within one month of the notice of such order to him and if the appellant fails to make the above compliance the appellate author ity may dispose of the appeal in the manner as it deems fit.

(8) The Director-General or an Inspector-General may. for reasons to be re corded in writing, either on his own motion or on request from an appellate authority before whom the appeal is pending transfer the same to any other officer of corresponding rank."

"23. Revision. [(1) An officer whose appeal has been rejected by any author ity subordinate to the Government is entitled to submit an application for revision to the superior authority next to the authority which has rejected his appeal within three months from the date of rejection of appeal as mentioned below:

(a) to the Police officer who is the immediate jurisdictional superior authority to the Police Officer who passed the appellate order.

(b) to the Director General of Police who may either decide the revision himself or nominate any Additional Director General for deciding it;

(c) to the State Government against the order passed under Clause (b).

On such an application the powers of revision may be exercised only when, in consequent of flagrant irregularity, there appears to have been material injustice or miscarriage of justice:

Provided that the revising authority may on its own motion call for and ex amine the records of any order passed in appeal against which no revision has been preferred under this rule for the purpose of satisfying itself as to the legality or propriety of such order or as to the regularity of such procedure and pass such order with respect thereto as it may think fit:

Provided further that no order under the first proviso shall be made except after giving the person effected a reasonable opportunity of being heard in the matter.

(2) The procedure prescribed for appeal applies also to application for revision. An application for revision of an order rejecting an appeal shall be accompanied by a copy of the original order as well as the order of appellate authority."

13. Rule 25 of Rules of 1991 is an enabling provision under which the State Government has been empowered to confirm, modify or revise the order passed by any such authority or direct that a further enquiry be held in a case or reduce or enhance the penalty imposed by the order or make such other order in the case as it may deem fit on its own motion or otherwise after calling for and examining the records of any case decided by the authority, subordinate to it. It does not mean that a delinquent employee without exhausting the statutory remedy of appeal and revision as provided under Rules 20 and 23 of Rules of 1991 can avail the powers of State Government under Rule 25 of Rules of 1991 by making a representation. In case the argument of learned counsel for the petitioner in this regard is accepted, it will frustrate the entire scheme of Rules as provided under Rules of 1991 relating to punishment and the appeal and revision thereafter.

14. We cannot accept the arguments made in this regard by learned counsel for the petitioner.

15. Now, if we examine the impugned judgment and order dated 28.06.2021, passed by learned Tribunal, we see that the learned Tribunal has dealt, in detail, the provisions under Rules of 1991 and the relevant legal position with respect to the limitation in approaching the Court.

16. Learned Tribunal has rightly relied on the law laid down by the Apex Court in the case of ***S.S. Rathor Vs. State of Madhya Pradesh and others;1*** and judgment of this court in the case of ***Dr. Anil Kumar Agrawal Vs. State of U.P. and others;2***. Learned Tribunal has rightly come to the conclusion that the claim petition preferred by the petitioner was time barred and, as such, is liable to be rejected.

17. We do not find any infirmity or illegality in the impugned judgment and order dated 28.06.2021, passed by U.P. State Public Service Tribunal, Lucknow in Claim Petition No.2321 of 2018; Amol Kumar Sharma Vs. State of U.P. and others.

18. The writ petition being devoid of merit is ***dismissed.***

(2021)07ILR A714
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.06.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 28509 of 2018

Ram Surat Chaudhary ...Petitioner
Versus
State of U.P & Ors. ...Respondents

Counsel for the Petitioner:
Rakesh Chandra Tewari, Gyan Prakash Srivastava

Counsel for the Respondents:
C.S.C., Shireesh Kumar, Vinod Singh

A. Service Law – Continuation of disciplinary proceeding after retirement – U.P. Cooperative Societies Employees Service Regulations, 1975 - U.P. Cooperative Societies Employees Service 22nd Amendment Regulations, 2018.

Under the Regulations, 1975, there was no provision to continue the disciplinary proceeding after the retirement of the employee. The State Government amended the rule vide notification dated 27.8.2018, which is known as U.P. Co-operative Societies Employees Service 22nd Amendment Regulations, 2018, wherein under Regulation 85, it was notified that the disciplinary proceeding can be continued after retirement, if applicable rules permit. (Para 14, 15)

In absence of any provision to continue the disciplinary proceeding after retirement, the same cannot be continued. Once there was no provision (under the rules applicable i.e. Regulations, 1975), at the time of retirement of the petitioner, to continue the disciplinary proceeding after retirement, the same becomes non est in the eyes of law after retirement of the petitioner on 29.2.2016. Therefore, stoppage of payment of post retiral dues to him cannot be held to be legally sustainable. (Para 9, 16, 18, 19)

Challenge to disciplinary proceeding - The proceeding due to non existence of provisions at the time of retirement cannot be continued, thus the challenge to said proceeding is futile exercise. (Para 17)

Payment of interest on the gratuity amount and other dues - The payment of gratuity was made to the petitioner after some time from the date of retirement, therefore, the petitioner is entitled to get simple interest on the delayed payment after the retirement. In regard to the payment of other dues like leave encashment and security deposit, the petitioner is entitled for simple interest on the amount due to be paid like leave encashment and security deposit. (Para 19)

Writ petition allowed. (E-3)

Precedent cited:

1. Dev Prakash Tewari Vs Uttar Pradesh Cooperative Institutional Service Board, Lko & ors., (2014) 7 SCC 260 (Para 9)

Present petition assails order dated 24.12.2013 and 29.01.2014, chargesheet dated 23.06.2014 and the showcause notice dated 31.01.2015.

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

1. In view of COVID-19 pandemic, this case is being heard through video conferencing.

2. Heard Sri R.C. Tewari, learned counsel for the petitioner, Sri Shireesh Kumar, learned counsel for respondent Nos.2&3 and learned ACSC for respondent No.1- State.

3. By means of present writ petition, the petitioner has prayed as under:

"i) Issue a writ, order or direction in the nature of Certiorari quashing the disciplinary proceedings pursuant to the impugned order dated 24.12.2013 & 29.01.2014, impugned chargesheet dated 23.06.2014 & the showcause notice dated 31.01.2015.

ii) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 24.12.2013 & 29.01.2014 (after summoning the same from the opposite parties as the same is not available with the petitioner), impugned chargessheet dated 23.06.2014 (as contained in ANNEXURE NO.02 to this writ petition) & showcause notice dated

31.01.2015 (as contained in ANNEXURE NO.04 to this writ petition).

iii) Issue a writ, order or direction in the nature of Mandamus commanding /directing the opposite parties to pay the petitioner Leave Encashment, Security Deposits along with interest on the delayed payment of the aforesaid dues as well as interest on the delayed payment of gratuity which has been given to the petitioner after more than 2 years of retirement.

iv) Such other order or direction deemed just and proper in the circumstances of the case, may also be passed.

v) Allow the writ petition with costs."

4. Brief fact of the case is that the petitioner while holding the post of Assistant Manager (Accounts) in U.P. Cooperative Federation Ltd. retired from service on 29.02.2016. After the retirement, vide order dated 17.09.2018 the petitioner was the amount of gratuity, however, he has not been paid interest on delayed payment of gratuity and amount of leave encashment and security deposit.

5. In the short counter affidavit filed by respondent - Federation, it has been stated that the rules governing service conditions of the petitioner was amended vide notification published in the official gazette on 27.08.2018 providing that in case the employees of respondent - department retired pending disciplinary proceeding, the same will continue and conclude after his retirement.

6. Learned ACSC also submitted that at the time of retirement, there was no rule prescribing continuance of disciplinary proceeding of retired employee. The rule was subsequently amended and it was incorporated vide notification issued on 27.08.2018.

7. Learned counsel for the petitioner submitted that the petitioner retired from service on 29.02.2016 and in absence of any provision to continue the disciplinary proceeding as soon as the petitioner retired, the disciplinary proceeding became nonest in the eyes of law.

8. He next submitted that even though the amended rule was notified on 27.08.2018, the proceeding, which has become nonest, cannot be revised in view of amendment incorporated in the rules.

9. In support of his submission he placed reliance upon a judgment in the case of **Dev Prakash Tewari Vs. Uttar Pradesh Cooperative Institutional Service Board, Lucknow and others; (2014) 7 Supreme Court Cases 260** and submitted that similar controversy in this regard has been decided that in absence of any provision to continue the disciplinary proceeding after retirement, the same cannot be continued. He further submitted that the petitioner retired from service on 29.02.2016 and payment of gratuity has been made to him on 17.09.2018, however, no interest on delayed payment of gratuity has been made to him, therefore, he requested that in case direction is issued for payment of interest on the amount due to be paid, ends of justice would be met.

10. On the other hand, learned counsel for the respondent Nos.2&3 submitted that the submission advanced by learned counsel for the petitioner in regard to provision to continue the disciplinary proceeding was not in existence under the rules at the time of retirement but it was

incorporated vide notification dated 27.08.2018, therefore, treating the petitioner to be under disciplinary proceeding, the payment was stopped. He further submitted that there is no delayed payment of gratuity to the petitioner, therefore, he is not entitled for payment of interest on the amount due to be paid.

11. Learned ACSC also followed the submission advanced by learned counsel for respondent Nos.2 & 3 that although in the existing rule at the time of retirement of the petitioner there was no provision to continue the disciplinary proceeding after the retirement, however, after amendment in the rules, it was treated that against him there is a disciplinary proceeding pending and the payment was stopped.

12. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as submissions of learned counsel for the parties on the payment of interest on amount of gratuity.

13. To resolve the controversy involved in the writ petition, I have perused the **U.P. Co-operative Societies Employees Service Regulations, 1975.**

14. Under the rules, there is no provision to continue the disciplinary proceeding after the retirement of the employee. The State Government amended the rule vide notification dated 27.08.2018, which is known as **U.P. Co-operative Societies Employees Service 22nd Amendment Regulations, 2018,** wherein under Regulation 85, following amendment was made:

"Amendment of regulation-85:

2- In the Uttar Pradesh Co-operative Societies Employees Service Regulations, 1975, in regulations 85, after sub regulation (X) the following sub regulation shall be inserted, namely:-

(XI) Rules regarding disciplinary proceedings after retirement applicable for the employees of the State Government, shall also be applicable for the employees of the Co0operative Society with due modification from time to time:

Explanation*- For the purposes of this sub rules, the word, "Governor" has been used under the rules of the State Government, the word "Register" shal be deemed to be substituted.*

(vii) If an employee retires from the service while disciplinary proceeding against him is already in operation, the disciplinary proceedings will continue after his retirement."

15. On its perusal, it is evident that under the rules it has been provided that the same will be made effective from the date of its publication in the official gazette. The rule was published in the official gazette on 27.08.2018. Law is settled in this regard that the disciplinary proceeding can be continued after retirement, if applicable rules permit.

16. Here, in the present case, it is admitted case of the parties that at the time of retirement of the petitioner, under the rules applicable there was no provision to continue the disciplinary proceeding against the petitioner, therefore, stoppage of payment of post retiral dues to him cannot be held to be legally sustainable.

17. In regard to challenge of disciplinary proceeding in the present writ petition, it is recorded that the proceeding due to non existence of provisions at the time of retirement cannot be continued, thus the challenge to said proceeding is futile exercise.

18. In view of the above, I am of the considered opinion that once there was no provision to continue the disciplinary proceeding after retirement, the same becomes nonest in the eyes of law after retirement of the petitioner on 29.02.2016.

19. Accordingly, the disciplinary proceeding initiated against the petitioner prior to his retirement is declared nullity and the same cannot be continued. In regard to the payment of interest on the gratuity amount already paid to the petitioner, it is recorded that the payment of gratuity was made to the petitioner after some time from the date of retirement, therefore, the petitioner is entitled to get simple interest on the delayed payment after the retirement. In regard to the payment of other dues like leave encashment and security deposit, once this Court has held that the disciplinary proceeding is not permitted as per the rules applicable against the petitioner and amendment was incorporated on 27.8.2018, the petitioner is entitled for simple interest on the amount due to be paid like leave encashment and security deposit.

20. In view of the finding recorded above, the petition succeeds and is allowed.

21. The respondents are directed to release the post retiral dues to the petitioner like interest on gratuity, leave encashment and security deposit with simple interest of 8% within a period of two months from the date of production of a certified copy of this order.

(2021)07ILR A718
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.07.2021

BEFORE

THE HON'BLE ABDUL MOIN, J.

Service Single No. 14055 of 2021

Sandeep Kumar Pandey ...Petitioner
Versus
State of U.P & Anr. ...Respondents

Counsel for the Petitioner:
Rakesh Chandra Tewari

Counsel for the Respondents:
C.S.C.

A. Service Law – Suspension - Central Civil Services (Class, Control & Appeal) Rules, 1965 - Rule 10 - U.P. Government Servant (Discipline and Appeal) Rules, 1999 - Rule 4(8).

Petitioner placed reliance on the judgment of *Ajay Kumar Choudhary (infra),* to contend that the suspension order should not extend beyond three months if within this period the memorandum of charges/charge sheet is not served on the delinquent officer/employee. (Para 9)

It was observed that petitioner would be governed by the provisions of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (1999 Rules). Rule 4 of 1999 Rules pertains to suspension of a State Government employee. The said rule does not contain any stipulation of the order of a suspension becoming invalid after 90 days or three months, rather Rule 4(8) of 1999 Rules itself stipulates that any suspension ordered or deemed to have been ordered shall continue to remain in force unless and until it is modified or revoked by the competent authority. (Para 18)

It was held that the judgment of *Ajay Kumar Choudhary (infra)* would not be applicable w.r.t. a State Government employee i.e. the petitioner because abovementioned judgment pertained to All India Service Officer where the suspension rules' themselves provided for initial order of suspension being invalid beyond three months and there is no such stipulation in the discipline and appeal rules governing the petitioner more particularly in 1999 Rules. (Para 19)

B. Precedential value of a decision - Judgment of a Court is not to be read mechanically as a Euclid's Theorem nor as if it was a statute. Rather ratio of any decision has, to be understood in the background of the facts of that case. **Reliance on the decision without looking into the factual background of the case before it is clearly impermissible.** A decision is a precedent on its own facts. (Para 20 to 24)

Writ petition dismissed. (E-3)

Precedent followed:

1. Deepak Bajaj Vs St. of Mah., AIR 2009 SC 628 (Para 20)

2. Bharat Petroleum Corporation Ltd. & anr. Vs. N.R. Vairamani & anr., (2004) 8 SCC 579 (Para 22)

3. Oriental Insurance Company Ltd. Vs. Smt. Raj Kumari & ors., AIR 2008 SC 403 (Para 23)

Precedent distinguished:

1. Ajay Kumar Choudhary Vs U.O.I. & anr., (2015) 7 SCC 291 (Para 9, 14, 25)

2. Ram Ratan Vs. St.of U.P. & ors., Writ Petition No. 10276 (SS) of 2019 (Para 10, 25)

3. Radheyshyam Yadav Vs St. of U.P. & ors., Writ Petition No. 14023 (SS) of 2020 (Para 10, 25)

Present petition assails suspension order dated 12.01.2021.

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents through video conferencing.

2. Present petition has been filed inter-alia aggrieved against the suspension order dated 12.01.2021, a copy of which is Annexure-1 to the writ petition, by which the petitioner has been placed under suspension.

3. Learned counsel for the petitioner contends that primarily four grounds have been taken while placing the petitioner under suspension which grounds do not stand scrutiny under the eyes of law and consequently the suspension order merits to be quashed.

4. So far as the first ground is concerned, it is contended that the petitioner has been placed under suspension on the ground that he continued to keep the important documents pertaining to starred questions in his possession. In this regard, learned counsel for the petitioner has invited the attention of this Court towards the order dated 11.08.2020, a copy of which is Annexure-11 to the writ petition, whereby he contends that the duty pertaining to documents of starred questions had been given to Sri Afzal Farooqui, Senior Assistant, while the work of the petitioner in the said order itself only pertained to the election and reservation and thus prima facie the said charge cannot be levelled against the petitioner.

5. So far as the second charge is concerned, it has been contended in the suspension order that the petitioner has not

decided the matters pertaining to Right to Information Act within the specified time.

6. In this regard, learned counsel for the petitioner has again invited the attention of the Court towards the order dated 11.08.2020 to contend that the duty pertaining to Right to Information Act had been given to Sri Amit Srivastava, Principal Assistant and thus again the petitioner has no role in the matter.

7. So far as the third charge is concerned which pertains to having kept the applications of certain personnel whose application for transfer during the annual session 2019-2020 had been rejected, learned counsel for the petitioner contends that the petitioner has already been punished for the same charge vide the punishment order dated 14.01.2020, a copy of which is Annexure-4 to the writ petition, and as such, he cannot be placed under suspension for the same charge.

8. So far as the fourth charge as has been levelled in the suspension order is concerned i.e. of having proceeded on leave without his application for leave being sanctioned, learned counsel for the petitioner concedes that once no order pertaining to rejection of his leave application had been communicated, yet at the same time, also not rejected, as such the petitioner had bonafidely proceeded on leave but he contends that even if the said charge is proved, the same would not entail imposition of a major punishment so as to justify the impugned suspension order.

9. Learned counsel for the petitioner has placed reliance on the judgment of the Apex Court in the case of **Ajay Kumar Choudhary vs. Union of India and another reported in (2015) 7 SCC 291** to contend that the Apex Court has held that currency of the suspension order should not extend beyond three months if within this period the memorandum of charges/charge sheet is not served on the delinquent officer/employee.

10. Placing reliance on the aforesaid judgment, learned counsel for the petitioner contends that even this Court has held in a number of judgments more particularly in the case of **Ram Ratan vs. State of U.P. and others** in Writ Petition No.10276 (SS) of 2019 as well as the judgment in the case of **Radheyshyam Yadav vs. State of U.P. and others** in Writ Petition No.14023 (SS) of 2020, copies of which are Annexure-14 to the writ petition, that suspension order cannot continue beyond three months.

11. Learned counsel for the petitioner contends that once the suspension order is of 12.01.2021 and a period of almost six months have lapsed and no charge sheet has been served upon the petitioner consequently considering the law laid down by the Apex Court in the case of **Ajay Kumar Choudhary (supra)**, the suspension order itself becomes vitiated in the eyes of law.

12. Heard learned counsel for the parties and perused the record. The Court was of the view that the learned Standing Counsel for respondent State be granted a short time to seek instructions in the matter but the learned counsel for the petitioner, Sri R.C. Tewari, insisted that time be not granted rather the matter should be decided on the basis of judgment of the Apex Court in the case of **Ajay Kumar Choudhary (supra).** As such, the Court proceeds to decide the matter.

13. The petitioner has been placed under suspension vide order dated

12.01.2021 on four grounds as have already been indicated above. There could be an argument of three of the charges being frivolous but learned counsel for the petitioner has himself candidly admitted of the leave not having been sanctioned to the petitioner and he having proceeded on leave. This fact is specifically admitted in paragraphs 22 and 23 of the writ petition. In this view of the matter, the said charge alone is sufficient to place the petitioner under suspension for in case an employee gets unfettered discretion to go on leave without any leave having been sanctioned then both, the discipline of the office and accountability of the person, would suffer. However, this observation of the Court may not be treated as if this Court has given a finding on the charge levelled against the petitioner.

14. So far as the judgment of the Apex Court in the case of **Ajay Kumar Choudhary (supra)** is concerned, though the Apex Court has categorically laid down that a suspension order should not continue beyond three months in case the charge sheet has not been served yet from a perusal of the said judgment, it comes out that the Apex Court was seized of the matter pertaining to an All India Service Officer namely a Defence Estate Officer belonging to All India Service of Indian Defence Estate Service. At first glance, it comes out that All India Services (Discipline & Appeal) Rules, 1969 (hereinafter referred to as '1969 Rules') shall be applicable with respect to All India Service Officers but when seen in the context of All India Services Act, 1951 (hereinafter referred to as '1951 Act'), it comes out that as per the definition clause, 'All-India Service' means the service known as the Indian Administrative Service or the Indian Police Service. Sfter addition of Section 2-A in 1951 Act, the Indian Service of Engineers, Indian Forest Service and Indian Medical and Health Service have been included in 1951 Act. Thus, even though the Indian Defence Estate Service is an All-India Service yet once it is not included in 1951 Act consequently 1969 Rules shall not be applicable upon them rather it is the Central Civil Services (Class, Control & Appeal) Rules, 1965 (hereinafter referred to as '1965 Rules') which shall be applicable upon them.

15. Rule 10 of 1965 Rules deals with the suspension which, for the sake of convenience, is reproduced below:-

"10. Suspension. *(1) The appointing authority or any authority to which it is subordinate or the disciplinary authority or any other authority empowered in that behalf by the President, by general or special order, may place a Government servant under suspension-*

(a) where a disciplinary proceeding against him is contemplated or is pending; or

(aa) where, in the opinion of the authority aforesaid, he has engaged himself in activities prejudicial to the interest of the security of the State; or

(b) where a case against him in respect of any criminal offence is under investigation, inquiry or trial:

Provided that, except in case of an order of suspension made by the Comptroller and Auditor - General in regard to a member of the Indian Audit and

Accounts Service and in regard to an Assistant Accountant General or equivalent (other than a regular member of the Indian Audit and Accounts Service), where the order of suspension is made by an authority lower than the appointing authority, such authority shall forthwith report to the appointing authority the circumstances in which the order was made.

(2) A Government servant shall be deemed to have been placed under suspension by an order of appointing authority –

(a) with effect from the date of his detention, if he is detained in custody, whether on a criminal charge or otherwise, for a period exceeding forty-eight hours;

(b) 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 or compulsorily retired consequent to such conviction.

EXPLANATION - The period of forty-eight hours referred to in clause (b) of this sub-rule shall be computed from the commencement of the imprisonment after the conviction and for this purpose, intermittent periods of imprisonment, if any, shall be taken into account.

(3) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant under suspension is set aside in appeal or on review under these rules and the case is remitted for further inquiry or action or with any other directions, the order of his suspension shall be deemed to have continued in force on and from the date of the original order of dismissal, removal or compulsory retirement and shall remain in force until further orders.

(4) Where a penalty of dismissal, removal or compulsory retirement 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 disciplinary 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, removal or compulsory retirement was originally imposed, the Government servant shall be deemed to have been placed under suspension by the Appointing Authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders :

Provided that no such further inquiry shall be ordered unless it is intended to meet a situation where the Court has passed an order purely on technical grounds without going into the merits of the case.

[(5)(a) Subject to the provisions contained in sub-rule (7), an order of suspension made or deemed to have been made under this rule shall continue to remain in force until it is modified or revoked by the authority competent to do so.]

(b) 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 until the termination of all or any of such proceedings.

(c) An order of suspension made or deemed to have been made under this rule may at any time be modified or revoked by the authority which made or is deemed to have made the order or by any authority to which that authority is subordinate.

[(6) An order of suspension made or deemed to have been made under this rule shall be reviewed by the authority competent to modify or revoke the suspension, before expiry of ninety days from the effective date of suspension, on the recommendation of the Review Committee constituted for the purpose and pass orders either extending or revoking the suspension. Subsequent *reviews shall be made before expiry of the extended period of suspension. Extension of suspension shall not be for a period exceeding one hundred and eighty days at a time.]*

[(7) An order of suspension made or deemed to have been made under sub-rules (1) or (2) of this rule shall not be valid after a period of ninety days unless it is extended after review, for a further period before the expiry of ninety days :

Provided that no such review of suspension shall be necessary in the case of deemed suspension under sub-rule (2), if the Government servant continues to be under suspension at the time of completion of ninety days of suspension and the ninety days period in such case will count from the date the Government servant detained in custody is released from detention or the date on which the fact of his release from detention is intimated to his appointing authority, whichever is later.]"

16. From perusal of the aforesaid rules, it comes out that Rule 10(5)(a) of 1965 Rules provides that an order of suspension shall continue to remain in force until it is modified or revoked by the competent authority. Rule 10(6) of 1965 Rules provides that an order of suspension made or deemed to have been made under this rule shall be reviewed by the competent authority before expiry of 90 days from the effective date of suspension, on the recommendation of the Review Committee and that subsequent reviews shall be made before expiry of the extended period of suspension. Further extension of suspension shall not be for a period exceeding 180 days at a time.

17. Rule 10(7) of 1965 Rules also provides that an order of suspension made or deemed to have been made under sub-rules (1) or (2) of this **rule shall not be valid after a period of ninety days** unless it is extended after review for a further period before the expiry of 90 days. However, from perusal of Rule 10(7) of 1965 Rules, it is apparent that an order of suspension passed against a Government Servant shall not be valid after a period of 90 days **unless** it is extended after a review for a further period. Thus, the rule itself contains specific stipulation of an order of suspension becoming invalid, if not extended, beyond three months.

18. So far as the rules pertaining to suspension of the State Government

employees is concerned i.e. in the case of the petitioner, he would be governed by the provisions of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as 1999 Rules). Rule 4 of 1999 Rules pertains to suspension of a State Government employee. The said rule does not contain any stipulation of the order of a suspension becoming invalid after 90 days or three months, rather Rule 4(8) of 1999 Rules itself stipulates that any suspension ordered or deemed to have been ordered **shall continue to remain in force unless and until it is modified or revoked by the competent authority.**

19. Thus, once the Apex Court was seized of a matter of suspension pertaining to All India Service Officer where the suspension rules themselves provided for initial order of suspension being invalid beyond three months and there being no such stipulation in the discipline and appeal rules governing the petitioner more particularly in 1999 Rules consequently it cannot be said that the judgment of **Ajay Kumar Choudhary (supra)** would be applicable with respect to a State Government employee i.e. the petitioner.

20. In this regard, the Court may notice the judgment of the Apex Court in the case of **Deepak Bajaj vs. State of Maharashtra - AIR 2009 SC 628** wherein it has been held by the Apex Court that the judgment of a Court is not to be read mechanically as a Euclid's Theoram nor as if it was a statute rather ratio of any decision has to be understood in the background of the facts of that case.

21. For the sake of convenience, relevant observations of the aforesaid judgment are reproduced below:-

7. It is well settled that a judgment of a Court is not to be read mechanically as a Euclid's theorem nor as if it was a statute.

8. On the subject of precedents Lord Halsbury, L.C., said in Quinn vs. Leathem, 1901 AC 495 :

"Now before discussing the case of Allen Vs. Flood (1898) AC 1 and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all."

We entirely agree with the above observations.

9. In Ambica Quarry Works vs. State of Gujarat & others (1987) 1 SCC 213 (vide paragraph 18) this Court observed :

*"**The ratio of any decision must be understood in the background of the facts of that case.** It has been said a long time ago that a case is only an authority for*

what it actually decides and not what logically follows from it".

10. In Bhavnagar University vs. Palittana Sugar Mills Pvt. Ltd. (2003) 2 SCC 111 (vide paragraph 59), this Court observed :

"It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision".

11. As held in Bharat Petroleum Corporation Ltd. & another vs. N.R. Vairamani & another (AIR 2004 SC 4778), a decision cannot be relied on without disclosing the factual situation. In the same judgment this Court also observed :

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of the context*. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes".(emphasis supplied)*

12. In London Graving Dock Co. Ltd. vs. Horton (1951 AC 737 at page 761), Lord Mac Dermot observed :

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge".

13. In Home Office vs. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid Said, "Lord Atkin's speech ... is not to be treated as if it was a statute definition; it will require qualification in new circumstances, Megarry, J. in (1971) 1 WLR 1062 observed :

"One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament".

14. And in Herrington vs. British Railways Board (1972 (2) WLR 537) Lord Morris said :

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case.

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper*. The following words of Lord Denning in the matter of applying precedents have become locus classicus :*

Each case depends on its own facts and a close similarity between one

case and another is not enough because even a single significant detail may alter the entire aspect*. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo, J.) by matching the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*

Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path of justice clear of obstructions which could impede it."

(emphasis supplied)

15. The same view was taken by this Court in Sarva Shramik Sanghatana (K.V.), Mumbai vs. State of Maharashtra & Ors. AIR 2008 SC 946 and in Government of Karnataka & Ors. vs. Gowramma & Ors. AIR 2008 SC 863.

22. In the case of **Bharat Petroleum Corpn. Ltd. and another vs. N.R. Vairamani and another - (2004) 8 SCC 579,** Apex Court has held as under:-

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. V. Horton (1951 AC 737 at p.761), Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, "Lord Atkin's speech.....is not to be treated as if it was a statute definition it will require qualification in new circumstances." Megarry, J in (1971) 1 WLR 1062 observed: "One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament." And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

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"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

23. Likewise, in the case of **Oriental Insurance Co. Ltd. vs. Smt. Raj Kumari and others - AIR 2008 SC 403,** Apex Court has held as under:-

*"11. **Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent on its own facts.** Each case presents its own features. It is not everything said by a Judge while giving a judgment that constitutes a precedent. The only thing in a Judges decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates (i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. (See: State of Orissa v. Sudhansu Sekhar Misra and Ors. (AIR 1968 SC 647) and Union of India and Ors. v. Dhanwanti Devi and Ors. (1996 (6) SCC 44). A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in Act of Parliament. In Quinn v. Leathem (1901) AC 495 (H.L.), Earl of Halsbury LC observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.*

12. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which

reliance is placed. Observations of Courts are neither to be read as Euclids theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. V. Horton (1951 AC 737 at p.761), Lord Mac Dermot observed:

"The matter cannot, of course, be settled merely by treating the ipsissima vertra of Willes, J as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge."

13. In Home Office v. Dorset Yacht Co. (1970 (2) All ER 294) Lord Reid said, Lord Atkins speech.....is not to be treated as if it was a statute definition. It will require qualification in new circumstances. Megarry, J in (1971) 1 WLR 1062 observed: One must not, of course, construe even a reserved judgment of Russell L.J. as if it were an Act of Parliament. And, in Herrington v. British Railways Board (1972 (2) WLR 537) Lord Morris said:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances made in the setting of the facts of a particular case."

14. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

15. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

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"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."

24. From perusal of the aforesaid judgments in the cases of **Deepak Bajaj (supra), Bharat Petroleum Corp. Ltd. (supra) and Oriental Insurance Co.Ltd. (supra)** and the cases as have been referred to in the said judgments, it comes out that the broad principles of law as have been laid down by the Apex Court with regard to

following of a precedent are primarily as under:-

(a) The ratio of any decision has to be understood in the background of the facts of that case;

(b) A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision;

(c) The Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed;

(d) Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of the context;

(e) An additional or different fact may make a world of difference between conclusions in two cases;

(f) Disposal of cases by blindly placing reliance on a decision is not proper; and

(g) Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.

25. Considering the aforesaid principles of law, it is apparent that the rules governing the suspension in the present case are at variance with the rules which were applicable in the case of **Ajay Kumar Choudhary (supra)** where there was a clear stipulation of a suspension order coming to an end after 90 days in case the suspension order was not extended. As regards the judgment of this Court in the cases of **Ram Ratan (supra)** and **Radheyshyam Yadav (supra)** passed by this Court, suffice to state that the said judgments were based on the judgment of the Apex Court in the case of **Ajay Kumar Choudhary (supra)** and once the judgment in the case of **Ajay Kumar Choudhary (supra)** itself is not applicable in the facts of the instant case consequently the judgments of **Ram Ratan (supra)** and **Radheyshyam Yadav (supra)** would also not be applicable. Thus, the Court does not find any merit in the writ petition. Accordingly, the writ petition is dismissed.

(2021)07ILR A729
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.06.2021

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Writ -A No. 26813 of 2018 connected with others cases

Ajay Prakash Mishra & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Seemant Singh, Sri Ashok Kumar Singh, Sri Dhiraj Singh, Sri Ganesh Kumar, Sri Rakesh Kumar, Sri Vibhu Rai, Sri Siddharth Khare, Sri Pradeep Keshwarni, Ms. Atipriya Gautam, Sri Vinod Kumar Mishra, Sri Devesh Mishra, Sri Tarun Agarwal, Sri Mujeeb Ahmad Siddqui, Sri Ashok Khare, Sri H.N. Singh, Sri Vjay Gautam, Sri Anoop Trivedi

Counsel for the Respondents:

C.S.C.

A. Service Law – Appointment/Selection - Challenge to Selection Process - Uttar Pradesh Police Constable and Head Constable Service Rules, 2015 - Rules 15 (b), 15(c), 15(e) - As per chart, which has been submitted before this Court on behalf of the State, it indicates that vacant posts of Constables (Civil Police & PAC) of the selection year 2015 in respect of those candidates, who either failed in physical efficiency test or document verification, were carried forward for the next selection year 2017. The contention of the petitioners is to the effect that these posts should be offered to the petitioners, and the same posts are to be allotted in the same process of selection. (Para 24)

At every stage in case the applicant does not fall in the zone of consideration, nowhere, discretion is available to the authority and in every eventuality the post is to be carried forward. It is equally well-settled that laying down of relevant criteria for recruitment is within the exclusive domain of the employer. The categorical procedure, which contemplates in the Rules, 2015, nowhere, provides any discretion to the recruitment authority or the appointing authority to either manipulate or show any favour in the process of recruitment. (Para 25)

B. Power of judicial review - The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is arbitrary or is vitiated due to mala fides. (Para 25)

C. Doctrine of Estoppel - Once a person takes part in the process of selection and is not found fit for appointment, such person is barred from challenging the process of selection. Indirectly the petitioners are questioning the recruitment process as contemplated in Rule 15(e) and (g) of the Rules, 2015, which provide in every eventuality such vacancies shall be carried forward. The conduct of the petitioner in taking part in the selection process would clearly disentitle him from questioning the selection. (Para 26, 28)

D. Preparation of a wait list is not at all obligatory or mandatory unless recruitment rules provide for the same in addition to the select list. It is always open to the employer not to prepare any wait list and after declaring the result of the selected candidates, to make appointment therefrom and in case any vacancy remained unfilled, to make a fresh selection instead of looking for a wait list. (Para 35, 36, 38)

The petitioners have prayed for mandamus commanding the respondents to lower the respective category-wise merit and accord selection to them on the vacant posts of Constable (Civil Police/PAC). Such situation eventually leads to preparation of wait list, which is not contemplated in Rules, 2015. (Para 29, 30)

Competent authority has power to fix cut-off marks for preparation of select list. Process of final selection had to be closed at some stage. In this case, Circular dated 15.11.1999 directed for preparation of select list of the candidates equal to the number of vacancies. Thus merit of last person in different category is the cut-off marks of the merit. As soon as select list is published on 24.6.2000, selection process was closed. No direction can be issued for lowering the merit, after closure of the selection process. (Para 32)

A candidate who has not been selected has no legal right to seek a writ of mandamus commanding the respondents to prepare a waiting list in the absence of statutory rules. (Para 35, 36)

E. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed, which cannot be legitimately denied. (Para 31)

State cannot act in arbitrary manner - The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. (Para 31)

F. A pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. The earlier decision of the coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench. (Para 39 to 45)

Writ petition dismissed.(E-3)

Precedent followed:

1. G. Sarana Vs University of Lucknow (1976) 3 SCC 585 (Para 27)

2. Nanak Lal Vs Prem Chand Singhvi [AIR 1957 SC 425] (Para 27)

3. Prakash Shukla Vs Akhilesh Kumar Shukla [1986 Supp SCC 285] (Para 27)

4. Manish Kumar Shahi Vs St.of Bihar [(2010) 12 SCC 576] (Para 28)

5. Amlan Jyoti Borooah Vs St. of Assam [(2009 3 SCC 227] (Para 28)

6. Ramesh Chandra Shah Vs Anil Joshi [(2013) 11 SCC 309] (Para 28)

7. Dr. Sarojkumari Vs R. Helen Thilakom & ors. 2017 (9) SCC 478 (Paras 4-12) (Para 15)

8. D. Saroj Kumari Vs R. Helen Thilakom [2017 (11) SCALE 366] (Para 28)

9. Bihar State Electricity Board Vs Suresh Prasad & ors., AIR 2004 SC 1724 (Paras 6, 7, 30) (Para 14)

10. Shankarsan Dash Vs U.O.I., AIR 1991 SC 1612 (Paras 7, 8, 9, 10, 11, 31) (Para 15)

11. Govt. of Orissa V.s Harprasad Das, AIR 1998 S.C. 375 (Para 31)

12. Arthur Vs Jeen, AIR 2001 S.C. 1851 (Para 31)

13. Punjab State Electricity Board Vs Malkiat Singh, AIR 2004 S.C. 5061 (Para 31)

14. U.O.I. Vs Kali Das Batish, (2006) 1 SCC 779 (Para 31)

15. Aryavrat Gramin Bank Vs Vijay Shanakr Shukla, (2007) 12 SCC 413 (Para 31)

16. U.O.I. & ors. Vs S. Vinod Kumar & ors., (2007) 8 SCC 100 (Para 32)

17. Sri Kant Tripathi Vs St. of U.P., AIR 2001 SC 3757 (Para 33)

18. Surinder Singh & ors. Vs St. of Pun. & anr., (1997) 8 SCC 488 (Para 33)

19. St. of Bihar & ors. Vs Amrendra Kumar Mishra, JT 2006 (12) SC 304 (Para 33)

20. U.P. State Road Transport Corporation & anr. Vs Gobardhan & anr., AIR 1997 SC 1840 (Para 34)

21. St. of J & K & ors. Vs Sanjeev Kumar & ors., 2005 (1) SCC 148 (Para 34)

22. U.P. Public Service Commission, Allahabad & anr. Vs St. of U.P. & anr., 2007 (5) ADJ 280 (Para 35)

23. Kumar Sanjay Vs U.P. Public Service Commission & ors., Civil Misc. Writ Petition No. 8530 of 2009, decided on 03.07.2009 (Para 36)

24. Chandra Prakash Yadav Vs St. of U.P. & 3 ors., Writ A No. 401 of 2021 (Para 37)

25. Ankit Yadav Vs St. of U.P. & 3 ors., Writ A No. 1334 of 2021 (Para 38)

26. U.O.I. & anr. Vs Raghubir Singh (Dead) by LRS. etc., (1989) 2 SCC 754 (Para 27, 28, 39)

27. St. of Tripura Vs Tripura Bar Association & ors., (1998) 5 SCC 637 (Para 40)

28. Brijendra Kumar Gupta & ors. Vs St. of U.P. & ors., 2000 (18) LCD 886 (Para 41)

29. Rajasthan Public Service Commission & anr. Vs Harish Kumar Purohit & ors., (2003) 5 SCC 480 (Para 42)

30. Sant Lal Gupta & ors. Vs Modern Co-operative Group Housing Society Ltd. & ors., 2010 (28) LCD 1688 (Para 43)

31. Safia Bee Vs Mohd. Vjahath Hussain @ Fasi, (2011) 2 SCC 94 (Para 44)

Precedent cited:

1. Manish Kumar Vs U.O.I. & ors., Writ Petition No. 183 of 2013 (Para 12)

2. Chandra Prakash Yadav Vs St. of U.P. & 3 ors., Writ A No. 401 of 2021 decided on 27.01.2021 (Para 13)

3. Ankit Yadav Vs St. of U.P. & 3 ors., Writ A No. 1334 of 2021, decided on 05.02.2021 (Para 13)

4. Abhinav Anand Singh & ors. Vs St. of U.P. & ors., 2016 SCC Online All (DB) (Para 7, 12, 13, 14)

5. St. of M.P. & ors. Vs Sanjay Kumar Pathak & ors., 2008 (1) SCC 456 (Paras 15, 18, 19, 20, 24, 25)

6. Union Public Service Commission Vs S. Thiagarajan & ors., 2007 (8) JT 451 (Para 15, 22)

7. Ashok Kumar & anr. Vs St. of U.P. & ors., 2017 (4) SCC 357 (Paras 9, 10, 15, 12-22)

8. K.H. Siraj Vs High Court of Kerala & ors., 2006 (6) SCC 395 (Paras 15, 62, 68, 71-75)

9. St. of U.P. & 5 ors. Vs Bhanu Pratap Rajput, Special Appeal No. 725 of 2020, decided on 08.02.201 (Paras 11, 12, 13, 14, 15, 16)

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri Ashok Khare, learned Senior Advocate assisted by Shri Siddharth Khare, Advocate; Shri H.N. Singh, learned Senior Advocate assisted by Shri Seemant Singh, Advocate; Shri Vijay Gautam, learned Senior Advocate assisted by Shri Pradeep Kesharwani, Advocate, Ms. Atipriya Gautam, Advocate, Shri Anoop Trivedi, learned Senior Advocate assisted by Shri Vibhu Rai, Advocate, Shri Vinod Kumar Mishra, Advocate and Shri Devesh Mishra, Advocate; Shri Tarun Agrawal, Advocate and Shri Mujeeb Ahmad Siddiqui, Advocate for the petitioners and Shri Manish Goyal, learned Additional Advocate General assisted by Shri Bipin Bihari Pandey, learned Chief Standing Counsel, Shri A.K. Goyal, learned Additional Chief Standing Counsel, Shri Sanjay Kumar Singh, learned Additional Chief Standing Counsel, Shri Apurva Hajela, learned Standing Counsel, Shri Devesh Vikram, learned Standing Counsel, Shri Sheetala Prasad, learned Standing Counsel and Shri Vikram Bahadur Yadav, learned Standing Counsel for the State respondents.

2. All the writ petitions relate to similar facts and raise common questions of law, therefore, with the consent of the counsel for the parties, all the petitions have been heard together and are being decided by means of a common judgment.

3. In this group of cases the petitioners are seeking suitable direction upon the respondents to consider their

claim for selection and appointment on the vacant posts of Constables (Civil Police) and Provincial Armed Constabulary (PAC) Direct Recruitment-2015 initiated in pursuance of the advertisement dated 29.12.2015 published by the Additional Secretary (Recruitment), U.P. Police Recruitment and Promotion Board, Lucknow.

4. For the sake of convenience, the facts of leading Writ A No.26813 of 2018 are being noted below:-

5. Ajay Prakash Mishra and 216 others are before this Court with following prayers:-

"i) Issue a writ, order or direction in the nature of mandamus directing the respondents to consider the claim of the petitioners in respect of their selection on the post of Police Constable and Constable PAC against the posts, which are lying vacant by lowering down the cut-off marks in respect of different categories in the selection of Police Constable and Constable PAC for male candidates in pursuance of advertisement dated 29.12.2015 issued by the Additional Secretary (Recruitment), Uttar Pradesh Police Recruitment and Promotion Board, Lucknow and in the selection of Police Constable for female candidates in pursuance of advertisement dated 29.12.2015 issued by the Additional Secretary (Recruitment) Uttar Pradesh Police Recruitment and Promotion Board, Lucknow within stipulated period of time as fixed by this Hon'ble Court.

ii) Issue any other suitable writ, order or direction as this Court may deem fit and proper in the facts and circumstances of the case.

iii) Award the costs of the petition to the petitioners."

6. The factual matrix, which is relevant for considering the relief that falls for consideration to this Court in all the writ petitions, is common. A notification was issued on 29.12.2015 by the Uttar Pradesh Police Recruitment and Promotion Board, Lucknow, notifying recruitment of Constables (Civil Police) and Provincial Armed Constabulary (for short 'PAC') under the Uttar Pradesh Police Constable and Head Constable Service Rules, 2015 (for short, Rules, 2015). The respondents had notified 23200 posts of Constable (Civil Police) and 5716 posts for PAC, totalling 28,916, prescribing 17.2.2016 as last date for registration of online applications and 22.2.2016 for submission of the applications.

7. The Rule 15 (b), 15 (c) and 15 (e) of the Rules, 2015 were challenged before this Court in **Ranvijay Singh and others vs. State of UP and others1** for considering the question regarding ideal mode of selection to the post of Police Constable, by written examinations, as provided for under Rule 15 of the Uttar Pradesh (Civil Police) Constable and Head Constable Service Rules, 2008 (for short 'Rules, 2008') or on the basis of marks awarded in 10th and 12th Board examination results, as provided for in the Rules, 2015. The primary challenge raised in the said writ petition under Article 226 of the Constitution of India, was to the Rules 15(b), 15(c) and 15(e) of the Rules, 2015, whereby, Preliminary Written Test and Main Written Examination, that was provided for in the Rules, 2008, has been done away with by providing selection on the basis of marks awarded in 10th and

12th Board examination results or qualification equivalent thereto, as provided under clause (8) of Rules, 2015. In the said writ petition vide order dated 27.5.2016 the Court had directed the State Government to continue with the recruitment process, but restrained them from declaring the result till the next date of hearing. In the aforesaid writ petition, the respondents had filed counter affidavit stating that for the posts of 28,916 male vacancies, 15,63,674 applications and for 5800 female vacancies, 56338 applications were received. Finally, a Division Bench of this Court had proceeded to dismiss the writ petition with following observations:-

"25. Having so observed, we are of the opinion that the object of any process of recruitment for the post of constable is to secure best and most suitable person for the job, obviously avoiding patronage and favoritism and, therefore, the selection should be based on merits and should be fair. Therefore, giving paramount importance to physical efficiency test, for the post of constable, in our opinion, is most fair and ideal way of recruitment, coupled with their merit based on the marks obtained by them in 10th and 12th standard examinations conducted by a Board. It is common knowledge that in the process of recruitment for the posts, such as constables, lot of manipulation and unfair tactics are adopted, particularly if independent written examination and interviews are made as part of the process of selection. In fact, this is all done away with by the impugned Rules, which provide for selection solely on the basis of the marks obtained by candidates in 10th and 12th standard examinations and their physical efficiency test and physical fitness. Having regard to the fact that the procedure for recruitment introduced and prescribed by the impugned Rules, we are satisfied that it will avoid patronage and favoritism and the selection would be absolutely transparent and it would not be possible for any one to either manipulate or show any favour in the process of recruitment. Therefore, it cannot be stated that it is either arbitrary or irrational and violative of Article 14 of the Constitution of India. As a matter of fact, the procedure contemplated by the impugned Rules for recruitment, discloses sufficient safeguards. It does not deprive or discriminate any eligible person from fair and transparent selection based on merits. Insofar as physical fitness is concerned, by Rules, 2015, as observed earlier, the physical efficiency test is made more stringent, commensurate with the post for which the recruitment drive under these Rules is undertaken without diluting the academic performance.

26. It is now well settled, as observed by the Supreme Court in Chandigarh Administration (supra), that it is for the rule-making authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. The courts can neither prescribe the qualification nor entrench upon the power of the authority concerned so long as the qualifications prescribed by the appointing authority/employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provisions of the Constitution, Statute and Rules. It is equally well settled that laying down of relevant criteria for recruitment is within the exclusive domain of the employer. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other

conditions of service is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations and restrictions envisaged in the Constitution of India and it is not for the courts, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or impose itself by substituting its views for that of the State [See P.U. Joshi (supra)]. Similarly, it is well open and within the competence of the State to change the rules relating to a service and alter or amend or vary by addition/subtraction of qualifications, the eligibility criteria and other conditions of service, from time to time, as the administrative exigencies may need or necessitate. There is no right in any person to claim that the rules for recruitment should be forever the same as the one which is more suited to him. Merely because written test has been restored by the State once again by further amending the Rules in 2017 would not render the impugned Rules in Rules, 2015 arbitrary and irrational. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is arbitrary or is vitiated due to mala fides. We have applied all these tests while examining the challenge and we are satisfied that the impugned Rules are neither arbitrary nor irrational nor contrary to any constitutional or statutory provision or are vitiated due to mala fides.

27. In the circumstances, we find no merit in the challenge raised in these writ petitions. The petitions are accordingly dismissed and we hold that the mode of selection to the post of police constable on the basis of the marks awarded in 10th and 12th standard Board examination results deserves no interference by this Court or the impugned Rules cannot be declared ultra vires the Constitution of India".

GROUND OF ATTACK

8. It has been submitted on behalf of the petitioners that the Rules, 2015 provide that the posts, which came to be vacant at the time of verification of documents and physical standard test, shall not be carried forward for further selection. Such vacant posts have to be filled up by next meritorious candidates in the same selection. The respondent Police Board, in the garb of the Rules, 2015, is adamant not to fill up the remaining vacant posts of Constable (Civil Police) and Constable (PAC) for the reasons best known to it. The petitioners are under the zone of consideration as they are all selected and as such, their valuable rights are going to be frustrated on account of inaction of the Police Board. In any eventuality the vacant posts cannot be carried forward for the next selection year. The Rules, 2015 do not provide that in any eventuality in case at the time of verification of documents and physical standard test any candidate fails to achieve the minimum required standard or failed to clear the minimum physical standard test then in such situation said post is to be carried forward in the next selection. The post is to be filled up from the same selection process and therefore, the merit was required to be lowered to select the remaining candidates, who were otherwise eligible.

9. I t is being claimed that the petitioners applied under different categories and their category-wise merit is given in paragraph-9 of the leading writ petition. All the petitioners participated in

the physical efficiency test and secured minimum prescribed 191.6 cutoff marks and were declared as qualified. Consequently, the petitioners were called upon for appearing in the verification of documents and physical efficiency test. It is being claimed that all the petitioners appeared in the said process. The petitioners could not reach to the cutoff merit prescribed by the Police Board for the verification of documents and physical efficiency test. The Police Board had prescribed the cutoff merit for 403.6 marks (General Category); 394.73 marks (OBC) and 380.3 marks (SC/ST).

10. In this backdrop, it is being claimed that candidatures of large number of candidates, whose mark sheets of Class-X and XII examinations were found to be forged, were cancelled by the Police Board. Similarly, the candidates, who found place in the select list dated 15.5.2018 and 21.5.2018 and further whose marks sheet of Class-X and XII examination were found to be genuine, were called upon for appearing in the medical examination in which again large number of candidates were declared as medically unfit, causing 3000 vacancies of Constable (Civil Police) and Constable (PAC). The petitioners, who are next in the merit list, are to be considered by lowering down the merit category-wise, otherwise, the petitioners shall suffer irreparable loss and injury.

GROUND OF DEFENCE

11. Per contra, Shri Manish Goyal, learned Additional Advocate General appearing for the State submitted that the advertisement was made on 29.12.2015 for 23,200 male and 5800 female posts of Constable (Civil Police) and 5716 posts of Constable (PAC). In pursuance of the requisition, the Police Board initiated the process of selection which was followed by preparation of merit list on the basis of marks obtained by them in 10th and 12th standard board examination results, physical efficiency test, scrutiny of documents & physical standard test, selection and preparation of final merit list on their part. Finally, the result was declared on 15.5.2018 by the Police Board on its official website. The candidates, whose names were in the select list, were required to appear for the medical examination by the appointing authority. However, since a technical error was occurred, the amended result of 4350 Constable (PAC) was declared on 24.5.2018 and 1366 Constable (PAC) (General Category) and 13 Constable (Female) (SC category) was declared on 25.1.2019 by the Selection Board on its official website. Thereafter, the selected candidates were sent to their respective districts/battalions for the purpose of medical examination and character verification and further process was carried out at districts level for Constable (Civil Police) and battalion level for Constable (PAC). The selected candidates joined police force and sent for training.

12. Shri Manish Goyal further submitted that in terms of the direction issued by Hon'ble Apex Court in **Manish Kumar vs. Union of India and ors2** the guideline was issued by the State Government vide letter dated 18.5.2017 providing, therein, the process of recruitment of remaining 1,01,619 vacancies of Constable in the State of Uttar Pradesh. During the ongoing process of selection of the year 2015 and in compliance of the direction of Hon'ble Apex Court dated 24.4.2017 the requisition for recruitment process of the year 2017

was sent to the Police Board on 12.1.2018. The collective left over vacancies in the Constable (Civil Police) Recruitment 2015 and Constable PAC Recruitment 2015 were carried forward in the requisition of Constable recruitment of the year 2018, which was sent to the Police Board on 30.10.2018. The same vacancies have been quantified as 2846 and a district-wise chart has also been prepared giving the vacancies occurred in each and every district. With regard to the remaining posts of Constable (PAC) similar procedure was initiated by the respondents in terms of the result dated 21.5.2018. The Additional Director General (PAC) vide his letter dated 17.10.2018 intimated that 18,580 posts of Constable (PAC) were available for recruitment and 1366 remaining posts of Constable (PAC) 2015 whose result were not declared by the Police Board till date, were included in the category of ongoing recruitment. In pursuance of the final result of police constable as provided by the Police Board on 21.5.2018, the entire process was completed and the left over vacant posts were carried forward by the Police Board in the recruitment and selection process of the subsequent recruitment year 2017.

13. Shri Manish Goyal has contended that sole relief has been pressed by the petitioners for lowering down the merit and in absence of any serious challenge to the Rule, 2015, the said relief cannot be accorded to them under Article 226 of Constitution of India. So far as the Rules, 2015 are concerned, the same has been upheld by the Division Bench of this Court in **Ranvijay Singh** (supra). Similar relief and Rule 15 of the Rules, 2015 have also been considered in **Chandra Prakash Yadav vs. State of UP and 3 others3 and in Ankit Yadav vs. State of UP and 3 others4**, wherein, the Court has held that the action of the respondents is not arbitrary and held that the recruitment process has already over. The resultant vacancies occurred on account of non-availability or non-joining of the candidates can only be filled up in the next selection process and the cutoff of merit cannot be lowered. Therefore, he submitted that judicial propriety also demands that these writ petitions are liable to be dismissed on this very sole ground.

14. He further submitted that the relief, as has been framed and drawn, cannot be accorded under Article 226 of Constitution of India. Eventually, such relief would lead to preparation of wait list, which is impermissible as per Rules, 2015 wherein, full fledged recruitment process is defined. In any case the Rules, 2015 do not provide any discretion to the selection authority to lower down the cutoff merit and preparation of a wait list. (Ref.: **Bihar State Electricity Board vs. Suresh Prasad and others5 and Abhinav Anand Singh and ors vs. State of UP and ors6).**

15. Shri Manish Goyal further submitted that mere participation in different stages of selection process does not vest any indefeasible right to a candidate much less a legitimate expectation to be included in the select list. (Refer: **State of M.P. And ors vs. Sanjay Kumar Pathak and ors7; Union Public Service Commission vs. S. Thiagarajan and others8 and Shankarsan Dash vs. Union of India9.** He has also submitted that the petitioners have already participated in the selection process and since very beginning they were known with the conditions applicable to such selection process. Subsequently, they cannot tern

around and challenge the selection process after being declared unsuccessful. (Refer: **Dr. Sarojkumari vs. R. Helen Thilakom and ors)10; Ashok Kumar and another vs. State of UP and others11 and K.H. Siraj vs. High Court of Kerala and others12.** Lastly, he has submitted that the difference between physical efficiency test under Rule 15 (c) and medical examination under Rule 15 (g) of the Rules, 2015 is not of nomenclature but is substantive. (Refer: **State of U.P. and 5 others vs. Bhanu Pratap Rajput)13.**

16. I have carefully considered the submissions of learned counsel for the parties and perused the records.

17. In order to understand the challenge better, it would be appropriate to have a close look at Rule 15 in the Rules, 2008 and the Rules, 2015. The Rules, 2008 provided for Preliminary Written Test, followed by Physical Efficiency Test and then Main Written Examination under clauses (c), (d) and (e) of the Rule 15 of the Rules, 2008. The basic academic qualification for direct recruitment to the post of constable remained the same i.e. one must possess the qualification of 12th standard by a Board established by law in India or a qualification recognized by the Government equivalent thereto. The procedure for direct recruitment of constable, as provided for under Rule 15 of the Rules, 2008, consisting of the clauses (c), (d) and (e), read thus:

"[15. **Procedure for direct recruitment of Constable.--(a) Application. –**

(i) A candidate shall fill the application form from one District only. Regarding allocation of Examination Center, the candidate may give more than one option. However, Board may allocate center other than those indicated by the candidate.

(ii) The details of the information regarding educational qualification, age, minimum qualifying standards for each category of examination, including physical, written, medical etc., minimum qualifying marks for Written Examination subject wise, copy of O.M.R. sheet for practice and other important guidelines as may be determined by the Board from time to time shall be provided by the Board on its web-site or any other method as it deems necessary.

(iii) The applications shall be invited by the Board giving the applicants adequate time for application. The candidate shall be personally and solely responsible for its accuracy and completeness, if Form of any candidate found incomplete, wrong or having inaccurate information, this Form shall be cancelled.

(iv) An applicant shall certify himself all his certificates and documents and be responsible for their genuineness and correctness.

(v) The application form may also include identification details like Unique Identity Number, thumb and finger impressions, photograph or bio metries in appropriate manner as prescribed by the Board from time to time.

(vi) The head of the department may fix an application fee for any recruitment.

(vii) The Board shall have the right to summarily reject the candidature of an applicant for any incompleteness or

inaccuracy or variation or conflict with any previous or subsequent information submitted by the candidate.

(viii) The Government may change the number of vacancies for any recruitment at any time before the first examination and may also cancel any recruitment at any time or stage of recruitment without assigning any reason thereof.]

[(b) Call Letter. - Call letters for candidate shall be made available at least ten days before the examination.

(c) Preliminary Written Test. - Candidates whose applications are found to be correct may be required to appear in an objective type preliminary written test of qualifying nature. The test shall be of one paper of 300 marks and contain questions on general knowledge, current affairs, reasoning ability and numeric ability of appropriate level, the detailed syllabus for which shall be notified by the Board from time to time. The candidate who fails to obtain 35% marks shall not be eligible for recruitment. From the candidates who pass the preliminary written test, a number equal to ten times the number of vacancies shall be eligible for the physical Efficiency Test.

(d) Physical Efficiency Test. - The eligible candidates shall be required to appear in a Physical Efficiency Test which shall be of 100 marks. The procedure for conducting the Physical Efficiency Test shall be such as prescribed in Appendix-2.

(e) Main Written Examination. - The eligible candidates who qualify Physical Efficiency Test shall be required to appear in the main written examination which will be of objective type shall carry 300 marks. The written paper will consist of questions covering, general awareness, mental ability, reasoning and comprehension. The detailed syllabus for the examination shall be notified by the Board. The procedure for conducting written examination shall be such as mentioned in Appendix-3. Candidates who fail to obtain 35% marks in the main written examination shall not be eligible for recruitment.

(f) Scrutiny of Documents and Medical Examination. - The Board shall prepare a merit list for each category of candidates on the basis of total marks obtained by the candidates according to the orders of the State Government and the provisions of enactments for the time being in force.

The scrutiny of documents of the above candidates shall be carried out as per Appendix-4. In case any document is found to be manipulated, inaccurate or forged during the scrutiny or at any time after the scrutiny, the candidature of the applicant will be cancelled at the discretion of the Board and Head of the Department. Those candidates whose documents are found in order will undergo for Medical Examination as per Appendix-5.

Note. - The Medical Board shall examine the candidate and deficiencies thereof such as knock knee, bow-legs, flat feet, varicose veins, distant and near vision, colour blindness, hearing test comprising of Rinne's test, Webber's test and shall also tests for vertigo, speech defects etc. of the candidates as may be notified from time to time by the State Government.

(g) Selection and Merit List. - The Board shall prepare a final select list of

candidates in order of their merit, keeping in view the reservation policy of the State.

If two or more candidates obtain equal marks, preference will be given to the candidates who have obtained higher marks in the main written examination. If two or more candidates secure the same marks in main written examination then the candidate who are older will be placed higher in the merit list. In case two or more candidates have the same date of birth, the candidates possessing preferential qualification as mentioned in Rule 9 will be placed higher in the merit list.

The final list shall be published in Website/Notice Board. This list shall be forwarded to the Head of Department, who will forward it to the Appointing Authority for further action.]

Note. - If two or more candidates obtain equal marks then the merit list would be finalized, according to the following procedure: -

(i) Such candidate will be given preference, having Preferential qualification if any. A candidate having more than one preferential qualification will get benefit of only one preferential qualification.

(ii) If despite the above, two or more candidates have the same rank then such candidate will be given preference who secures higher marks in the main written examination.

(iii) If despite the above two or more candidates have equal marks then such candidate will be given preference who is older in age.

(iv) If in spite of above consideration still the marks are equal, and date of birth is same and marks in the main written examination are also the same then such candidate will be given preference in order of the first letter of the English alphabet of the first name as mentioned in High School Certificates.

The merit-list shall be published in website/Notice Board.

(ii) The Board shall prepare a select list of candidates in order of the merit, keeping in view the reservation policy guidelines and the total number of vacancies notified to the Board which will be subject to character verification by the Appointing Authority. The select list shall be forwarded to the Head of Department who will after approval forward it to the Appointing Authority for further action.]"

18. The Rules, 2015 were notified by the State Government in exercise of the powers under clause (c) of sub-section (2) of Section 46 read with sub-section (3) of the said Section and Section 2 of the Police Act, 1861 on 02.12.2015 and all other powers enabling him, in this behalf and in supersession of all existing rules or orders issued in this behalf. The Rules, 2015 were framed with an object to regulate the selection, promotion, training, appointment, determination of seniority and confirmation etc. of Constables and Head Constables of the police in Uttar Pradesh Police Force. By the Rules, 2015, procedure laid down under Rules, 2008, in particular, clauses (c), (d) and (e) thereof, for recruitment has been done away with. In other words, under the Rules, 2015, clauses (b), (c) and (e) thereof in particular, the Preliminary Written Test and the Main Written Examination has been done away with and

now it is made on the basis of 10th and 12th standard Board examination results or qualification equivalent thereto, as provided under clause (8) of these Rules was introduced, followed by a Physical Efficiency Test. Relevant provisions for the purposes of the controversy involved in these writ petition are Rules 14, 15 and 16 of the Rules, 2015 and Appendix-1, Appendix-2 and Appendix-3, which are reproduced below:-

PART-V
Procedure for Recruitment

14. Determination of vacancies –

The appointing authority shall determine and intimate to the Head of the Department the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies reserved for candidates belonging to Scheduled Castes, Scheduled Tribes and other categories under rule 6. The Head of the Department shall intimate the number of vacancies for both male and female candidates separately, to the Board and also to the Government. Subsequently the Board shall notify the vacancies for both male and female3 candidates separately in the following manner:-

(i) by issuing advertisement in daily Hindi and English newspapers having wide circulation;

(ii) by pasting the notice on the notice board of the office or by advertising through Radio/Television and other Employment newspapers;

(iii) by notifying vacancies to the Employment Exchange; and

(iv) by other means of mass communication-

Rule 15. **Procedure for Direct Recruitment to the post of Constable** –

(a) Application Form –

(I) A candidate shall fill only one application Form. The Board will accept only online applications. The application of candidates, who fill more than one Forms, may be rejected by the Board.

(ii) The details of the information regarding educational qualification, age, minimum qualifying standards for each category of examination, including physical, medical examination etc., other important guidelines as determined by the Board from time to time shall be made available by the Board on its own website and or by other means as it deems necessary.

(iii) The application shall be invited by the Board giving the applicants adequate time for making application, the candidate shall be personally and solely responsible for its accuracy and competeness, if the Form of any candidate is found incomplete, wrong or having inaccurate information, it may be cancelled and the decision of the Board in this regard shall be final.

(iv) An applicant shall certify himself his certificates and documents and be responsible for their genuineness and correctness.

(v) In the application Form the detail of identity, specific identity card number, thump and finger impression, photographs or bio-matrix details will be so included as determined by the Board from time to time.

(vi) The Head of the Department may fix an application fee for any recruitment in consultation with the Recruitment Board.

(vii) The Board shall have the right to summarily reject the candidature of an applicant for any incompleteness or inaccuracy or variation or conflict with any previous or subsequent information submitted by the candidate.

(viii) The Government may change the number of vacancies for any recruitment at any time or stage of recruitment without assigning any reason thereof.

(b) **Merit List on the basis of 10th and 12th examination results**

All such candidates whose application forms are found correct, shall be awarded marks on the basis of 10th and 12th examination results, or qualification equivalent thereto, as provided under clause (8) of these rules. For awarding these marks, maximum of 100 marks will be awarded on the basis of 10th standard Board examination and maximum of 200 marks will be awarded on the basis of 12th standard Board examination. The marks such awarded to them will be counted upto second digit after decimal point and will be awarded to them will be counted upto second digit after decimal point and will be awarded as per following procedure –

(1) Marks awarded on the basis of 10th examination result = percentage of marks obtained by the candidate in 10th standard Board or examination equivalent thereto.

(2) Marks awarded on the basis of 12th examination result = 2 x percentage of marks obtained by candidate in 12th standard Board or examination equivalent thereto.

If any examination Board, awards grades in place of marks to the candidates, in above mentioned 10th and 12th examination, then Board shall proceed only after taking information from concerned examination Board, regarding marks to be awarded equivalent to corresponding grades. Candidates shall be awarded total marks on the basis of such total marks awarded to them on the basis of 10th class examination results and marks awarded to them on the basis of 12th class examination results, as above. All candidates will be awarded total marks as per sum total of marks awarded as above, out of a maximum of 300 marks and a list in the order or merit will be prepared on the basis of these total awarded marks. Out of the merit list such prepared, candidates equal to 15 times the number of total vacancies, on the basis of merit shall be called for Physical Efficiency Test. If more than one candidates are found on the marks obtained by the last candidate in the merit list then all such candidates shall be considered eligible for physical Efficiency Test.

(c) **Physical Efficiency Test**

All candidates declared eligible in the merit list under clause (b) shall be required to participate in Physical Efficiency Test which shall be of 200

marks. The procedure for conducting the Physical Efficiency Test shall be as prescribed in Appendix-1.

(d) **Scrutiny of Documents & Physical Standard Test –**

The scrutiny of documents & Physical Standard Test of candidates selected under clause (c) mentioned above shall be done according to Appendix-2. In case any document is found to be manipulated, inaccurate or forged during the scrutiny or at any time after the scrutiny, the candidature of the applicant will be cancelled at the discretion of the Board or the Appointing authority as the case may be.

(e) Selection and Final Merit List –

From amongst the candidates found successful after Physical Standards Test and scrutiny of documents under clause (d), the Board shall prepare, as per the vacancies, a select list of each category of candidates, on the basis of sum total of, marks awarded to each candidate on the basis of 10th and 12th examination results as per clause (b) and marks obtained by him in physical efficiency test as per clause (c), keeping in view the conservator policy and send it with recommendation to the head of the department subject to character verification, medical examination and 10th and 12 examination mark sheet verification. **No waiting list shall be prepared by the Board. List of all candidates with marks obtained by each candidate shall be uploaded on its website by the Board. The Head of the Department shall after his approval forward the list sent by the Board to the concerned Authority for further action.**

Note - If two or more than two candidates obtain equal marks the merit list shall be decided according to the following procedure –

(1) If marks of two, or more candidates are equal then candidate obtaining higher marks, as per total marks awarded in clause (b), will be given preference.

(2) If two or more candidates are equal even after this the candidates who have the preferential qualification (in the same order as stated in Rule 9) will be given preference. Candidate having more than one preferential qualification shall get the benefit of only one preferential qualification.

(3) Even then if two or more candidates have equal marks then candidates older in age shall be given preference.

(4) If despite the aforementioned more than one candidates are equal, then preference to such candidate shall be determined according to the order in English Alphabets of their names mentioned in High School Certificate.

(f) Verification of 10th and 12th examination marks sheets

While preparing the final select list, the Board will send for verification to the concerned Education Board, the 10th and 12th class mark sheets of all candidates included in the select list. As and when their verification reports from concerned Education Boards are received, the Board will send them separately to Police Headquarter later on, who will

subsequently send it to the Appointing Authority for necessary action. **If as per report sent by the concerned Educations Board, the 10th and 12 examination marks sheets of any candidate,is not verified, then such candidate shall be declared unfit by the Appointing Authority and such vacancies shall be carried forward for new selection**.

(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 candidate found unsuccessful in Medical Examination shall be declared unfit by the Appointing authority and such vacancies shall be carried forward for new selection."**

16. **Character Certificate Verification**

Character Verification shall be completed under the supervision of appointing authority before issuing of appointment letter and before sending the candidates for training. Ordinarily character verification shall be completed within a month. **On adverse fact coming to light during character verification of any candidate, he shall be declared unfit by the appointing authority and such vacancies shall be carried forward for next selection.**

APPENDIX-I

[See Rule 15 (c)]

Physical Efficiency Test for direct recruitment

1. The Physical Efficiency Test will be conducted by a team formed by the Board which shall have the following members –

(i) Sub Divisional Magistrate nominated by the District Magistrate of he District concerned;

(ii) Medical Officer nominated by the Chief Medical Officer of the District concerned;

(iii) Deputy Superintendent of Police nominated by Senior Superintendent of Police/Superintendent of Police.

Where according to the prevalent Government Orders representation of Scheduled Castes/Scheduled Tribes, Other Backward classes. Minority or any other category whose representation is necessary in the above team, the Board shall keep additional officers nominated by the District Superintendent of Police to ensure their representation. Such nominated officers shall not be below the ranks of Inspector in police department. The said team may take the help of any other expert for conducting the examination.

1. In the physical efficiency test for direct recruitment of constables, the male candidates will have to complete 4.8 Km. (Kilometre) run in 27 minutes and female candidates will have to complete 2.4 Km. (Kilometre) run in 16 minutes. Those candidates who fail to complete the run in

stipulated time will not be eligible for next stage.

The allotment of the marks will be according to time taken by the candidates within the above stipulated time, for which there shall be a maximum of 200 marks and minimum of 120 marks.

2. For male candidates maximum of 200 marks will be awarded to those, who complete the 4.8 Km run in 17 minutes or time less than that. After that male candidates completing the run in more than 17 minutes and upto 17 minutes 15 seconds, will be awarded 198 marks, male candidates completing the run in more than 17 minutes 15 seconds and upto 17 minutes 30 seconds will be awarded 196 marks. Likewise in the increasing order of time as above, 2 marks shall be deducted every time from the marks to be awarded to male candidates for every 15 seconds increase in time interval. Likewise, serially as per above prescribed norms, all male candidates completing the run in more than 26 minutes 30 seconds and upto 26 minutes 45 seconds shall be awarded 122 marks and all male candidates completing the run in more than 26 minutes 45 seconds and upto 27 minutes will be awarded 120 marks, minimum prescribed for this run, and all those male candidates who complete the 4.8 Km. run in more than 27 minutes shall be declared unfit for selection.

For female candidates maximum of 200 marks will be awarded to those, who complete the 2.4 Km. run in 11 minutes or time less than that. After that female candidates completing the run in more than 11 minutes and upto 11 minutes 15 seconds, will be awarded 196 marks, female candidates completing the run in more than 11 minutes 15 seconds and upto 11 minutes 30 seconds will be awarded 192 marks. Likewise in the increasing order of time as above, 4 marks shall be deducted every time from the marks to be awarded to female candidates for every 15 seconds increase in time interval. Likewise, serially as per above prescribed norms, all female candidates completing the run in more than 15 minutes 30 second and upto 15 minutes 45 seconds shall be awarded 124 marks and all female candidates completing the run in more than 15 minutes 45 seconds and upto 16 minutes will be awarded 120 marks, minimum prescribed for his run, and all those male candidates who complete the 2.4 Km. run in more than 16 minutes shall be declared unfit for selection.

The detailed table for Physical Efficiency Test, indicating marks to be awarded for different timings as above, separately for male and female candidates, shall be displayed by Board on its website.

3. Manual timing shall not be permitted to be used by the team. Standardised Electronic Timing Equipment alongwith CCTV coverage and biometrics with adequate backup will be used to ensure accuracy, transparency and avoid impersonation.

4. The team shall follow the process laid down as under –

(a) the number of candidates to be tested per day shall be determined by the Board and decided depending on the total numbers to be tested and prevailing conditions.

(b) The information regarding minimum standards of physical efficiency of qualification and table indicating marks

for different timing for physical efficiency test as given in para 2 of this appendix, shall be displayed on the notice board at the venue of the test.

(c) The result of this test will be displayed on the notice board at the end of the day, at the venue of the Test and if possible, will be uploaded on the Board's website as soon as possible.

(d) The members of the organizational team including testing agency if any who willfully commit an act which is wrong or omit to perform an act and which causes an unfair advantage or disadvantage to any candidate may be liable to Criminal proceedings or Department proceedings.

(e) The result of the Physical Efficiency Test will be made available to the candidates on the same day. The list of the successful candidates will be declared under the joint signature of the members of the team.

(f) The outdoor test shall be such that the results are capable of being measured and recorded mechanically without manual intervention. Only standardized equipment preferably having Bureau of Indian Standards certificate shall be used for Physical Efficiency Test.

(g) Candidates will be expected to appear on the date and time assigned to them. For reasons beyond their control and to be recorded in writing, the date and time of the test may be changed by the board for a group of candidates to be tested at a particular time.

(h) The list of successful and unsuccessful candidates shall be declared by the collective signatures of members of the team.

(i) If a candidate fails to appear in the examination on the scheduled date and time, then he can give application to the committee formed for conducting the test in concerned district, giving reasons in detail for absence and requesting to appear in the examination on some other date. The committee, after considering his application, may decide and allow him to appear for test on some other date. The candidate will be given only one chance in this regard and if he fails to appear in the examination on rescheduled date and time, he shall be considered unsuccessful. The candidates may give this application, before the last date fixed for this test, by the Board. No application will be accepted after the last date. The committee shall inform the Board about all such cases where the date and time of the test has been rescheduled.

(j) A candidate who fails for not achieving the prescribed standards in the examination, shall not be given another chance and no appeal shall lie for a retest for reasons of health and any other ground whatsoever.

Note-- Individual privacy will be respected in all video records and the record will be kept in safe custody and will be made available to a court of law when summoned by it, or to an officer with the permission of the Board.

Appendix-2

(See rule 15 (d))

(Scrutiny of Documents & Physical Standard Test)

Scrutiny of the Documents

1. Candidates will be summoned with relevant documents with regard to eligibility, relaxation, preferential qualifications, etc., for scrutiny thereof to be carried out by a committee which will consist of following members:-

(a) a Deputy Collector nominated by the District Magistrate of the District will be the Chairman;

(b) a Deputy Superintendent of Police nominated by the Senior Superintendent of Police/Superintendent of Police of the district;

(c) District Inspector of Schools (D.I.O.S.) or Basic Siksha Adhikari (B.S.A) or any other gazetted officer of the education department by the District Magistrate.

Where according to the prevalent Government Orders representation of Scheduled Castes/Scheduled Tribes, Other Backward Classes, Minority or any other category whose representation is necessary in the said committee, the Board shall keep additional officers nominated by the District Superintendent of Police to ensure their representation. Such nominated officers shall not be below the ranks of Inspector in police department.

2. Original documents shall be checked as per the information provided in the application form.

3. During scrutiny of documents on being referred by any committee because of any doubt or any being brought directly in its notice, the Board can issue directions in this regard. The directions issued by the Board, shall be final.

Physical Standard Test

The above mentioned committee can take help of any Government employee for conducting Physical Standard Test.

1. Minimum Physical Standards for male candidates are as follows –

(a) Height –

(one) for General/Other Backward classes and Scheduled Castes male candidates minimum height should be 168 centimetre.

(two) for Scheduled Tribe male candidates minimum height should be 160 centimetre.

(b) Chest –

For the candidates belonging to General/Other Backward classes and Scheduled Castes minimum chest measurement should be 79 centimetres without expansion and at least 84 centimetres with expansion and for the Scheduled Tribes 77 centimetres without expansion and not less than 82 centimetres on expansion.

Note - Minimum 5 centimetres chest expansion is essential.

2. Minimum Physical Standards for female candidates are as follows –

(a) Height –

(one) for General/Other Backward classes and Scheduled Castes female candidates minimum height should be 152 centimetre.

(two) for Scheduled Tribes female candidates minimum height should be 147 centimetre.

(b) Weight –

Minimum 40 Kg. for female candidates.

3. The minimum physical standards for qualifying for each test shall be displayed very prominently on Notice Boards in the venue of examination before conducting the examination.

4. Only standardized equipments having Bureau of Indian Standards certification or duly certified by the Director of Weights and Measures are to be used for physical standards test examination."

5. if any candidate is not satisfied with his Physical Standard Test, he/she may file an objection on the same day after the test. For clearing all such objection; the Board shall nominate one Additional Superintendent of Police at every place and Physical Standard Test of all such candidates will be conducted again by the committee in the presence of above nominated Additional Superintendent of Police. All those candidates who are again found unsuccessful in the Physical Standard Test, will be declared unfit and no further appeal will be entertained in this regard.

General Instructions

(1) Candidates will be expected to appear on the date and time assigned to them. For reasons beyond their control and to be recorded in writing, the date and time of the test may be changed by the Board for a group of candidates to be tested at a particular time.

(2) If a candidate fails to appear in the examination on the scheduled date and time, then he/she can give application to the committee formed for conducting the test in concerned district, giving reasons in detail for absence and requesting to appear in the examination on some other date. The committee, after considering his/her application, can decide and may allow him/her to appear for test on some other date. The candidate will be given only one chance in this regard and if he/she fails to appear in the examination on rescheduled date and time, he/she shall be considered unsuccessful. The candidates may give application before the last date fixed for this test, by the Board. No application will be accepted after the last day. The committee shall inform the Board about all such cases where the date and time of the test has been rescheduled.

(3) A candidate who fail for not achieving the prescribed standards in the examination, shall not be given another chance and no appeal shall lie for a retest for reasons of health and any other ground whatever.

(4) The candidate will be informed about result of Scrutiny of Documents and Physical Standards Test.

APPENDIX-3

[See rule 15(g)]

Medical Examination for direct recruitment

The appointing authority will request the Chief Medical Officer of the concerned District to constitute Medical Board for conducting Medical Examination. The Medical Board will consist of three Doctors, who will conduct Medical Examination as per "Police Recruitment Medical Examination Forms" as prescribed and codified by Head of Department in consultation with Director General of Medical Examination. Medical Board may take services of any expert as per requirements.

(1) The doctors will examine the candidates in accordance with the Medical Manual, if any, and announce the result on the day of the Medical Examination.

(2) The result of the Medical Examination will be displayed on the notice board outside the premises at the end of the day.

(3) Any candidate not satisfied by his Medical Examination, may file an appeal on the day of examination itself. Any appeal in regard to Medical Examination will not be considered if the candidate fails to file appeal on the date of Medical Examination and declaration of its result itself. The appeal should be disposed of by the Medical Board, constituted for the same purpose within two weeks of the appeal being filed. The Medical Board constituted for appeal shall have expert regarding Medical deficiency of the applicant.

(4) The members of the Medical Board who are found to give wrong report wilfully will be liable for criminal proceedings.

(5) The Medical Examination is only qualifying in nature and it has no effect on the merit list.

Note:- The Medical Board will examine the candidates and their deficiencies such as knock knee, bow legs, flat feet, varicose veins, distant and near vision, colour blindness, hearing test comprising of Rinne's Test, Webber's Test and Tests for vertigo etc. as notified by the government from time to time. The Medical Board may get conducted other examinations after obtaining opinion of experts."

DISCUSSIONS AND FINDINGS

19. The Rules, 2015 were introduced, whereunder, Preliminary Written Test and Final Written Examination have been done away with and merit list of candidates now would be prepared on the basis of the marks obtained by them in 10th and 12th standard Board examination results. 300 marks have been awarded for Class 10th (100 marks) and Class 12th (200 marks) and out of the merit list prepared, candidates equal to 15 times the number of total vacancies, on the basis of merit shall be called for Physical Efficiency Test. (200 marks) has been assigned to Physical Efficiency Test, the procedure for conducting the Physical Efficiency Test is prescribed in Appendix-1 to the Rules. From amongst the candidates found successful after Physical Efficiency Test and scrutiny of documents, the Board shall prepare, as per vacancies, a select list of each category of candidates, on the basis of

sum total of marks awarded to each candidate on the basis of 10th and 12th Board examination results and marks obtained by him/her in Physical Efficiency Test, keeping in view the reservation policy, the recommendation of selected candidates shall be made to the Head of the Department, subject to character verification, medical examination and examination of educational documents.

20. The Rule 15 (e) of Rules, 2015 deals with selection and final merit list, which contemplates that from amongst the candidates found successful after Physical Standards Test and scrutiny of documents under clause (d), the Board shall prepare, as per the vacancies, a select list of each category of candidates, on the basis of sum total of marks awarded to each candidate on the basis of 10th and 12th examination results as per clause (b) and marks obtained by him in physical efficiency test as per clause (c), keeping in view the conservator policy and send it with recommendation to the Head of the Department subject to character verification, medical examination and 10th and 12th examination mark sheet verification. **No waiting list shall be prepared by the Board**. List of all candidates with marks obtained by each candidate shall be uploaded on its website by the Board. The Head of the Department shall after his approval forward the list sent by the Board to the concerned Authority for further action. The Rule 15 (f) provides verification of 10th and 12th examination marks sheet. While preparing the final select list, the Board will send for verification to the concerned Education Board, the 10th and 12th class mark sheets of all candidates included in the select list. As and when their verification reports from concerned Education Boards are received, the Board will send them separately to Police Headquarter later on, who will subsequently send it to the Appointing Authority for necessary action. It further provides that ***"if as per report sent by the concerned Educations Board, the 10th and 12 examination marks sheets of any candidate, is not verified, then such candidate shall be declared unfit by the Appointing Authority and such vacancies shall be carried forward for new selection".***

(emphasis supplied)

21. Similarly, the Rule 15 (g) deals with medical examination, which provides that 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. **It further provides that the candidate found unsuccessful in Medical Examination shall be declared unfit by the Appointing Authority and such vacancies shall be carried forward for new selection.**

(emphasis supplied)

22. The Rule 16, which provides for Character Certificate Verification, contemplates that Character Verification shall be completed under the supervision of appointing authority before issuing of appointment letter and before sending the candidates for training. Ordinarily character verification shall be completed within a month***. "On adverse fact coming to light during character verification of any candidate, he shall be declared unfit by the appointing authority and such vacancies shall be carried forward for next selection".***

(emphasis supplied)

23. In the present proceeding, in response of the earlier order dated 06.1.2020 the State has filed detailed supplementary counter affidavit dated 12.2.2020 on behalf of respondent nos.2 and 3 with categorical averments, refuting the alleged claim set up by the petitioners. It would be appropriate to have a glance of the averments contained in paragraphs 4, 5 and 6 of the said affidavit as under:-

"4. That, for the purposes of initiating the selection process of the same, the office of answering respondents received requisition dated 26.12.2015 from the office of Director General of Police, Uttar Pradesh, therein requiring the selection of 23,000 for the post of Constable (Civil Police), 5716 post of Constable (PAC) and 5800 posts for Female Constable (Civil Police). In pursuance of the above requisition the Police Recruitment and Promotion Board (Hereinafter referred as Board/answering respondents initiated with the selection process in terms of the Rules, 2015 thereby inviting the advertisement dated 29.12.2015 seeking online applications for the same posts as provided by the above Rules. A merit was prepared of all the applicants on the basis of the marks secured in Class 10th and in Class 12th. The said merit consisted of total 300 marks and the classification of the same is as follows:-

(a) Maximum 100 marks for the marks secured in Class 10th;

(b) Maximum 200 marks for the marks secured in Class 12.

The same maximum marks as stated above were a parameter for the marks secured by each and every candidate as provided and calculated under Rules 2015 in order to ascertain his own independent merit and accordingly, post preparation of the same, 15 times maximum candidates of the total vacancies were called upon for the purposes of physical efficiency test (running). The notification of the same for female Constable was made on 30.03.2016 and for Male Constable and PAC was made on 04.04.2016 on the official website of the Selection Board. It is also pertinent to state over here that physical efficiency test (Running) carried 200 maximum marks and as per the Schedule 1 of Rule 2015, the male candidates were required to complete the stage of 4.8 km in 27 minutes and female candidates were required to run 2.4 km. in 16 minutes.

After completion of the aforesaid process, the merit as prepared out of total 500 marks and 1.5 times candidates of the total vacancies were called upon for the purposes of documents verification and physical standard test. It is pertinent to state over here that the said documents verification and physical standard test were are a prima-facie qualifying examination and scrutiny of the documents as well as of the physical condition of the candidates and the final selection would be subject to the final scrutiny and verification of the documents from the concerning Education Boards and the Physical Standard Test is also followed by a comprehensive medical examination at the Range/District Level in the supervision of Police Headquarter/ Addl. Director General of Police (Establishment).

5. That, accordingly the selection process was initiated and concluded and at

the stage of board and accordingly on 15.05.2018 result were declared. However, it appeared that due to some technical error occurred in the cut of marks of Constable PAC under open category and Female Constable (Civil Police) as ascertained by the board and therefore, on 18.05.2018 a notification was published on the official website of Board bringing on record the same discrepancy on 19.05.2018 the Director General of Police, Uttar Pradesh was also intimated of the same anomaly and was further requested to return the result as were forwarded by the Board. The same information was also forwarded to the Principal Secretary, Home, U.P. vide letter dated 21.05.2018.

In order to further clarify the above discrepancy it is most respectfully submitted that after declaration of the selection result on 15.05.2018, it appeared that certain candidates of general category for Constable P.A.C were having marks as secured by the selected candidates of the same category. Similarly in the case of Female Constable (Civil Police) it was found that certain female candidates of Scheduled Caste category were having higher marks in comparison to that selected candidates of Female Constable (Civil Police) to Schedule Caste category and accordingly, in order to rectify the same mistake, the above mentioned exercise was done on the part of the Board. On appreciation of the above controversy and on proper scrutiny of the same by the Board it was found that the same discrepancy occurred due to the reason that their documents verification as well as their physical standard test was not undertaken and accordingly they were left out from getting included in the select list.

6. That due to the above discrepancy and the technical error, 1366 posts for Constable PAC under open category and 13 post for Female Constable (Civil Police) of Scheduled Caste category were getting effected and as such rectification in the result dated 15.5.2018 was highly warranted. In the same reference it is most respectfully submitted that post declaration of result on 15.05.2018, 1366+13 posts were not vacant or unfilled as stated by the petitioners. However, due to technical error the same required rectification and correction of the cut of marks on the end of the answering respondents and accordingly, the present exercise was initiated and concluded by the Board in the interest of meritorious candidates only."

CONCLUSION

24. As per chart, which has been submitted before this Court on behalf of the State, it indicates that vacant posts of Constables (Civil Police & PAC) of the selection year 2015 in respect of those candidates, who were either failed in physical efficiency test and document verification, were carried forward for the next selection year 2017. The contention of the petitioners is to the effect that these posts should be offered to the petitioners, and the same posts are to be allotted in the same process of selection. Said aspect of the matter has been considered by the Division Bench of this Court in **Abhinav Anand Singh (supra)** and after considering the relevant provisions of the Uttar Pradesh Sub-Inspector and Inspector (Civil Police) Service Rules, 2008 the Division Bench had proceeded to dismiss the writ petition with following observations:-

"12. In the present case, there is a clear statutory embargo which provides that such vacancies shall be carried forward for further selection which is specifically in the context of candidates being found unfit in the medical test or being invalidated as a result of the character verification. Rule 15 (h) clearly contemplates drawing up of a tentative select list on the basis of marks obtained in the main written examination and group discussion for each category of candidates which is then sent to the head of the department with a recommendation, subject to medical test and verification of testimonials/character. Rule 15 (h) specifically contemplates that no waiting list is to be prepared by the Board. It is in this background that Rule 15 (j) provided that prior to the issuance of letters of appointment, completion of the character verification is necessary and if any candidate has been found unfit in the medical test or as a result of the character verification, these vacancies shall be carried forward for further selection. The principle that the vacancies which are available should be filled up is subject to statutory rules laying down the method and process of selection. Each of the petitioners admittedly has received marks which are lower than the cut off which was prescribed for the general category of candidates and had been unable to be selected on the basis of the cut off.

13. Hence, we find no merit in the submission which has been urged on behalf of the petitioners that Rule 15 (h) should be so construed as to require that the vacancies which remain unfilled as a result of unfitness of 104 candidates and the absence of 46 should be offered to the petitioners or to other persons in order of merit. This would be plainly contrary to the provisions contained in the Rules.

14. During the course of hearing, the issue of interpretation alone has been pressed for the consideration by the Court and the issue of vires was not pressed.

15. For these reasons, we are unable to accept the submissions which have been urged on behalf of the petitioners.

16. The writ petition shall, accordingly, stand dismissed."

25. The categorical procedure, which contemplates in the Rules, 2015, nowhere, provides any discretion to the recruitment authority or the appointing authority to either manipulate or show any favour in the process of recruitment. At every stage in case the applicant does not fall in the zone of consideration, nowhere, discretion is available to the authority and in every eventuality the post is to be carried forward. It is equally well settled that laying down of relevant criteria for recruitment is within the exclusive domain of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is arbitrary or is vitiated due to mala fides.

26. It was also one of the ground urged on behalf of the State that once petitioners participated in the selection process, then they could not be permitted to challenge/question the recruitment process after they were unsuccessful in getting selection. Indirectly the petitioners are questioning the recruitment process as contemplated in Rule 15 (e) and (g) of the Rules, 2015, which provide in every

eventuality such vacancies shall be carried forward. The law is well settled that once a person takes part in the process of selection and is not found fit for appointment, the said person is estopped from challenging the process of selection.

27. In **G. Sarana v. University of Lucknow14** the Supreme Court observed that it was not necessary for the court to go into the question of reasonableness of bias or real likelihood of bias because the petitioner appeared before the Committee and at the relevant time did not raise any finger against constitution of the Committee. It was ruled that petitioner voluntarily appeared before the Committee and took chance of favourable view of the Committee, but when he was not able to get the appointment, he turned around his face. Similar was the principle pronounced in **Nanak Lal v. Prem Chand Singhvi15** where the appellant found to have taken chance to secure a favourable report from the Tribunal but when confronted with the unfavourable report, he adopted the device of raising objection. In **Prakash Shukla v. Akhilesh Kumar Shukla16** the Apex Court held that as the petitioner appeared at the examination without any protest and when he found that he would not succeed in the examination, he filed a petition challenging the examination, the High Court should not have granted any relief to such petitioner.

28. Again **in Manish Kumar Shahi v. State of Bihar17** it was emphasized that the conduct of the petitioner in taking part in the selection process would clearly disentitle him from questioning the selection. It was stated that the petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name did not figure in the merit list prepared by the Commission. In **Amlan Jyoti Borooah v. State of Assam18** it was reiterated that since the appellant had subjected himself to the allegedly faulty selection process without questioning it during the process, he could not question it later on. In **Ramesh Chandra Shah v. Anil Joshi19**, it was held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents. In **D. Saroj Kumari v. R. Helen Thilakom20,** the Supreme Court stated the principle the very principle that once a person takes part in the process of selection and is not found fit for appointment, such person is barred from challenging the process of selection.

29. The petitioners have prayed for mandamus commanding the respondents to lower the respective category-wise merit and accord selection to them on the vacant posts of Constable (Civil Police/PAC). Such situation eventually leads to preparation of wait list, which is not contemplated in Rules, 2015.

30. The Apex Court in **Bihar State Electricity Board's** case (supra) has upheld non-preparation of wait list, where rules do not require for preparation of wait list and held that preparation of a wait list is not at all obligatory or mandatory unless recruitment rules provide for the same in addition to the select list. Relevant paragraphs 6 and 7 of the said judgment are reproduced herein below:-

"6. We find merit in this appeal preferred by the Board. In the case of Shankarsan Dash Vs. Union of India (supra) it has been held by this Court that even if number of vacancies are notified for appointment and even if adequate number of candidates are found fit the successful candidates do not acquire any indefeasible right to be appointed against existing vacancies. That ordinarily such notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. It was further held that the State is under no legal duty to fill up all or any of the vacancies unless the relevant recruitment rules indicate. In the present case we are not shown any such relevant recruitment rules. Moreover, there is no merit in the contention advanced on behalf of respondents Nos.1 to 7 that the appellant had violated the order of High Court dated 23rd March, 1994 by preparing a list of only 22 candidates instead of filling up 50% of the alleged 161 vacancies. In this connection, the impugned judgment of the High Court has recorded a finding of fact that the board has rightly reduced the number of vacancies to 50 and to that extent claim of the writ petitioners was rejected. In the impugned judgment, the High Court found that 50 vacancies were required to be filled up, 255 against the advertisement dated 15th December, 1986 and 255 against advertisement dated 25.11.1992. However, according to the impugned judgment, the appellant ought to have made appointments by preparing a further panel for 18 vacant posts which became vacant when the earlier 18 selected candidates opted out. It is this part of the reasoning of the High Court, which is fallacious.

7. In the present case pursuant to the direction of the High Court dated 23.3.1994, the appellant took steps for filling up 25 vacancies in the post of Operators from advertisement No. 3/86 and the remaining 25 vacancies from advertisement No. 6/92. The results were notified on 29.4.1994 on the notice board. The Board recommended names of successful candidates under advertisement No. 3/86 and advertisement No. 6/92. Out of 22 candidates selected by the Board for appointment under advertisement No. 3/86 18 candidates did not turn up. At this stage it is important to note that respondent Nos. 1 to 7 had applied for appointment under advertisement No. 3/86 dated 15.12.1986 and they had qualified but they were placed at serial no. 23 onwards in the descending order. As stated above a panel of 22 candidates was prepared for appointment under advertisement No. 3/86 and respondent Nos. 1 to 7 fell beyond cut off number. We are not shown any statutory recruitment rules which require the Appellant-Board to prepare a waiting list in addition to the panel. The argument advanced on behalf of respondent Nos. 1 to 7 was in effect that when 18 candidates failed to turn up the appellant was bound to offer posts to candidates in the waiting list. No such rule has been shown to us in this regard. In our view, the judgment of this Court in the case of Shankarsan Dash Vs. Union of India (supra) squarely applies to the facts of this case. Further there was no infirmity in the judgment of this Court delivered on 4.12.1998 and in our view with respect there was no need to recall the said judgment."

31. The Apex Court in **Shankarshan Dash Vs, Union of India** (Constitution Bench) (supra) held that it is not correct to say that if a number of vacancies are notified for appointment and adequate

number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed, which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This judgment has been consistently followed in **Government of Orrisa Vs. Harprasad Das21, A. Arthur Vs. Jeen22, Bihar State Electricity Board (supra), Punjab State Electricity Board Vs. Malkiat Singh23, Union of India Vs. Kali Das Batish24, Aryavrat Gramin Bank Vs. Vijay Shanakr Shukla25.**

32. Hon'ble Supreme Court in **Union of India and others Vs. S. Vinodh Kumar and others26** held that competent authority has power to fix cut-off marks for preparation of select list. Process of final selection had to be closed at some stage. In this case, Circular dated 15.11.1999 directed for preparation of select list of the candidates equal to the number of vacancies. Thus merit of last person in different category is the cut-off marks of the merit. As soon as select list is published on 24.06.2000, selection process was closed. No direction can be issued for lowering the merit, after closure of the selection process.

33. In **Sri Kant Tripathi v. State of U.P.27** it was held "An applicant, whose name appears in the wait list, does not get an enforceable right for being appointed to a post....." In **Surinder Singh and others vs. State of Punjab and another28** the Court held " The candidates in the waiting list have no vested right to be appointed except to the limited extent that when a candidate selected against the existing vacancy does not join for some reason and the waiting list is still operative." Subsequently, in State of Bihar and others Vs. Amrendra Kumar Mishra29 after referring to various earlier judgments on the issue, the Hon'ble Apex Court held "The decisions noticed hereinbefore are authorities for the proposition that even the wait list must be acted upon having regard to the terms of the advertisement and in any event cannot remain operative beyond the prescribed period."

34. In **U.P. State Road Transport Corporation and another vs. Gobardhan and another30** while upholding the contention of the learned counsel for the Corporation that the wait list candidate has no right, the Hon'ble Apex Court held "since the Corporation itself has taken decision to appoint a person from the wait list, such a wait list candidate is entitled to be appointed". This view has again been reiterated **in State of J & K and others Vs. Sanjeev Kumar and others31** and Hon'ble Apex Court held "As it clearly spelt from the quoted portion, the Government can by a policy decision appoint people from the waiting list."

35. A Division Bench of this Court in **U.P. Public Service Commission, Allahabad and another versus State of U.P. and another32** held as under:

"However, it is neither obligatory nor mandatory for the employer to prepare simultaneously a wait list or to keep a wait list intact as and when any selection is made besides the select list, unless a provision is made making it obligatory to prepare a wait list. It is always open to the employer not to prepare any wait list and after declaring the result of the selected candidates, to make appointment therefrom and in case any vacancy remained unfilled, to make a fresh selection instead of looking for a wait list."

36. It was followed again by a Division Bench **in Kumar Sanjay Vs. U.P. Public Service Commission and others33** wherein it was held :

"On the contrary, the law is well settled that unless Rules require, waiting list need not be prepared. Even otherwise, a candidate who has not been selected has no legal right to seek a writ of mandamus commanding the respondents to prepare a waiting list in the absence of statutory rules."

37. A coordinate Bench of this Court has also considered similar relief and Rule 15 of the Rules, 2015 in **Chandra Prakash Yadav vs. State of UP and 3 others34** and dismissed the writ petition on 27.1.2021 with following observations:-

"This petition has been preferred seeking the following reliefs:-

"I. Issue an ad-interim mandamus directing the respondents to consider the claim of the petitioner with regard to his selection on the post of Constable (Civil Police) against the vacant post in the selection of Constable (Civil Police) and Constable (P.A.C.) Direct Recruitment-2018 initiated vide advertisement dated 14.01.2018 issued by the Additional Secretary (Recruitment) U.P. Police Recruitment and Promotion Board, Lucknow within the stipulated period of time as fixed by this Hon'ble Court."

Undisputedly, under the 2015 Rules which apply, a specific provision has been engrafted prohibiting the preparation of a waiting list in respect of seats which may remain unfilled. The Court has also not been apprised of whether the vacancies which remained have not been carried forward or included in a subsequent recruitment. In any case, the petitioner does not rest his case on any statutory provision which may oblige the respondents to fill the remainder vacancies by lowering the merit. The action of the respondents is also not established to be arbitrary. In view of the aforesaid, the Court finds no justification to issue the writs as prayed for.

Petition is dismissed."

38. Again this Court has considered similar relief in **Ankit Yadav vs. State of UP and 3 others35** and dismissed the writ petition with following observations:-

"The petitioner herein seeks writ of mandamus commanding the respondents to consider his candidature on the post of Police Constable and Constable PAC by lowering down the cutoff marks in O.B.C category, against the vacancy which occurred on account of non-availability or non-joining of OBC candidates in the selection which was held pursuant to the advertisement dated 29.12.2015 issued by the U.P Police Recruitment and Promotion Board, Lucknow.

Placing Rule 15 of the U.P. Civil Police and PAC Service Rules 2015 which governs recruitment process to the said posts, it is argued that the Rule 15 provides for carrying forward the resultant vacancies to be filled in the next selection process. There is no justification of sticking to the cut-off merit when the recruitment board did not find suitable candidates for filling up the quota. The merit was, therefore, required to be lowered to select the remaining candidates, who were otherwise eligible.

There is no challenge to the provision of Rule 15. Evenotherwise, it is noteworthy that the result of the recruitment examination held pursuant to the advertisement dated 29.12.2015 was declared in the year 2018. Thereafter, two recruitment processes were conducted by the Selection Board in the year 2018. This means that the resultant vacancies of the recruitment conducted pursuant to the advertisement dated 29.12.2015 were notified in the subsequent recruitment process in the year 2018 and filled.

The prayer in the present writ petition filed in the month of January, 2021 after a period of two years of conclusion of the selection process is found wholly misconceived.

Even otherwise, it is well settled that once the recruitment process is over, the resultant vacancies occurred on account of non availability or non joining of the candidates can only be filled in the next selection process and the cutoff of merit cannot be lowered. There is no provision of preparation of waiting list.

For the aforesaid facts, the writ petition is dismissed."

39. Apex Court in the case of **Union of India and another Vs. Raghubir Singh (Dead) by LRS. Etc.36** held as under:-

"It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges.

We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court."

40. In the case of **State of Tripura Vs. Tripura Bar Association and others37,** it is held that as under:-

"We are of the view that the Division Bench of the High Court which has delivered the impugned judgment being a coordinate Bench could not have taken a view different from that taken by the earlier Division Bench of the High Court in the case of Durgadas Purkayastha. If the latter Bench wanted to take a view different than that taken by the earlier Bench, the proper course for them would have been to refer the matter to a larger bench."

41. In the case of **Brijendra Kumar Gupta and others Vs. State of U.P. and others38** held as under:-

8.6. We remind ourselves of the following observations made by a 5 Judges Constitution Bench of the Supreme Court in Sub-Committee of Judicial Accountability v. Union of India and others : AIR 1992 SC 63 :

".....Indeed, no coordinate bench of this Court can even comment upon, let one sit in judgment over, the discretion exercised or judgment rendered in a cause or matter before another co-ordinate bench..... Judicial propriety and discipline as well as what flows from the circumstances that each Division Bench of this Court functions as the Court itself renders any interference by one bench with a Judicial matter before another lacking as much in propriety as in jurisdiction."

The principle enunciated aforementioned equally applies to a High Court as it exercises its judicial functions through its different Benches--Single or Division Bench or Full Bench or Special Bench and while doing so each Bench constitutes the High Court itself.

8.8 The principle laid down by the Apex Court was also held to be applicable to the High Courts as well as by the Apex Court itself in Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Co. etc. v. State of Andhra Pradesh and others, : AIR 1972 SC 51. in following words :

"It is strange that a coordinate Bench of the same High Court should have tried to sit on judgment over a decision of another Bench of that Court. It is regrettable that the learned Judges who decided the latter case overlooked the fact that they were bound by the earlier decision. If they wanted that the earlier decision should be reconsidered, they should have referred to the question in issue to a larger Bench and not to ignore the earlier decision."

42. In the case of **Rajasthan Public Service Commission and another Vs. Harish Kumar Purohit and others39,** Hon'ble Supreme Court in para Nos. 12 and 13 (relevant portion quoted) held as under:-

Para No. 12 - Unfortunately, the Division Bench hearing the subsequent applications did not even refer to the conclusions arrived at by the earlier Division Bench. The earlier decision of the Division Bench is binding on a Bench of coordinate strength. If the Bench hearing matters subsequently entertains any doubt about the correctness of the earlier decision, the only course open to it is to refer the matter to a larger Bench.

Para No. 13 - If the latter Bench wanted to take a view different than that taken by the earlier Bench, the proper course for them would have been to refer the matter to a larger Bench. We have perused the reasons given by the learned Judges for not referring the matter to a larger Bench. We are not satisfied that the said reasons justified their deciding the matter and not referring it to the larger Bench.

43. In the case of **Sant Lal Gupta and others Vs. Modern Co-operative Group Housing Society Ltd. and others40**, it is held as under:-

Para 19- The earlier decision of the coordinate bench is binding upon any latter coordinate bench deciding the same

or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench.

44. In the case of **Safia Bee Vs. Mohd. Vajahath Hussain alias Fasi41** held as under:-

Para No. 27 - The learned Judges were not right in over-ruling the statement of the law by a Co-ordinate Bench of equal strength. It is an accepted rule or principle that the statement of the law by a Bench is considered binding on a Bench of the same or lesser number of Judges. In case of doubt or disagreement about the decision of the earlier Bench, the well accepted and desirable practice is that the later Bench would refer the case to a larger Bench.

Para No. 29 - In Central Board of Dawoodi Bohra Community and Anr. v. State of Maharashtra and Anr.: (2005) 2 SCC 673, (para 12), a Constitution Bench of this Court summed up the legal position in the following terms:

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

(2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

45. In view of the above exposition of law of the Apex Court as well as Division Bench and coordinate Bench of this Court, which are binding on this Court, I am not inclined to accord any relief to the petitioners.

46. For the aforesaid reasons, all the writ petition are dismissed.

(2021)07ILR A760
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2021

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE RAVI NATH TILHARI, J.

Writ C No. 2259 of 2021

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

Counsel for the Petitioners:
Sri Sandeep Kumar, Sri Karuna Nand Tiwari

Counsel for the Respondents:
C.S.C.

A. Civil Law – Constitutional Validity - U.P. Revenue Code, 2006: Section 54, 61, 59, 189, 190, 233 - U.P. Revenue Code Rules, 2016 - Rule 57 Sub- Rules (4), (5), (7), (8), (11), Rule 58.

The impugned condition (of making full deposit of the lease rent of ten years,

within 15 days of the acceptance of bid) cannot be termed arbitrary or discriminatory or in any way violative of Art. 14 of Consitution of India - The thrust of the argument is not that Ss. 189 and 190 are ultra vires per se but that they should not be applied on settlement of fishery lease because such leases are reserved for marginal sections of the society and therefore applying onerous condition laid in Ss. 189 and 190 of the Code, 2006, through Rule 57(8) of the Rules, 2016, for settlement of fishery lease through auction, is arbitrary and as such violative of Articles 14 and 21 of the Constitution of India.

Underlying principle enshrined in Article 14 of the Constitution - All persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same. (Para 14)

The impugned condition applies only in a situation where settlement of the fishery lease is through an auction which is when there are more than one claimants in that class of claimants and it applies equally to all in that class. Therefore, when members of that particular class submit their bid with prior knowledge of what they would require to meet, their financial bids would logically be as per their financial capacity.

B. The provisions of Rule 57 of the Rules, 2016 when read as a whole would reflect that they do a balancing act. On one hand they provide a list of persons eligible to participate in the process of grant of fishery lease by ensuring exclusion of non-serious bidders so as to make the bidding process meaningful and effective, and thereby subserve the avowed object of Art. 38 of the Constitution and, on the other, by making the provisions of Ss. 189 and 190 of the Code, 2006 applicable, by virtue of Rule 57(8) of the Rules, 2016, they seek to serve the larger public interest of securing higher revenue for the State. (Para 13, 14)

The provisions of Rule 57(8) of the Rules, 2016 are not ultra vires Article 21 of the Constitution - **Fishery lease is obtained not merely to earn a livelihood for survival but for profits, inasmuch as it has a commercial value.** The commercial value of the fishery lease cannot be denied and the mere fact that there are more claimants than one for the lease in issue lends credence to its commercial potential. The bidding process commences only when there are more eligible claimants than one. As the bidders are all of the same class, and they bid keeping in mind the commercial interest that the proposed lease would serve, they are free to submit their bids as per their financial capacity. (Para 15)

C. The challenge laid to the impugned provisions on the ground that they violate Article 19(1)(g) of the Constitution is equally misconceived as they do not place unreasonable restriction on the right to carry on any business, trade or occupation. They only put a procedure in place for acquiring a business interest from the State which by no means can be termed arbitrary or unreasonable. (Para 16)

D. It cannot be said that the impugned condition defeats the object set out by Rule 57(5) of the Rules, 2016. The impugned condition applies only when there is settlement by auction when there are more claimants than one in the same class. (Para 17)

E. The petitioner participated in the bidding process without a demur. The petitioner has not at all demonstrated that before participating in the bidding process he had registered his protest to the impugned condition of the advertisement. It is only after he committed default that he has challenged the impugned condition of the advertisement. (Para 11, 18)

Writ petition dismissed.

Precedent followed:

1. St. of W.B. Vs Anwar Ali Sarkar, AIR 1952 SC 75 (Para 14)

(Delivered by Hon'ble Manoj Misra, J.
&
Hon'ble Ravi Nath Tilhari, J.)

1. We have heard Sri Sandeep Kumar for the petitioners; the learned standing counsel for the respondents 1, 2 and 3; and have perused the record.

2. At the outset, Sri Sandeep Kumar, the learned counsel for the petitioners, states that the cause of action to file the present petition is with the second petitioner and, therefore, he prays to withdraw this petition in so far as the petitioner no.1 (Ravi Kumar) is concerned.

3. In view of the above, the petition of petitioner no.1 (Ravi Kumar) is dismissed as withdrawn. The petitioner no.2 (Thagai), for the sake of convenience, would hereinafter be referred to as the petitioner.

4. In brief the facts giving rise to this petition, as could be elicited from the petition, are as follows: The petitioner being member of fishermen community, pursuant to an advertisement inviting bids for settlement of fishery lease of Gaon Sabha ponds for a period of ten years, after depositing security amount of Rs.1.47 lacs, participated in an auction held on 30.09.2020. His bid, amongst four bidders, at Rs.13.40 lacs, was highest for the pond i.e. plot no.421 @ 1.137 hectare. Vide condition no.2 of the advertisement, provisions of sections 189 and 190 of the U.P. Revenue Code, 2006 (for short Code, 2006) were made applicable, which, otherwise also, by virtue of sub-rule (8) of Rule 57 of the U.P. Revenue Code Rules, 2016 (for short Rules, 2016), were to apply. As per those sections, the highest bidder is required to deposit one-fourth of the bid amount on the day of the auction and the balance, three-fourth, within 15 days. On failure to deposit, there are penal consequences including that of forfeiture of the security amount. The condition no.2 of the advertisement reiterates that position. Admittedly, the petitioner could not fulfil the condition of deposit, despite grant of additional time. Accordingly, by the impugned notice dated 19.10.2020, the petitioner was given 3 days time to make deposit of the entire amount or to face forfeiture of the security amount.

5. Through this petition, the petitioner has sought quashing of the forfeiture notice dated 19.10.2020 as well as condition no.2 of the advertisement and has also prayed that the sub-rule (8) of Rule 57 of the Rules, 2016, which provides that the provisions of Sections 189 and 190 of the Code, 2006 shall apply to every auction under that rule, be declared ultra vires Articles 14, 19, 21 and 38 of the Constitution of India as also sub rules (5) and (11) of Rule 57 of the Rules, 2016 and the intention of the legislature reflected from Section 175 of the Code, 2006.

6. Before we proceed to notice and assess the merit of the submissions, it would be apposite to notice the relevant provisions of the Code, 2006 and the Rules, 2016 governing settlement of lease of tanks/ ponds etc. Section 54 of the Code, 2006 declares, inter alia, that all lakes, ponds and tanks, in absence of establishment of right of any person in or over the same, be the property of the State Government. Section 59 of the Code, 2006 empowers the State Government to entrust, inter alia, tanks, ponds etc to a Gram Panchayat for the purposes of superintendence, preservation, management

and control in accordance with the provisions of the Code, 2006. Section 61 of the Code, 2006 provides for management of village tanks. It provides that where a tank in a village is entrusted or deemed to be entrusted in 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 acre, the Bhumi Prabandhak Samiti shall, with the previous approval of the Sub-Divisional Officer, let it out in the manner prescribed. In the Explanation thereof it is provided that for the purpose of the section, the term "tank', includes talab, pond, pokhar and other land covered with water. Section 233 of the Code, 2006 empowers the State Government to make rules for carrying out the purposes of the Code, 2006. Sub-section (2) of section 233 provides that "without generality of the foregoing power, such rules may also provide for-- (i) to (viii).....; (ix) the protection, preservation and disposal of properties belonging to or vested in the State Government, Gram Panchayat or other local authority, including determination of compensation for damages misappropriation or wrongful occupation thereof; (xi) to (xiv).....; (xv) the procedure for granting lease by the Collector, cancellation of such lease and eviction of unauthorised occupants from the land belonging to the State Government, Gram Panchayat and local authority; (xvi) to (xix)....; (xx) the regulation of fishing in rivers, lakes, ponds and tanks entrusted to a Gram Panchayat or other local authority; (xxi).....; (xxii) any other matter for which rules are required to be or may be made under the Code, 2006."

7. Pursuant to the power conferred by section 233 of the Code, 2006, the State Government notified Rules, 2016. Rules 57 and 58 thereof deal with lease of tanks. Rule 57 deals with lease of smaller tanks, that is where the size of the tank exceeds 0.5 acre but does not exceed 5 acres whereas Rule 58 deals with lease of bigger tanks where the area exceeds 5 acres.

8. As the present case concerns a smaller tank below 5 acres in area, the lease of such tank is to be accorded in accordance with the provisions of Rule 57 of the Rules, 2016. Sub Rule (1) of Rule 57 provides that where the area of a tank exceeds 0.5 acre but does not exceed 5 acres, the Samiti shall let out the same for fishing purposes or for *Singhara* with the prior approval of the Sub-Divisional Officer in accordance with the procedure prescribed. Sub Rule (2) provides for organisation of a camp at the tehsil level, about which wide publicity is to be made. Sub Rule (4) provides for preparation of a list of eligible persons in accordance with the order of preference specified in sub-rule (5). Sub Rule (5) provides that 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 SC, ST 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. Sub Rule (6) provides that 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. Sub-Rule (7) provides as follows: *"If the list of eligible persons prepared under sub-rule (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 list. If there is only one person eligible for the lease aforesaid, the lease shall be granted on the annual rent of the amount fixed by the Government from time-to-time which shall not be less than Rs.1000/- and shall not exceed Rs.2000/- per acre." Sub-Rule (8) provides as follows: "The provisions of Sections 189 and 190 of the Code shall apply to every auction under this rule."* Sub-Rules (9) to (11) is in respect of the formalities required for approval/ execution and registration of the lease. Sub Rule (12) provides that every such lease shall be executed for a period of ten years and the same shall not be renewed or extended. Sub Rules (13) to (15) are not being discussed because they are not relevant for the purposes of deciding this case.

Section 189 of the Code, 2006 provides as follows:

*"**Deposit by purchaser and re-sale on default.**-- (1) The person declared to be the purchaser shall be required to deposit immediately twenty-five per cent of the amount of his bid, and in default of such deposit, the property shall be forthwith re-sold, and such person shall be liable for the expenses incurred on the first sale and any deficiency in price occurring on re-sale, and the same may be recovered from him by the Collector as if the same were an arrear of land revenue.*

(2) A deposit under sub-section (1) may be made either in cash or by a demand draft (issued by a scheduled bank) or partly in cash and partly by such draft.

Explanation.-- For the purposes of this section, the expression "demand draft' includes a banker's cheque."

Section 190 of the Code, 2006 reads thus:

*"**Deposit of purchase money.**-- The balance amount of the purchase money shall be paid by the purchaser on or before the fifteenth day from the date of the sale in the office of the Collector or at the district treasury or sub-treasury, and in case of default--*

(a) the property shall be re-sold; and

(b) the deposit made under section 189 shall be forfeited to the State Government.

9. The contention of the learned counsel for the petitioner is that the lease of smaller tanks for the purposes of fishing rights as per sub-rules (4) and (5) of Rule 57 of the Rules, 2016 is reserved for the members of fishermen community and members of the SC/ ST or other backward classes or persons of General category living below poverty line, which is to enable marginal sections of the society to earn their livelihood and, therefore, the stringent condition imposed by Sections 189 and 190 of the Code, 2006 read with the Rules, 2016 is ultra vires Article 21 of the Constitution of India and is also arbitrary as it defeats the avowed object of Article 38 of the Constitution of India and as such is violative of Article 14 of the Constitution of India. Further, by placing an onerous condition of making full deposit of the lease rent of ten years, within 15 days of the acceptance of bid, an unreasonable condition is imposed on the fundamental right to carry on trade or business and as such it violates Article

19(1) (g) of the Constitution of India. In addition thereto, it has been argued that as per sub rule (7) of Rule 57 of the Rules, 2016 if there is just a solitary eligible person, annual rent is charged but, interestingly, in the case of settlement by auction the entire money for ten years lease is charged within fifteen days which defies logic and makes the provision completely arbitrary.

10. Per Contra, the learned standing counsel has submitted that the provisions of sections 189 and 190 of the Code, 2006 are backed by sound logic as they serve the public interest at large by ensuring exclusion of non serious bidders so as to make the bidding process meaningful and effective. They do not violate Article 14 of the Constitution as they do not discriminate between members of the same class. Rather they apply universally to a common class of bidders. The provisions are also not onerous because they apply to a situation when more than one eligible person come forward to stake a claim and therefore the bidding is inter se a class of persons to find out the winner. Moreover, a bidder is fully aware of the rigours of the bidding outcome and with open eyes he participates in the bidding process therefore, he cannot complain about the conditions being onerous. In the instant case, there were four persons who participated in the auction. They all participated with open eyes as to the conditions applicable on auction. Under the circumstances, if the petitioner had difficulty in arranging for the funds he should have abstained from bidding. But as he did participate with open eyes he cannot now complain of the conditions being onerous.

11. We have given thoughtful consideration to the rival submissions. Before we proceed to test the merit of the submissions, we would like to put on record that the petitioner has not at all demonstrated that before participating in the bidding process he had registered his protest to the impugned condition of the advertisement. It is only after he committed default that he has challenged the impugned condition of the advertisement.

12. It is well settled that vires of a legislation i.e. an Act can be questioned on limited grounds such as legislative incompetence of the legislature to legislate on the subject with which the Act deals or that the Act or its provisions violate the provisions of the Constitution or any of the fundamental rights guaranteed under Part III of the Constitution of India. The vires of a subordinate legislation such as Rules or Regulations in addition to the grounds above, can be questioned on the ground that they are in conflict with the provisions of the parent Act or are beyond the scope of rule making power conferred by the Act.

13. In this case, there is no challenge to the legislative competence of the State legislature or to the rule-making power of the State Government. Moreover, sections 189 and 190 of the Code, 2006 are general provisions applicable to auction sale. The conditions imposed therein on the bidders is based on sound everlasting logic which is to ensure that non serious bidders do not get into the fray and derail the bidding process. They, therefore, by no means can be termed arbitrary or discriminatory more so when they apply equally to the bidder class. Otherwise also, the thrust of the argument is not that sections 189 and 190

are ultra vires per se but that they should not be applied on settlement of fishery lease because such leases are reserved for marginal sections of the society and therefore applying onerous condition laid in Sections 189 and 190 of the Code, 2006, through Rule 57 (8) of the Rules, 2016, for settlement of fishery lease through auction, is arbitrary and as such violative of Articles 14 and 21 of the Constitution of India.

14. No doubt, at first blush, it may appear that the impugned condition of the advertisement is quite harsh, particularly, when we notice it from the point of view of those who are eligible to bid. But then it applies equally to all within the same class of persons and comes into play only when there are more claimants than one in that class. More over, it serves the object of generating a fair competition within that class to secure more revenue for the State. At this stage, we may notice the observations made by **Hon'ble B. K. Mukherjea, J.** while authoring his opinion separately, though concurring with the majority view, in the landmark seven judges Bench decision of the Apex Court in **State of West Bengal versus Anwar Ali Sarkar, AIR 1952 SC 75,** on the underlying principle enshrined in Article 14 of the Constitution. His Lordship observed: *"It can be taken to be well settled that the principle underlying the guarantee in Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is substantially the same."* When we test the impugned condition no.2 of the advertisement on the anvil of the legal principle noticed above, we find that the impugned condition applies only in a situation where settlement of the fishery lease is through an auction which is when there are more than one claimants in that class of claimants and it applies equally to all in that class. Therefore, when members of that particular class submit their bid with prior knowledge of what they would require to meet, their financial bids would logically be as per their financial capacity. Hence, the impugned condition cannot be termed arbitrary or discriminatory or in any way violative of Article 14 of the Constitution of India. In fact, the provisions of Rule 57 of the Rules, 2016 when read as a whole would reflect that they do a balancing act. On the one hand they provide a list of persons eligible to participate in the process of grant of fishery lease and thereby subserve the avowed object of Article 38 of the Constitution and, on the other, by making the provisions of Sections 189 and 190 of the Code, 2006 applicable, by virtue of sub-rule (8) of Rule 57 of the Rules, 2016, they seek to serve the larger public interest of securing higher revenue for the State. We are therefore of the considered view that neither Section 189 or Section 190 of the Code, 2006 nor Rule 57 (8) of Rules, 2016 is ultra vires Article 14 of the Constitution of India. For the same reasons, the condition no.2 of the advertisement, which seeks to apply sub-rule (8) of Rule 57 of the Rules, 2016, is not arbitrary or in any manner violative of Article 14 of the Constitution.

15. In so far as the submission that the provisions of Rule 57(8) of the Rules, 2016

are ultra vires Article 21 of the Constitution is concerned, that is completely misconceived because fishery lease is obtained not merely to earn a livelihood for survival but for profits, inasmuch as it has a commercial value. The commercial value of the fishery lease cannot be denied and the mere fact that there are more claimants than one for the lease in issue lends credence to its commercial potential. The bidding process commences only when there are more eligible claimants than one. As the bidders are all of the same class, and they bid keeping in mind the commercial interest that the proposed lease would serve, they are free to submit their bids as per their financial capacity. Hence, we are of the considered view that neither the impugned Rule nor the impugned Section(s) or the impugned condition of the advertisement violates Article 21 of the Constitution of India.

16. The challenge laid to the impugned provisions on the ground that they violate Article 19 (1) (g) of the Constitution is equally misconceived as they do not place unreasonable restriction on the right to carry on any business, trade or occupation. They only put a procedure in place for acquiring a business interest from the State which by no means can be termed arbitrary or unreasonable.

17. A feeble attempt was made by the learned counsel for the petitioner to demonstrate that the onerous condition defeats the very purpose enshrined in sub-rule (5) of Rule 57 of the Rules, 2006 but as we have noticed that the impugned condition applies only when there is settlement by auction when there are more claimants than one in the same class, it cannot be said that the impugned condition defeats the object set out by sub-rule (5) of Rule 57 of the Rules, 2016.

18. For all the reasons stated above and by keeping in mind that the petitioner participated in the bidding process without a demur, we are of the considered view that the petitioner has not made out a case for interference. The petition lacks merit and is hereby **dismissed.**

(2021)07ILR A767
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2021

BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ C No. 41929 of 2018

Ram Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash Shukla

Counsel for the Respondents:
C.S.C., Sri Saurabh Kumar

A. Civil Law – Permission for transfer of land - Indian Forest Act, 1927 - Section 4 - U.P. Revenue Code 2006 - Section 98 - Forest Conservation Act, 1980 - Section 2 - The State cannot deprive the petitioner of his rights over the land in dispute merely because it has chosen not to implement the directions issued by this Court 24 years ago. This Court finds itself unable to either sustain or countenance the impugned decision which is merely the result of the State

having failed to constitute the Committee even though more than two decades have passed. It can only be described as an unjustified and incomprehensible state of slumber and inertia on the part of the State. It cannot be permitted to deprive the privilege accorded to the petitioner by S. 98 of the Code solely on the ground that the High-Powered Committee has not taken a decision and that too when the State has itself chosen not to constitute that Committee for the past twenty-four years. (Para 17)

B. There was no explicit restraint on transfer entered at all. The only two restraints that were placed was in respect of cutting of trees and damage to "forest land". The Court fails to appreciate how the aforesaid injunction could eclipse the rights conferred on the petitioner by S. 98 of the Code. (Para 18, 19)

The Court has deliberately placed emphasis on the phrase "forest land" as used by the learned Judge while deciding *Jai Ram* (infra). **The landholding of the petitioner did not remain forest land once it came to be excluded from the proposed reserved forest by virtue of the order passed by the FSO.** The FSO while passing that order has clearly noted that the land was agricultural and was being tilled by the petitioner and the respondents. The order of the FSO to that extent became final in the later course of litigation. (Para 20)

C. In any case, review was clearly not maintainable since as, Village Patwadh was not covered by the order of 10 May 1991 or 4 October 1993 passed in *Banwasi* (infra). The 1927 Act did not confer any independent power on the authorities to undertake a substantive review. The review could have thus been entertained solely if it could have been sustained by the directions of the Supreme Court. (Para 8, 21)

The "special review" which was permitted by the Supreme Court by its order of 10 May 1991 was itself restricted to the 17 villages which were mentioned in that order and Village Patwadh was not part of the villages identified. (Para 7)

D. In petitioner's case adjudicatory process had already come to an end. Once the adjudication in accordance with the procedure formulated in *Banwasi* came to a conclusion and attained finality, nothing further essentially remained to be considered or decided by the High-Powered Committee. (Para 22, 24)

Writ petition allowed. (E-3)

Precedent followed:

1. Banwasi Sewa Ashram Vs St of U.P. & ors., (1986) 4 SCC 453 (Para 4)

2. St. of U.P. Vs. A.D.J., Anpara & ors., 2019 (10) ADJ 771 (Para 5)

3. Ram Prasad Vs. A.D.J., Anpara, Sonbhadra, Writ Petition No. 26422 of 1994 (Para 11)

4. Jai Ram & anr. Vs. St. of U.P., Writ Petition No. 25505 of 1994 (Para 11)

Present petition assails order dated 06.10.2018, passed by Additional District Magistrate, Sonebhadra, refusing permission to the petitioner to sell a part of his land holding.

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

1. Heard learned counsel for the petitioner, Sri Saurabh Kumar who appears for respondent Nos. 5 to 11 and Sri Birendra Pratap Singh learned Standing Counsel for the State respondents.

2. The petitioner claims to be the bhumidhar over plot No. 961/1. The aforesaid plot is situated in Village Patwadh Tehsil Robertsganj District Sonbhadra and forms part of a belt of land falling south of the Kaimur Range. According to the petitioner the plot admeasures 10 Bighas 9 biswa. The petition challenges an order dated 06 October 2018 passed by the third respondent refusing permission to the petitioner to sell a part of his land holding.

That permission was sought by the petitioner who belongs to the Scheduled Castes in light of the provisions made in Section 98 of the **U.P. Revenue Code 20061**. Section 98 of the Code reads thus:

"98. Restrictions on transfer by bhumidhars belonging to a scheduled caste- [(1) Without prejudice to the provisions of this Chapter, no bhumidhar belonging to a scheduled caste shall have the right to transfer, by way of sale, gift, mortgage or lease any land to a person not belonging to a scheduled caste, except with the previous permission of the Collector in writing :

Provided that the permission by the Collector may be granted only when-

(a) the bhumidhar belonging to a scheduled caste has no surviving heir specified in clause (a) of sub-section (2) of Section 108 or clause (a) of Section 110, as the case may be; or

(b) the bhumidhar belonging to a scheduled caste has settled or is ordinarily residing in the district other than that in which the land proposed to be transferred is situate or in any other State for the purpose of any service or any trade, occupation, profession or business; or

(c) the Collector is, for the reasons prescribed, satisfied that it is necessary to grant the permission for transfer of land.

(2) For the purposes of granting permission under this section, the Collector may make such inquiry as may be prescribed.]"

3. Before proceeding further, however, it would be apposite to step back and sketch the backdrop in which the controversy would have to be decided.

4. It would be relevant to recollect that this vast tract of land falling south of the Kaimur Range in District Sonbhadra formed subject matter of proceedings before the Supreme Court in **Banwasi Sewa Ashram v. State of U.P. And Others2.** This celebrated judgment took up the grievance of numerous traditional forest dwellers, members of the SC/ST communities who had been in possession of the said land for decades and were being evicted or deprived of their right to cultivate their land consequent to the inclusion of this vast area in various notifications issued under section 4 of the **Indian Forest Act, 19273**. In order to safeguard their rights and to ensure that a fair and transparent process of settlement was undertaken, the Supreme Court proceeded to formulate a special procedure for the trial and disposal of claims. Departing from the statutory mechanism inbuilt and laid in place by the 1927 Act, it provided that all claims of landholders and persons found in possession would firstly be decided by the Forest Settlement Officers4. Their decisions were thereafter to be placed before designated courts of Additional District Judges by way of suo moto appeals. The Additional District Judges were to examine and scrutinize the decisions of the FSO and after hearing the landholders or persons found to be in possession dispose of those appeals. The decisions rendered by the Additional District Judges were in terms of the directions issued by the Supreme Court liable to be treated as final and to be recognised as orders contemplated under the 1927 Act.

5. The salient orders which were passed by the Supreme Court in the aforesaid matter were noticed in great detail by this Court in **State of U.P. Vs. ADJ Anpara and others5.** The extracts of that decision are reproduced hereinbelow:-

"4. The case before the Supreme Court proceeded further and ultimately after taking into consideration the reports of the Commissioners submitted to it and the peculiar facts of the case as appearing before it, it framed detailed directions for the consideration and disposal of claims that were to be raised. Those directions as embodied in its detailed decision of 20 November 1986 rendered on that petition read thus:

"(1) So far as the lands which have already been declared as reserved forest under Section 20 of the Act, the same would not form part of the writ petition and any direction made by this Court earlier, now or in future in this case would not relate to the same. In regard to the lands declared as reserved forest, it is, however, open to the claimants to establish their rights, if any, in any other appropriate proceeding. We express no opinion about the maintainability of such claim.

(2) In regard to the lands notified under section 4 of the Act, even where no claim has been filed within the time specified in the notification as required under section 6(c)of the Act, such claims shall be allowed to be filed and dealt with in the manner detailed below:

I. Within six weeks from December 1, 1986, demarcating pillars shall be raised by the Forest Officers of the State Government identifying the lands covered by the notification under Section 4 of the Act. The fact that a notification has been made under Section 4 of the Act and demarcating pillars have been raised in the locality to clearly identify the property subjected to the notification shall be widely publicised by beat of drums in all the villages and surrounding areas concerned. Copies of notices printed in Hindi in abundant number will be circulated through the Gram Sabhas giving reasonable specifications of the lands which are covered by the notification. Sufficient number of inquiry booths would be set up within the notified area so as to enable the people of the area likely to be affected by the notification to get the information as to whether their lands are affected by the notification, so as to enable them to decide whether any claim need be filed. The Gram Sabhas shall give wide publicity to the matter at their level. Demarcation, as indicated above, shall be completed by January 15,1987. Within three months therefrom, claims as contemplated under section 6(c) shall be received as provided by the statute.

II. Adequate number of record officers shall be appointed by December 31, 1986. There shall also be five experienced Additional District Judges, one each to be located at Dudhi, Muirpur, Kirbil of Dudhi Tehsil and Robertsganj and Tilbudwa of Robersganj Tehsil. Each of these Additional District Judges who will be spared by the High Court of Allahabad, would have his establishment at one of the places indicated and the State shall provide the requisite number of assistants and other employees for their efficient functioning. The learned Chief Justice of the Allahabad High Court is requested to make the services of five experienced Additional District Judges available for the purpose by December 15, 1986 so that these officers may be posted at their respective stations by January 1, 1987. Each of those Additional District Judges would be entitled to 30 per cent of the salary as

allowance during the period of their work. Each Additional District Judge would work at such of the five notified places that would be fixed up by the District Judge of Mirzapur before December 20, 1986. These Additional District Judges would exercise the powers of the Appellate Authority as provided under section 17 of the Act.

III. After the Forest Settlement Officer has done the needful under the provisions of the Act, the findings with the requisite papers shall be placed before the Additional District Judge of the area even though no appeal is filed and the same shall be scrutinized as if an appeal has been taken against the order of the authority and the order of the Additional District Judge passed therein shall be taken to be the order contemplated under the Act.

3. When the Appellate Authority finds that the claim is admissible, the State Government shall (and it is agreed before us) honour the said decision and proceed to implement the same. Status quo in regard to possession in respect of lands covered by the notification under Section 4 shall continue as at present until the determination by the appellate authority and no notification under Section 20 of the Act shall be made in regard to these lands until such appellate decision has been made."

5. It becomes pertinent to note that the Supreme Court at the very outset clarified that the directions as framed would have no application to land which had already come to be included in a final notification issued under Section 20 of the 1927 Act. The directions consequently stood confined to land notified under Section 4 and in respect of which settlement proceedings had not concluded. The detailed directions framed inter alia provided for survey and settlement operations being undertaken by the FSO's in accordance with the statutory obligations placed under the 1927 Act, the appointment of adequate number of survey officials, the publication of notices in the area of the proposal of the Government to create a reserved forest and the establishment of special courts manned by Additional District Judges to facilitate the process of adjudication of claims. The Supreme Court, in a significant departure from the adjudicatory procedure otherwise provided for under the 1927 Act, provided that all orders that may come to be passed or made by the FSO's would be mandatorily placed for the consideration and scrutiny of the Additional District Judges concerned and treated as suo moto appeals. It was further provided that the decision taken by the Additional District Judges on these suo moto appeals shall be taken to be the final orders as contemplated under the 1927 Act. The special procedure was evolved principally to protect the interests of the large number of tribals and traditional forest dwellers who otherwise were handicapped in seeking legal redress for protection of their rights by virtue of their social status.

6. It would also be relevant to advert to another order passed on 8 February 1989 in **Banwasi** Sewa Ashram, where the Supreme Court held that land which had been included in a notification issued under Section 4 of the 1927 Act, would also be subject to the rigours of Section 2 of the **Forest Conservation Act, 1980** which had in the meantime been promulgated. The Court takes note of this order since it would be of some significance while evaluating the correctness of the submissions which were advanced. "

6. During the course of trial of claims in accordance with the procedure evolved by the Supreme Court, various complaints

came to be made with regard to the manner in which they had been tried and disposed of. These complaints appear to have been made both by landholders as well as the Forest Department. It would be pertinent to note that the 1927 Act conferred no power of substantive review on authorities constituted thereunder. However taking notice of those complaints, the Supreme Court formulated a methodology of a "special review" in respect of certain category of cases. This Court in **State of U.P.** noted the position as it emerged from the directions of the Supreme Court in this regard in the following terms:-

"8. In the meanwhile, the Supreme Court while in seisin of proceedings in **Banwasi** Sewa Ashram took note of various complaints that were made with respect to the manner in which settlement proceedings had moved forward. It took note of the complaints made both by landholders as well as the Forest Department of apparent and patent errors having been committed by the FSO's in the disposal of claims. Bearing those complaints in mind, on 10 May 1991 it passed the following order:

"... It appears that there have been taken some instances where decisions have been taken but they required to be reviewed. Both the parties, counsel for the parties agrees, that review can be filed within 30 days from today and if so filed the plea of limitation shall not avail...."

9. The complaints with respect to settlement proceedings were yet again noticed by it in its order dated 16 February 1993, when it proceeded to frame the following additional directions:

"4. The reports of the Commissioners (January 1, 1993) and of Justice Loomba reveal that there have been some errors whereby rights of non-occupants have been recorded without on-the-spot inspection, hearings and to the prejudice of the actual occupants on the spot. The Commissioners and Justice Loomba have identified 17 forest villages in this respect which are as under:

1. Chattarpur
2. Goetha
3. Jaampani
4. Dhuma
5. Sukhra
6. Supachuan
7. Naudiha
8. Madhuvan
9. Karhiya (Dudhi)
10. Nagwa
11. Gulaljharia
12. Kudri
13. Ghaghri
14. Kirbil
15. Sagobaandh
16. Jarha
17. Bailhathhi

Agreeing with the Reports of the Commissioners, Justice Loomba and the contentions of Mr. Rajiv Dhawan, learned counsel for the petitioner, we direct that special review be undertaken in the above 17 villages only in respect of those cases where there are complaints from the individuals and the errors are patent on the record. The Forest Department shall also be at liberty to ask for special review in the cases pertaining to the above villages where according to the Department records have not been correctly prepared."

10. On 4 October 1993, the Supreme Court was apprised by the Department of Forest that various orders passed by the Forest Settlement Officer and the Additional District Judges merited review and reconsideration. Dealing with that prayer it entered the following observations in its order of 4 October 1993:

".....He seeks directions from this court for the review of those cases. The

forest department may bring those cases to the notice of the Additional District Judge, who shall consider those cases in accordance with law....."

11. These three orders are also of significant import since the 1927 Act otherwise did not confer any right of a substantive review on the adjudicatory authorities constituted under that enactment. The State in purported exercise of the liberty granted by these orders preferred a petition for review before the Additional District Judge. That review petition has been dismissed on 24 May 1994. It is in the above backdrop that the instant writ petition came to be preferred challenging the orders passed by the Additional District Judge originally as well as on the review petition preferred thereafter. "

7. It becomes pertinent to note that the "special review" which was permitted by the Supreme Court by its order of 10 May 1991 was itself restricted to the 17 villages which were mentioned in that order. It must be stated that Village Patwadh, to which the present writ petition relates, was not part of the villages identified in that order.

8. The order of 4 October 1993 which was subsequently passed in **Banwasi** noted the contentions of the Forest Department alone and provided that in case it chose to prefer further petitions for review, such applications would be considered in accordance with law. Significantly and in contrast to its order of 10 May 1991, the Supreme Court desisted from passing directions for review petitions being filed or entertained.

9. Having set forth the backdrop in which the issues which arise in this writ petition would be liable to be considered, the Court reverts to the facts of the present case.

10. The FSO disposed of the claim of the petitioner by an order appended at Annexure-1 to the writ petition. The FSO while passing the aforesaid order essentially excluded the land holding of the petitioner from the proposed reserved forest. However, while doing so he also proceeded to enter upon a dispute inter se the petitioner and respondent Nos. 5 to 11 insofar as the extent of their individual rights over the plot in question was concerned. The FSO in his order proceeded to record that the private respondents were found to be in possession of 10 Bigha 9 Biswa whereas the petitioner was in possession of 3 Bigha 15 Biswa. In the *suo motu* appeal which was taken against that decision, the Additional District Judge by his judgment of 16 January 1992 upheld the decision of the FSO to the extent that it excluded the land of the petitioner from the proposed reserved forest. However insofar as the extent of inter se land holding was concerned, the Additional District Judge returned a finding that the private respondents would have rights over 10 Bigha 10 Biswa of the plot whereas the petitioner would have rights over 3 Bigha and 15 Biswa of land. Pursuant to the aforesaid order of the Additional District Judge, the Assistant Records Officer made consequential changes and entries in the relevant revenue record by his order of 23 September 1992.

11. The private respondents thereafter appear to have filed a review application against the order passed by the Additional District Judge. That review came to be

allowed by a cryptic order passed by the Additional District Judge on 08 May 1994. The petitioner assailed the aforesaid order by way of a writ petition being **Ram Prasad Vs. Additional District Judge Anpara, Sonbhadra6**. In the meanwhile, another petition came to be preferred titled **Jai Ram and another Vs. State of U.P.7**. That petition alongwith various connected matters fell for decision before a learned Judge of the Court who after noticing the rival submissions disposed of the batch of writ petitions in the following terms

"In view of the joint submissions made by the learned Standing Counsel and learned counsel for the petitioners and on perusal of the writ petition and annexures, and in view of the decision of the Hon'ble Apex Court in similar types as reported in A.I.R. 1987 S.C. Page 374, this writ petition is finally disposed of with the directions that the State Government may constitute a High Power Committee consisting of a retired High Court Judge and two senior Government officers, wither in active service or retired, within a span of four months from today and if such a committee is constituted the petitioners may be allowed to be represented by lawyers having atleast seven years practice at the expenses of State Government's fund meant for legal aid if such a Committee is constituted and the matter be allocated before that Committee by proper notifications etc. However, petitioners are hereby restrained to cut any tree standing on the disputed lands but the petitioners will have the right to cultivate the land without causing any damage to the Forest land till the decisions given by the said High Power Committee. The impugned order is, thus, stands quashed and that the dispute is to be decided by the High Power Committee which may be constituted by the State Government within the specified time as directed above."

12. Following **Jai Ram**, the writ petition preferred by the petitioner here came to be disposed on 20 October 1997 in the following terms: -

"The writ petition is disposed of in the light of judgment rendered by Hon'ble Mr. Justice R.N. Ray in the case of **Jai Ram** Vs. State of U.P. in writ petition No. 25505 of 1994."

13. To complete the narration of facts it may be noted that although the High Powered Committee in terms of the directions issued in **Jai Ram** was to be constituted within 4 months from the date when that decision was rendered, undisputedly, the State has not complied with that direction till date even though more than two decades have passed.

14. As things stood thus, the petitioner moved an application on 23 December 2017 seeking grant of permission to sell a part of the land holding which stood recorded in his name pursuant to the original judgment of the Additional District Judge rendered on 16 January 1992. The application for permission has been refused simply on the ground that since the High-Powered Committee which was directed to be constituted in terms of the directions issued by this Court has yet to take a decision, the petitioner cannot be permitted to sell any part of his land holding.

15. Having noted the long and torturous journey that this litigation has traversed, the Court now proceeds to consider the validity of the stand taken by

the respondents as it stands reflected from the impugned order.

16. At the very outset the Court is constrained to observe that the stand struck by the State is not only patently arbitrary but also wholly iniquitous for the following reasons.

17. Firstly, the State cannot deprive the petitioner of his rights over the land in dispute merely because it has chosen not to implement the directions issued by this Court 24 years ago. This Court finds itself unable to either sustain or countenance the impugned decision which is merely the result of the State having failed to constitute the Committee even though more than two decades have passed. No plausible or valid explanation was proffered by the learned Standing Counsel for what can only be described as an unjustified and incomprehensible state of slumber and inertia on the part of the State. It cannot be permitted to deprive the privilege accorded to the petitioner by Section 98 of the Code solely on the ground that the High-Powered Committee has not taken a decision and that too when the State has itself chosen not to constitute that Committee for the past twenty-four years. The second respondent has exhibited a complete lack of compassion, empathy and sensitivity when he chooses to not even admit that the High-Powered Committee has yet to be constituted by the State. He then proceeds to non-suit the petitioner with the ludicrous and wholly irrational observation that he has failed to lead any evidence to establish whether he had submitted any claim before the nonexistent Committee.

18. Secondly, the final directions issued in **Jai Ram** restrained the landholders specifically only from felling standing trees. The injunction which was incorporated reads thus: - *"However petitioners are hereby restrained to cut any trees standing on the disputed lands* but the petitioners will have the right to cultivate the land without *causing any damage to the forest land* till the decisions given by the High Powered Committee."

19. As is evident, there was no explicit restraint on transfer entered at all. The only two restraints that were placed was in respect of cutting of trees and damage to *"forest land"*. The Court fails to appreciate how the aforesaid injunction could eclipse the rights conferred on the petitioner by Section 98 of the Code.

20. Thirdly, the Court has deliberately placed emphasis on the phrase *"forest land"* as used by the learned Judge while deciding **Jai Ram**. As noted hereinabove, the landholding of the petitioner did not remain forest land once it came to be excluded from the proposed reserved forest by virtue of the order passed by the FSO. The FSO while passing that order has clearly noted that the land was agricultural and was being tilled by the petitioner and the respondents. It had thus ceased to answer to the description of *"forest land"* even if one were to test it on the anvil of Section 2 of the **Forest Conservation Act, 1980**. The order of the FSO to that extent was upheld by the Additional District Judge in his judgment rendered on 16 January 1992. The order of 8 May 1994 reversing the aforesaid decision came to be set aside when the earlier writ petition preferred by the present petitioner came to be disposed of on 20 October 1997.

21. While the order on the review petition already stands set aside, it may be

additionally noted that it, in any case, was clearly not maintainable since as noted in the earlier parts of this decision, Village Patwadh was not covered by the order of 10 May 1991 or 4 October 1993 passed in **Banwasi**. The 1927 did not confer any independent power on the authorities to undertake a substantive review. The review could have thus been entertained solely if it could have been sustained by the directions of the Supreme Court.

22. Fourthly, it must be stated that **Jai Ram** proceeded on the basis that an adjudicatory process in respect of rights and claims was yet to be completed. It was perhaps in that context that the learned Judge directed the constitution of a High-Powered Committee. However, as was noticed in the introductory parts of this judgment, the principal order passed in **Banwasi** conferred finality on orders passed by the Additional District Judges in suo moto appeals. Once those appeals came to be decided, the curtains clearly came down and a closure rendered subject to the limited window of review which flowed from the orders of 10 May 1991 and 4 October 1993. **Jai Ram** and the directions there for matters being referred to a High-Powered Committee, thus, can only be recognised as governing those cases and claims which had yet to be decided and disposed of in accordance with the special procedure evolved by the Supreme Court in **Banwasi**. In the petitioner's case that adjudicatory process had already come to an end. Once the aforesaid adjudication in accordance with the procedure formulated in **Banwasi** came to a conclusion and attained finality, nothing further essentially remained to be considered or decided by the High-Powered Committee.

23. That then leaves the Court to notice and consider the dispute inter se the petitioner and the private respondents which was raised in respect of the land in question. According to the private respondents, the petitioner while applying for permission to alienate, seeks to transfer land in excess of his share. It may at the outset be clarified that while considering the present writ petition, this Court is essentially called upon to rule on the validity of the impugned order passed by the third respondent. It is really not concerned nor is it called upon to enter any definitive or conclusive findings with regard to the extent of land holding of the petitioner and the private respondents. This more so since that dispute stands settled by virtue of the decisions rendered by the FSO and the Additional District Judge. The order passed on review already stands set aside in light of the order passed on the earlier writ petition preferred by the present petitioner following the decision in **Jai Ram**. The adjudication undertaken in accordance with the procedure formulated by the Supreme Court in **Banwasi** has thus lent a quietus and finality to the aforesaid dispute. All that is left to be ascertained is whether the claim of the petitioner is in accord with the findings returned in those proceedings. Those decisions bind both the petitioner as well as the private respondents.

24. In view of the aforesaid discussion, this Court is of the firm opinion that it was not open for the third respondent to defer consideration of the grant of permission merely because the State had itself failed to implement the judgment of this Court in **Jai Ram**. In any case, the rights of the petitioner and the private respondents already stood settled in light of the orders passed by the FSO and the Additional District Judge. The principal order in **Banwasi** of 20 November 1986

mandated finality being accorded to the adjudication which was undertaken in accordance with the procedure enunciated by the Supreme Court. There was thus in such cases no further requirement of the matter being considered by a High-Powered Committee. As found by this Court, the directions in **Jai Ram** can only be recognised as applying to those matters where an adjudication in accordance with the directions issued in **Banwasi** were yet to be finalized or had remained pending. No direction or order of the Supreme Court in **Banwasi** required or mandated a further scrutiny or review of a completed adjudication process.

25. For all the aforesaid reasons, the writ petition is **allowed**. The impugned order dated 06 October 2018 is hereby quashed. The matter shall stand remitted to the third respondent who shall consider and decide the application of the petitioner afresh and in accordance with the observations made hereinabove. The third respondent upon remit shall ensure that the process of consideration is concluded and final orders passed within 1 month of the presentation of a duly authenticated copy of this order. The Court leaves it open to the third respondent to grant an opportunity of hearing to the private respondents also. However, the rights of parties inter se shall be liable to be considered and decided in accordance with the observations made in this judgment.

(2021)07ILR A777

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 16.07.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 316 of 2020

Chitra @ Bebi ...Applicant

Versus

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

Counsel for the Applicant:

Sri Atul Kumar, Sri Deepak Dubey, Sri M.J. Akhtar, Ms. Udita Upadhyay, Sri Imran Khan, Sri V.M. Zaidi (Senior Adv.)

Counsel for the Opposite Parties:

A.G.A., Sri Amit Daga

Code of Criminal Procedure, 1973 - Section 482 - An absurd and incredible prosecution, that is virtually persecution of an innocent person, ought to be undone by the High Court in whatever proceedings, a patent abuse of process of comes to its notice. Here, as said above, this Court has no manner of doubt that the impugned prosecution giving rise to these proceedings against the applicant, is a patent abuse of process of court, founded on incredible allegations.

It is settled law the inherent powers conferred upon the High Court ought to be exercised in order to secure the ends of justice, wherever it is found that the criminal proceedings are manifestly attended with malafides, are incredible and amount to an abuse of the process of the Court. (Para 15, 16, 17)

Criminal application accordingly allowed. (E-2)

Judgements/ Case law relied upon:-

1. Sanjay Kumar Rai Vs St. of U.P & anr., 2021 SCC OnlineSC 367.

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

The impugned proceedings arise from Case Crime No. 224 of 2019, under

Sections 395, 323, 307, 304, 506, 147, 149 of the Indian Penal Code, 18601, Police Station - Meerapur, District - Muzaffarnagar. This crime was registered in immediate succession to Case Crime No. 223 of 2019, under Sections 306, 506 IPC, lodged at the same police station by a brother of the informant, that is to say, Rahul Kumar Sharma. It is virtually a second chapter, if the prosecution case is accepted as one worth trial, to Case Crime No. 223 of 2019.

2. The proceedings arising out of Case Crime No. 223 of 2019 were challenged before this Court, through an application under Section 482 of the Code of Criminal Procedure, 19732, being Application under Section 482 No. - 737 of 2020, decided by a judgment and order of date.

3. The facts giving rise to the last mentioned crime have been detailed in my judgment and order of date rendered in Application under Section 482 No. 737 of 2020. For felicity of reference, the facts relating to Case Crime No. 223 of 2019, as detailed in Application under Section 482 of the Code last mentioned, may be extracted :

This prosecution commenced on a First Information Report3 lodged by the deceased's brother, Rahul Kumar Sharma, on 28.07.2019, about the suicidal death of his brother on 25th of July, 2019. The FIR nominates the deceased's in laws, numbering seven, including his wife Smt. Menka alias Monty, his mother-in-law Smt. Kusum Lata, his three sisters-in-law, to wit, Indu Sharma, Chhaya Sharma and Romika Sharma, besides his brother-in-law Rajat Sharma. Another person nominated is one Rajendra Chaudhary, said to be an uncle of sorts to the deceased's in-laws. The applicant is not named in the FIR. The substance of the information, read to the police, says that the named in-laws of the deceased were frequently troubling him and he was in distress. Rajendra Chaudhary had repeatedly threatened the deceased to death and demanded money of him. The deceased had shared the last mentioned fact with the informant, but his in-laws would not give up on their wayward conduct and Rajendra Chaudhary and the other in-laws would repeatedly demand money of the deceased. It is reported that distressed over this issue, on 25.07.2019, at 12 O' Clock, the deceased jumped off the bridge built over the Ganga Garage and into the river, committing suicide. It is also said that he had left home, riding the informant's motorcycle, which was found, and a suicide note in the deceased handwriting was found at the informant's Dharm Kanta, wherein he had claimed his wife and in-laws' harassment as the cause driving him to commit suicide. It is said in the closing lines of the FIR that the deceased did commit suicide because of the harassment that his wife and in-laws inflicted on him.

4. Close on heels of the FIR lodged by deceased Mohit Sharma's brother about a case of abetment to suicide against the former's in-laws, the other brother of the late Mohit Sharma, Sudhir Kumar Sharma, lodged an FIR, giving rise to this crime, also against Mohit's in-laws, numbering seven, and two unknown offenders. The applicant, like the other FIR relating to abetment to suicide, is not named as one of the accused. The FIR opens the prosecution narrative, linking it to the crime, when Mohit Sharma's family had gone to the Ganga Barrage to cremate his mortal remains. It says that on 29.07.2019, when the informant of the present case and other members of the deceased's family were away to the cremation

ground, at about half past twelve, apparently in the afternoon, the deceased's brother-in-law, Rajat Sharma, son of late Brij Bhushan Sharma, mother-in-law Kusum Lata, widow of late Brij Bhushan Sharma, sisters-in-law Indu Sharma, Romila Sharma and Chhaya Sharma, all daughters of late Brij Bhushan Sharma, and Romila's husband, Amit Sharma, son of Ishwar Swarup, besides Rajendra Singh Chaudhary, son of Hari Singh, together with two unknown men, arrived on board three cars (a Spark bearing Registration No. UP 12 W 1011, a Grand Sports bearing Registration No. UP 12 AK 4545 and an another car) at the informant's house. Menaka, the wife of the informant's deceased brother, was also accompanying the visitors. The incoming party assaulted the informant's sister Indu, his niece Swarna Sharma, together with other members of his family. Upon the informant's sister Indu protesting the assault, the accused are claimed to have strangulated her, with an intention to do her to death. It is further said that the assailants relieved the womenfolk of their ornaments (the description whereof is : 1-4 gold bracelets, 2-3 gold rings, 3-1 silver *rakhi*, 4-3 pairs of *bichchwa*, 5-1 gold *dolna*, 6-2 pairs of gold tops) besides other valuables, all of which they looted. It is further said that the raiding party took away Mohit Sharma's i-10 car, bearing Registration No. UP 12 AH 8305, the keys whereof were with Mohit's wife Menaka. It is also said that the accused kidnapped Abhiraj *alias* Manan Sharma, the late Mohit Sharma's three-year old son. Towards the tail end of the FIR, it is alleged that while making good their escape, the accused threatened the victims with death. There is almost a postscript mention of the fact that the accused while escaping, when attempted to be restrained by one Prabhat Sharma, son of Jai Bhagwan Sharma and Shailendra Sharma, son of Jagdish Lal Sharma, they threatened these two also with death, and drove away in their cars.

5. The Police investigated the matter and filed a charge-sheet dated 15.11.2019, on the basis whereof, the Magistrate has taken cognizance on 21.11.2019, giving rise to the impugned proceedings.

6. Heard Mr. V.M. Zaidi, learned Senior Counsel assisted by Mr. Imran Khan, learned Counsel for the appellant, Mr. Amit Daga, learned Counsel appearing on behalf of opposite party no. 2 and Mr. Deepak Mishra, learned A.G.A. appearing on behalf of the State.

7. It is urged by Mr. Zaidi, the learned Senior Advocate appearing for the applicant, that the impugned prosecution is a patent abuse of process of law, designed to achieve more than one extraneous purpose. It has been brought to overawe the deceased Mohit Sharma's wife Menaka and her family members, with an oppressive barrage of criminal prosecution, so that the deceased's wife gives up all that she is entitled to under the law, by virtue of being Mohit's widow. It is urged that the foremost purpose is to coerce Smt. Menaka to forgo all her rights that she inherits under the law by virtue of being Mohit's widow, and to coerce her into giving up custody of her minor son. It is emphasized by Mr. Zaidi that this prosecution to its best, is one based on incredible allegations. It is particularly pointed out by the learned Senior Counsel that so far as the applicant is concerned, her name does not find mention in the FIR. If it were an occurrence with a grain of truth to it, or the applicant indeed involved in the battery, attributed to the various in-laws of Mohit Sharma, there is no reason why the applicant's name would not figure in the FIR, where no one else has been spared. Learned Senior Counsel submits that it is not a case where the identity of the

offender may be in doubt. After all, the accused, including the applicant and the informant, are related by marriage, and very familiar with one another.

8. The omission of the applicant's name in the FIR without a whisper, according to the learned Senior Counsel, *ex-facie* excludes her culpability. It is emphasized by the learned Senior Counsel that the applicant's name has been introduced on the basis of design and afterthought *mala fide*, about a month after the case was registered. It is also emphasized that whatever has figured in the statement of witnesses, the applicant has not been credited with any specific role, except general allegations of being part of the unlawful assembly comprising the widow and the in-laws of the late Mohit Sharma. It is also argued that the Investigating Officer in the case has not at all been fair and forthright; rather he has done a biased and one-sided investigation, where the impugned charge-sheet would be a nullity. It is said by way of emphasis that the impugned proceedings are a patent abuse of process of Court, besides being *ex-facie mala fide*. There is no material collected worth trial; and whatever material is there, in the circumstances, discloses no more than an incredible story, which no reasonable person can be expected to believe.

9. A counter affidavit each has been put in put in on behalf of State as well as opposite party no. 2. The learned A.G.A. appearing for the State and Mr. Amit Daga, learned Counsel appearing for the complainant, have spoken in one voice to say that a triable case is disclosed against the applicant. They have referred to the fact that there are three independent witnesses, who have supported the prosecution in their statements under Section 161 of the Code, besides the recovery of two gold bracelets from the possession of co-accused Rajat Sharma and Rajendra Chaudhary, who are said to have been apprehended while travelling in their car, bearing Registration No. UP 12 AK 4545. It is also urged that two amongst the victims of the assault, that is to say, Indu Sharma and Swarna Sharma have sustained injuries, that are evident from the medico-legal reports that are part of the police papers. In the submission of learned Counsel appearing for opposite parties, therefore, it is a case where it cannot be urged that there is no material to proceed against the accused, or one where the investigation is so palpably unfair that a trial ought not be permitted.

10. This Court has considered the rival submissions and perused the material on record. If one were to look into the sequence of events, the prosecution against the applicant appears to be indeed both *mala fide* and incredible. The FIR giving rise to the impugned proceedings has been lodged close on heels of the earlier FIR, reporting a case of abetment to suicide against the applicant and the other co-accused, where the informant's other brother had reported them to the Police. It was a case where the man who took his life was the applicant's brother-in-law - her sister's husband, in consequence of what is made out to be a prolonged, oppressive and torturesome treatment by the deceased's wife and in-laws, including the applicant. Here, the informant alleges that on the deceased's family returning home from the cremation ground, the applicant, along with the deceased's wife, her sisters, brothers and mother came over to the deceased's home, assaulted the entire family and robbed them.

11. The incident appears to be relatable to a time when the bereaved family would expect

visitors come over to offer their condolences. Assuming that the background of the deceased Mohit Sharma's demise may not have led his in-laws to visit the family and condole the mutual loss, but to believe a bereaved family being raided by the deceased's wife, mother-in-law, sisters-in-law and brothers-in-law, only to be beaten up and looted by them, appears to be fantastic and incredible. The manner of commission of the crime smacks of a patently *mala fide* by implication by the informant. The informant and his family appear to be badly aggrieved on account of the suicidal death of their brother, alleging an abetement led by his wife and in-laws. They did report the wife and the Police for that abetment and in connection with that crime, the applicant too is facing trial.

12. The present prosecution, however, appears to be one that is fuelled by vengeance. The deceased's family have taken resort to abuse of process of court, to settle scores. The tangible evidence referred to by the complainant-opposite party and the State is about recovery of two bracelets, said to be robbed in the assault from one or the other women of the deceased's family. These are said to have been recovered from co-accused Rajendra Chaudhary, and not from the applicant. At the time of this recovery, those two co-accused were riding their car and not the car claimed to be looted from the deceased family. Quite apart, movables like jewellery and a car, that are said to have been looted, are invariably property held jointly by the husband and wife, that is kept parked at the husband's place, or the parties' matrimonial home. Jewellery is invariably part of the wife's *stree dhan*. There could be a situation where the wife took away her jewellery back to her parents' place after her estranged husband's death, or likewise, took along the car that the couple were using, but the passage of this property from the deceased's family to his wife, even if it be true for a fact, would not remotely be referable to robbery.

13. This Court cannot ignore the fact that the present crime is one of assault and robbery, where the offending party were all in-laws of the informant's deceased brother. It is hard to believe, considering the relationship between parties, that the applicant would not be named in a crime of this nature, in the FIR. It would be impossible to miss naming her in the FIR, even if there were an iota of truth to the prosecution. The introduction of the applicant's name at a later stage through statements under Section 161 of the Code, in the clear opinion of this Court, is a red-marker that predicates a *mala fide* implication for the applicant. The injuries that have been sustained by two of the family members of the deceased have already been found to be simple in nature. No doubt, one or the other injury sustained by Indu Sharma and Swarna Sharma are sited around the neck, but both the injuries are simple in nature, where, for various reasons already indicated, it is difficult to connect these to acts of the applicant.

14. So far as the charge under Section 364 IPC is concerned, that part of the prosecution is based on the allegation about the minor son of deceased Mohit and the applicant's sister, Menaka being kidnapped by the deceased's in-laws, including the minor's mother. It would, indeed, appear to be very incredible that the applicant, the other co-accused along with the minor's mother would kidnap the latter's son from her deceased husband's family. The minor is said to be staying all along with the mother, that is to say, the applicant's sister. In any case, the applicant's involvement in the entire episode appears no more than a device to add to the sting of a *mala fide* prosecution. To this Court's understanding, there is indeed no tangible material, on an overall view of the matter, that may warrant the applicant to be tried.

15. The Supreme Court in **Sanjay Kumar Rai v. State of Uttar Pradesh & Another**4 has laid down guiding principles, recounting earlier authority about the legitimate use of power of discharge by the trial court, and the scope of the High Courts' power, while revising an order refusing discharge under Section 397 of the Code. Their Lordships, while discouraging compartmentalization of the High Courts' power under Section 397 and its power to scrutinize an order refusing discharge, if it is a case of patent abuse of process of law, held :

16. The correct position of law as laid down in *Madhu Limaye*(supra), thus, is that orders framing charges or refusing discharge are neither interlocutory nor final in nature and are therefore not affected by the bar of Section 397 (2) of CrPC. That apart, this Court in the above-cited cases has unequivocally acknowledged that the High Court is imbued with inherent jurisdiction to prevent abuse of process or to secure ends of justice having regard to the facts and circumstance of individual cases. As a caveat it may be stated that the High Court, while exercising its afore-stated jurisdiction ought to be circumspect. The discretion vested in the High Court is to be invoked carefully and judiciously for effective and timely administration of criminal justice system. **This Court, nonetheless, does not recommend a complete hands off approach. Albeit, there should be interference, may be, in exceptional cases, failing which there is likelihood of serious prejudice to the rights of a citizen. For example, when the contents of a complaint or the other purported material on record is a brazen attempt to persecute an innocent person, it becomes imperative upon the Court to prevent the abuse of process of law.(emphasis by Court)**

16. The guidance of their Lordships of the Supreme Court unequivocally endorses the principle that an absurd and incredible prosecution, that is virtually persecution of an innocent person, ought to be undone by the High Court in whatever proceedings, a patent abuse of process of comes to its notice. Here, as said above, this Court has no manner of doubt that the impugned prosecution giving rise to these proceedings against the applicant, is a patent abuse of process of court, founded on incredible allegations.

17. In the result, this application **succeeds** and is **allowed**. The proceedings of Case No. 1983/9 of 2019 (arsing out of Case Crime No. 224 of 2019), under Sections 395, 323, 307, 364, 506, 147, 149 IPC, Police Station - Meerapur, District - Muzaffarnagar, pending before the Additional Chief Judicial Magistrate, Court No. 3, are hereby **quashed**, as against the applicant.

18. Let this order be communicated to the Magistrate concerned through the learned Sessions Judge, Muzaffarnagar by the Registrar (Compliance).

(2021)07ILR A782
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.07.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 737 of 2020

Chitra @ Bebi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri V.M. Zaidi, Sri Imran Khan, Sri Atul Kumar, Sri Deepak Dubey, Sri M.J. Akhtar

Counsel for the Opposite Parties:
A.G.A., Sri Amit Daga

Indian Penal Code, 1860- Sections 306 & 107- Abetment of Suicide- Where the charge is about abetment to commit suicide, there are very subtle features of evidence that may show the necessary *mens rea* and the relevant persistent conduct of the accused in driving the deceased to commit suicide. The proximate and immediate conduct of one of the accused rendering the deceased option-less to commit suicide, may not be an impromptu action, provoked by the action of the accused on occasion. It could be the precipitating event behind which stand a long trail of instigation or aid, driven by persistent conduct of one or more of the accused acting together.

The criminal intent to drive a person to commit suicide can be inferred from the persistent conduct over a long period of time.

Indian Penal Code, 1860 - Section 306 - Matrimonial Cruelty- Suicide by Husband - Section 107- Abetment of Suicide by Relatives-A spouse at the receiving end of matrimonial cruelty - mental and physical or both, cannot be compared to a person placed in a different situation of harassment, like an employee perceiving or being actually harassed by his employer, or a student by his teacher. The person actually involved in doing an act proximate in point of time to the deceased taking his life, may have others participating with him/her leading to the 'build-up', where the fatal event occurs. These could be those persons who have conspired with the instigator or the one who actively aids the deceased through a proximate act. The role of such persons in the shadows who have conspired would in no measure be less culpable and certainly relevant under Section 107 IPC. Public humiliation of a spouse, particularly, an act of assault by the husband or the wife, may, in the circumstances of long and persistent misbehaviour and harassment, drive a person to take the extreme step of taking his/ her life.

In a case of suicide as a result of matrimonial cruelty the persistent conduct of other relatives over a long period of time would be a relevant fact to constitute abetment of suicide.

Indian Penal Code, 1860- Section 306 - Constituents of- Mere harassment of an individual by another or oppressive behaviour cannot be held to be in itself constitutive of the offence of abetment to commit suicide, but persistent acts of harassment by the accused or a continuous course of conduct, that creates a situation, "which leads the deceased perceiving no other option except to commit suicide" to borrow the words of their Lordships in Ude Singh vs. State of Haryana has been regarded sufficient to qualify for the requirement envisaged under Section 306 IPC. If a person, particularly one in a relationship of great trust like man and wife, were to betray that trust persistently and indulge in harassment of the other in a manner that the victim-spouse, could reasonably be expected in the circumstances to be driven to take the extreme step, the precise kind of *mens rea* that would be involved, may not be very relevant. The necessary *mens rea* of whatever shade and fuelled by whatever motivation, would be inferable from the persistent conduct of the accused.

It is not mere harassment but persistent acts of harassment over a long period of time that leaves the spouse no other option but to commit suicide, that would makes out the offence under Section 306 IPC. (Para 22, 25, 27, 29)

Criminal Application rejected. **(E-2)**

Judgements/ Case law relied upon:-

1. Gurcharan Singh Vs St. of Punj, (2020) 10 SCC 200

2. Sudhakar Pathak Vs St. of U.P., Crl. Appeal No. 2120 of 2018 (Alld)

3. Arnab Manoranjan Goswami Vs St. of Maha. & ors, (2021) 2 SCC 427

4. Ude Singh Vs. St. of Har., (2019) 17 SCC 301

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

1. It is idiomatically said that *'Dead men tell no tales'*. But, sometimes, before a man crosses over to the netherworld, he may speak his mind or tell the circumstances that led to his death - homicidal or suicidal. In cases of suicide, an authentic and dependable suicide note is the most sterling evidence about what drove the man to take his own life.

2. This application under Section 482 of the Code of Criminal Procedure, 19731 seeks to challenge the impugned charge-sheet bearing number 219A of 2019 dated November the 15th, 2019 submitted in Case Crime No. 223 of 2019, under Sections 306, 506 of the Indian Penal Code, 18602, Police Station - Meerapur, District - Muzaffarnagar and the entire proceedings in Case No. 1984/9 of 2019, pending before the learned Additional Chief Judicial Magistrate, Court No. 3, Muzaffarnagar, as against the applicant. This application calls in question the aforesaid charge-sheet, primarily on the ground that no *prima facie* case against the applicant is disclosed on the basis of material carried in the impugned charge sheet, about her involvement in abetting the suicide committed by her brother-in-law (her sister's deceased husband), the Late Mohan Kumar.

3. This prosecution commenced on a First Information Report3 lodged by the deceased's brother, Rahul Kumar Sharma, on 28.07.2019, about the suicidal death of his brother on 25th of July, 2019. The FIR nominates the deceased's in laws, numbering seven, including his wife Smt. Menka *alias* Monty, his mother-in-law Smt. Kusum Lata, his three sisters-in-law, to wit, Indu Sharma, Chhaya Sharma and Romika Sharma, besides his brother-in-law Rajat Sharma. Another person nominated is one Rajendra Chaudhary, said to be an uncle of sorts to the deceased's in-laws. The applicant is not named in the FIR. The substance of the information, addressed to the police, says that the named in-laws of the deceased were frequently troubling him and he was in distress. Rajendra Chaudhary had repeatedly threatened the deceased to death and demanded money of him. The deceased had shared the last mentioned fact with the informant, but his in-laws would not give up on their wayward conduct and Rajendra Chaudhary and the other in-laws would repeatedly demand money of the deceased. It is reported that distressed over this issue, on 25.07.2019, at 12 O' Clock, the deceased jumped off the bridge built over the Ganga barrage, and into the river, committing suicide. It is also said that he had left home, riding the informant's motorcycle, which was later later on found. A suicide note in the deceased's handwriting was found at the informant's *Dharm Kanta*, wherein the deceased had blamed harassment by his wife and in-laws as the cause driving him to commit suicide. It is said in the closing lines of the FIR that the deceased did commit suicide because of the harassment that his wife and in-laws inflicted on him.

4. Heard Mr. V.M. Zaidi, leanred Senior Advocate, assisted by Mr. Imran Khan, learned Counsel for the applicant, Mr. Amit Daga, learned Counsel appearing

on behalf of opposite party no. 2, and Mr. Deepak Mishra, learned Additional Government Advocate appearing on behalf of the State.

5. Mr. V.M. Zaidi, learned Senior Advocate, has primarily submitted that no *prima facie* case is made out against the applicant, as the allegations and the material collected during investigation do not show that there was any act done by the applicant *vis-à-vis* the deceased, that may be said to constitute either "instigation' or a "conspiracy' with the other co-accused, or "aid' within the meaning of Section 107 IPC that led the deceased to commit suicide. He submits that in the absence of any material about an act or omission constituting instigation, conspiracy or aid on the applicant's part, that led the deceased to commit suicide, no case worth trial against the applicant is *prima facie* made out. He submits that on this ground, the impugned charge-sheet, as against the applicant, deserves to be quashed, which, if not done, would be an abuse of process of Court and lead to ends of justice being defeated. It is on the aforesaid case that Mr. Zaidi has advanced his submissions before this Court.

6. The learned Senior Advocate has proceeded to point out that the applicant, much unlike the other in-laws, has not been nominated in the FIR. Her name has been introduced on the basis of a second thought by the informant and the other family members of the deceased, who, according to the learned Senior Advocate, in any case, have launched a malicious and vindictive prosecution against the deceased's wife and in-laws for an oblique motive. That oblique motive, according to the learned Senior Advocate, is that the informant wants to deprive the deceased's wife of her inheritance in her husband's property, both movable and immovable. He has pointed out that the entire prosecution is *mala fide* and designed to achieve the last mentioned purpose. He has been at pains to point out that the informant has launched another *mala fide* prosecution against deceased's in-laws, reporting them for an offence involving a murderous assault on the informant and his family, besides loot of ornaments that belonged to the deceased's wife. By a reference to the other prosecution arising from an FIR registered as Case Crime No. 224 of 2019, under Sections 395, 323, 307, 364, 506, 145 IPC, Police Station - Meerapur, District - Muzaffarnagar, learned Senior Advocate urges that it shows the underlying *mala fides* that animate the impugned prosecution and its oblique purpose. Mr. V.M. Zaidi, further elaborating on his submissions, says that the applicant was not named in the FIR, and also in the earlier statement of the first informant recorded on 28.07.2019, under Section 161 of the Code or the statements of the other witnesses also recorded under Section 161. It is pointed out that the applicant's name was introduced for the first time in the statement of one Sushil Kumar, about a month after the incident, as a result of the continuing efforts, to bring oblique pressure upon the wife's family in order to coerce the wife into giving up her share in the deceased's property. The learned Senior Advocate has also pointed out to the various steps taken by the informant to get his name mutated over the deceased's share in the family's agricultural land and transfer of funds done from the deceased's bank account to his own.

7. Learned Senior Counsel has drawn the Court's attention to a copy of the mutation application dated 30.08.2019 moved by the informant before the Consolidation Officer-II, Sadar, Muzaffarnagar and registered as Case no.520. This document is annexed to the supplementary affidavit dated 10.09.2020, as Annexure no. SA-4. Learned Senior Counsel has also drawn the Court's attention to a photostat copy of the deceased's bank account statement, bearing Account ID no. 1609010100512190, where transfer of funds to the informant's Account have been shown. A copy of the said statement is annexed as part of Annexure no. SA-5 to the supplementary affidavit, last mentioned.

8. Mr. V.M. Zaidi, learned Senior Counsel, in support of his submissions noticed in the opening part of this judgment about the absence of necessary ingredients to make out a *prima facie* case of abetment to commit suicide, has placed reliance upon the decision of the Supreme Court in **Arnab Manoranjan Goswami vs. State of Maharashtra and others**4 and further on a decision of the Supreme Court in **Gurcharan Singh vs. State of Punjab**5. Reliance has also been placed on a decision of this Court in **Sudhakar Pathak vs. State of U.P.**6. All these authorities have been pressed in aid of the essential submission that the three necessary ingredients to attract an offence of abetment to suicide, that is to say, instigation, aid or conspiracy are at all not discernible from the material collected during investigation.

9. It must be remarked here that in aid of the Application, the applicant has filed three supplementary affidavits, to wit, the one dated 09.10.2020, another dated 16.01.2020 and still another dated 17.02.2020. A counter affidavit has been filed on behalf of the complainant/ opposite party, to which the applicant has filed a rejoinder. The State have not come up with any return, but at the hearing, supported the impugned proceedings through Mr. Deepak Mishra, learned A.G.A. The learned A.G.A. says that the facts here show it to be a triable case, which ought not to be quashed.

10. Mr. Amit Daga, learned Counsel appearing for the second opposite party/ informant submits that though the applicant is not named in the FIR, but during the course of investigation, the Investigating Officer found material showing her involvement in the crime. In this regard, he has, particularly, referred to the text messages sent by the deceased through his mobile phone to the mobile phone of his relatives, while alive. These messages have also been treated as a part of the suicide note and made part of the police papers. These messages specifically carry the name of the applicant as one of the persons responsible for driving the deceased to commit suicide. Learned Counsel for the second opposite party, therefore, says that it cannot be said that there is no material against the applicant connecting her to the crime. It is emphasized that the material collected during investigation shows that the applicant along with the other co-accused - all in-laws of the deceased created such inexorable pressure, where the deceased had no option except to put an end to his life. It is pointed out with reference to the averments in paragraph no. 9 of the counter affidavit and the suicide note annexed as Annexure no. CA-1 to the said affidavit that what the applicant has annexed for the deceased's suicide note, is not the complete document. It is pointed

out that the suicide note is a part of the case diary, annexed to the second *parcha* dated 29.07.2019.

11. Learned Counsel for the second opposite party submits that though the suicide note, a copy whereof is annexed as Annexure no. CA-1, does not specifically carry the applicant's name, but read as a whole, squarely blames all of the deceased's in-laws about that extreme position, where he was impelled to end his life. He submits that it is quite another matter that the deceased has, particularly, emphasized the malevolent role of his brother-in-law, Rajat and sister-in-law, Indu, but that, according to Mr. Daga, learned Counsel for the second opposite party, does not show that the applicant was no part of the conspiracy or instigation, that drove him to commit suicide. It is also submitted by the learned Counsel for the second opposite party, relying on averments made in paragraph no.10 of the counter affidavit that prior to scripting the suicide note, the deceased sent WhatsApp messages, carrying his photograph as well as a video from his mobile no. 9997589058 to the mobile number of the informant's elder brother, Sushil Kumar Sharma, where he specifically blamed the applicant alongwith the other co-accused as persons, who had tortured and harassed him to an extent that he had no option except to commit suicide. Copies of those WhatsApp messages are included in the case diary.

12. It is pointed out by the learned Counsel for the second opposite party that since the WhatsApp messages were sent on the WhatsApp messenger of his elder brother, Sushil Kumar Sharma, he was unaware about these messages when he lodged the FIR, or made his earlier statement to the police. It was during the course of investigation that Sushil discovered these WhatsApp messages on his phone and disclosed them to the police, who made them part of the case diary. It is these messages, which have shown the complicity of the applicant and certainly constitute material, on the basis whereof cognizance ought to be taken. It is urged with much emphasis on behalf of the second opposite party that the continued misbehaviour, torture, ill-treatment and harassment by the deceased's wife and in-laws, including the applicant, drove him to commit suicide and those acts do constitute intentional aid within the meaning of Section 107 IPC, besides conspiracy involving all the accused, so as to attract the provisions of Section 306 IPC.

13. This Court has keenly considered the submissions advanced on both sides and perused the record. It would be of seminal importance to extract the suicide note. The suicide note is part of CD no.2 dated 29.07.2019 and reads (in Hindi vernacular):

"मै मोहित शर्मा आज दुखी होकर आत्महत्या करने जा रहा हूँ, मेरी मौत की सारी जिम्मेदारी मेरी ससुराल वालो की है, मेरी सबसे बड़ी साली इन्दु शर्मा, छाया, रजत शर्मा, रोमिता और सबसे खास राजेन्द्र चौधरी उर्फ चाचा और मेरी सास कुसुमलता की है। ये सब मुझ पर नाजायज दबाव बनाते है। मुझे दिन रात धमकी देते रहते है। मुझे बहुत परेशान कर रखा है। मेरी पत्नी का मुज0नगर में नाजायज रिश्ता है। वो मुझ पर ससुराल के पास घर लेकर रहने का दबाव बनाती है। मुझे गाली देती है। खाना तक छीन लेती है। मेरी आप सबसे बिनती है कि मेरे

साले रजत को फॉसी और इन्दु को सजाये मौत जरूर देना और मेरा कोई पुत्र नहीं है। मेरी सारी सम्पत्ति मेरे प्रिय भाई राहुल कुमार को दे दी जाये और गै आज दुखी होकर जिसका कारण मेरी ससुराल के समस्त व्यक्तिगण है मैं आत्म हत्या करने जा रहा हूँ।"

14. Quite apart from it, are the contents of some WhatsApp messages, still photograph and videos, sent by the deceased to his elder brother, Sushil on 25.07.2019 at 11:26 a.m. in Hindi, but written in Roman script, which read thus:

"Meri mout ki sari jimmedari meri sasural wali ki meri sali Indu, Chhaya Rajat, Chitra, romita, Rajendra Choudhary (ChaCha). Ye sab mujh par najayaj dabav banate rahten hai or Jaan se Marni ki damki deten rahten hai"

15. This message shows that the deceased was last seen on Thursday at 11:56 a.m.

16. There is yet another WhatsApp message, which carries the same suicide note, that was recovered from the informant's *Dharm Kanta* and made part of the case diary. There is one oddity, or at least a feature about the prosecution case, which shows that opportunity came knocking to save the deceased, but the one who could did not act. There is a statement attributed to one Faeemuddin, son of late Badaruddin recorded under Section 161 of the Code, where he says that the deceased scripted the suicide note in his presence and said that he was going to commit suicide, driven to it by his wife, Menaka and the in-laws. It is rather baffling that if the witness saw the deceased writing a suicide note, why he did not prevent him from moving away to accomplish his fatal intentions; but that is all about it. This statement under Section 161 may be true or not, but it does not, of its own, render the prosecution case incredible.

17. The material collected during investigation by the police shows that there are statements of the informant Sushil Sharma, the deceased's sister-in-law Smt. Nirupama Sharma wife of Sushil Sharma, Smt. Priyanka Sharma, another sister-in-law of the deceased, Sonu Dhimaan, an unrelated witness, who happened to pass by the deceased's residence on 25.07.2019, and another unrelated witness Akash Rastogi, who also passed by the deceased's house on 25.07.2019; and all of them saw the deceased's wife misbehave with him. The statements of the informant and the two sisters-in-law of the deceased show, amongst other things, that the deceased's wife would often stay at her parents' place, rather than her matrimonial home. She would repeatedly ask for money, apparently to meet her expenses and enforce her demand by show of anger and misbehaviour towards her husband. The deceased's wife wanted him to sell his property at Town Meerapur, District Muzaffarnagar and move over to her place at Patel Nagar, Muzaffarnagar. She was persuaded by the deceased's family not to indulge in that kind of behaviour, but she was aided in her pernicious conduct by her sisters, Chhaya, Romita, Indu, Chitra (applicant), her mother Kusum Lata and uncle Rajendra. All of them would coerce the deceased to part with money, and upon refusal, would threaten him with death.

18. There is a particular instance that appears in the statements of Smt. Nirupama Sharma, Smt. Priyanka Sharma and the two passersby, Sonu Dhimaan and Akash Rastogi, which indicate that the deceased

Mohit Sharma and his wife were seen outside their house and the deceased's wife was misbehaving with him. The two sisters-in-law have said that the deceased's wife, Menaka beat him up publicly, a fact which many saw. The two public witnesses, who claimed to have witnessed the occurrence on 25.07.2019, have said that they saw the deceased, Mohit Sharma's wife misbehaving with him while they were passing by. She is alleged to have asked the deceased go somewhere and die. These witnesses also said that the deceased's wife said that when she demands money of him, he does not pay nor does he go over to Muzaffarnagar. It is said that thereafter Menaka beat him up. To the same effect is the statement of Akash Rastogi. All these statements have been recorded under Section 161 of the Code. The moot question is that, do all these statements taken together as material collected during investigation and the suicide note, besides the WhatsApp messages disclose a triable case of abetment to suicide against the applicant?

19. **Gurcharan Singh vs. State of Punjab**7 relied upon much by the learned Senior Counsel appearing for the applicant was a case that came up before the Supreme Court in appeal from an order of conviction for an offence punishable under Section 306 IPC. The deceased was the wife of one Dr. Jaspal Singh, whereas the appellant Gurcharan Singh was Dr. Jaspal Singh's brother. The victims were three in number, that is to say, Surjit Kaur, wife of Dr. Jaspal Singh and their two daughters, Geet Pahul and Preet Pahul. Apparently, four persons were charge sheeted after investigation, to wit, Satnam Kaur, who died pending committal proceedings, Gurcharan Singh, Ajit Kaur and Sukhvinder Singh *alias* Goldy. All of them were in-laws of the deceased, Surjit Kaur. At the conclusion of trial, Ajit Kaur was acquitted, whereas Gurcharan Singh and Sukhvinder Singh were convicted of the charge punishable under Section 306 IPC. The Trial Court awarded each of the accused a term of six years rigorous imprisonment. On appeal to the High Court, the conviction was upheld, but the sentences were reduced to five years' rigorous imprisonment. On appeal to their Lordships of the Supreme Court by Special Leave preferred by Gurcharan Singh, the conviction was overturned and the appellant acquitted. The facts giving rise to the prosecution can no better be described than in their Lordships' words, where these are recorded thus:

"3. The fascicule of facts, indispensable to comprehend the backdrop of the prosecution, has its origin in the inexplicable abandonment of the deceased Surjit Kaur and her two daughters, namely; Geet Pahul and Preet Pahul by Dr Jaspal Singh, their husband and father respectively, about two years prior to the tragic end of his three family members as above. The prosecution version is that Dr Jaspal Singh, who was initially in the government service, had relinquished the same and started a coal factory at Muktsar. He suffered loss in the business and consequently failed to repay the loan availed by him in this regard from the bank. As he and his brother Gurcharan Singh (appellant herein) and others succeeded to the property left by their predecessors, he started medical practice in private.

4. Be that as it may, before leaving his family, he addressed a communication to the bank concerned expressing his inability to repay the loan in

spite of his best efforts as he was not possessed of any property in his name. Dr Jaspal Singh was thereafter not to be traced. Following this turn of events, according to the prosecution, his wife Surjit Kaur and his daughters shifted from Jalalabad where they used to stay to Abohar and started residing in a rented house of one Hansraj (PW 3). According to them, they had no source of income and further, they were also deprived of their share in the property and other entitlements, otherwise supposed to devolve on Dr Jaspal Singh. They were also not provided with any maintenance by the family members of her husband -- Jaspal Singh and instead were ill-treated, harassed and intimidated.

5. While the matter rested at that, on 3-10-2000 at about 10.30 p.m., Hansraj, the landlord of the deceased Surjit Kaur, being suspicious about prolonged and unusual lack of response by his tenants, though the television in their room was on, informed the brother of the deceased Surjit Kaur. Thereafter they broke open the door of the room and found all three lying dead. The police was informed and FIR was lodged.

6. In course of the inquisition, the investigating officer collected a suicide note in the handwriting of Surjit Kaur and also subscribed to by her daughter Preet Bahul. The suicide note implicated the appellant, his wife Ajit Kaur and the convicted co-accused Sukhvinder Singh alias Goldy as being responsible for their wretched condition, driving them in the ultimate to take the extreme step. A notebook containing some letters, written by deceased Geet Pahul was also recovered. On the completion of the investigation, which included, amongst others the collection of the post-mortem report which confirmed death due to consumption of aluminium phosphide, a pesticide, charge-sheet was submitted against the three persons named hereinabove along with Satnam Kaur under Sections 306/34 IPC."

20. It must be remarked here for the purpose of emphasis, though already apparent, that the decision in **Gurcharan Singh** came on appeal before their Lordships, where there was the advantage of all evidence recorded during trial being available and analyzed by the Courts below threadbare. The case did not arise on a petition to quash proceedings at the threshold. It was after a consideration of the evidence on record that it was held in **Gurcharan Singh** :

"21. It is thus manifest that the offence punishable is one of abetment of the commission of suicide by any person, predicating existence of a live link or nexus between the two, abetment being the propelling causative factor. The basic ingredients of this provision are suicidal death and the abetment thereof. To constitute abetment, the intention and involvement of the accused to aid or instigate the commission of suicide is imperative. Any severance or absence of any of these constituents would militate against this indictment. Remoteness of the culpable acts or omissions rooted in the intention of the accused to actualise the suicide would fall short as well of the offence of abetment essential to attract the punitive mandate of Section 306 IPC. Contiguity, continuity, culpability and complicity of the indictable acts or omission are the concomitant indices of abetment. Section 306 IPC, thus criminalises the sustained incitement for suicide.

22. Section 107 IPC defines "abetment" and is extracted hereunder:

"107. *Abetment of a thing.*--A person abets the doing of a thing, who--

First.--Instigates any person to do that thing; or

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

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

Explanation 1.--A person, who by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that doing.

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

Not only the acts and omissions defining the offence of abetment singularly or in combination are enumerated therein, the explanations adequately encompass all conceivable facets of the culpable conduct of the offender relatable thereto.

27. The pith and purport of Section 306 IPC has since been enunciated by this Court in *Randhir Singh v. State of Punjab [Randhir Singh v. State of Punjab*, (2004) 13 SCC 129 : 2005 SCC (Cri) 56] , and the relevant excerpts therefrom are set out hereunder: (SCC p. 134, paras 12-13)

"12. Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing is required before a person can be said to be abetting the commission of offence under Section 306 IPC.

13. In *State of W.B. v. Orilal Jaiswal* [State of W.B. v. Orilal Jaiswal, (1994) 1 SCC 73 : 1994 SCC (Cri) 107] , this Court has observed that the *courts should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences* were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."(emphasis supplied)

28. Significantly, this Court underlined by referring to its earlier pronouncement in *Orilal Jaiswal [State of W.B. v. Orilal Jaiswal*, (1994) 1 SCC 73 : 1994 SCC (Cri) 107] that courts have to be extremely careful in assessing the facts and circumstances of each case to ascertain as to whether cruelty had been meted out to the victim and that the same had induced the person to end his/her life by committing suicide, with the caveat that if the victim committing suicide appears to be hypersensitive to ordinary petulance, discord and differences in domestic life,

quite common to the society to which he or she belonged and such factors were not expected to induce a similarly circumstanced individual to resort to such step, the accused charged with abetment could not be held guilty. The above view was reiterated in *Amalendu Pal v. State of W.B. [Amalendu Pal v. State of W.B.*, (2010) 1 SCC 707 : (2010) 1 SCC (Cri) 896].

29. That the intention of the legislature is that in order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit an offence and that there ought to be an active or direct act leading the deceased to commit suicide, being left with no option, had been propounded by this Court in *S.S. Chheena v. Vijay Kumar Mahajan [S.S. Chheena v. Vijay Kumar Mahajan*, (2010) 12 SCC 190 : (2011) 2 SCC (Cri) 465].

30. In *Pinakin Mahipatray Rawal v. State of Gujarat [Pinakin Mahipatray Rawal v. State of Gujarat*, (2013) 10 SCC 48 : (2013) 4 SCC (Civ) 616 : (2013) 3 SCC (Cri) 801] , this Court, with reference to Section 113-A of the Evidence Act, 1872, while observing that the criminal law amendment bringing forth this provision was necessitated to meet the social challenge of saving the married woman from being ill-treated or forced to commit suicide by the husband or his relatives demanding dowry, it was underlined that the burden of proving the preconditions permitting the presumption as ingrained therein, squarely and singularly lay on the prosecution. That the prosecution as well has to establish beyond reasonable doubt that the deceased had committed suicide on being abetted by the person charged under Section 306 IPC, was emphasised.

31. The assessment of the evidence on record as above, in our considered opinion, does not demonstrate with unqualified clarity and conviction, any role of the appellant or the other implicated in-laws of the deceased Surjit Kaur, as contemplated by the above provisions so as to return an unassailable finding of their culpability under Section 306 IPC. **The materials on record, to reiterate, do not suggest even remotely any act of cruelty, oppression, harassment or inducement so as to persistently provoke or compel the deceased to resort to self-extinction being left with no other alternative. No such continuous and proximate conduct of the appellant or his family members with the required provocative culpability or lethal instigative content is discernible to even infer that the deceased Surjit Kaur and her daughters had been pushed to such a distressed state, physical or mental that they elected to liquidate themselves as if to seek a practical alleviation from their unbearable earthly miseries."(Emphasis by Court)**

21. In **Sudhakar Pathak and others vs. State of U.P. and others**8 which is again a case that arose on appeal by a convicted husband before this Court - convicted for an offence punishable under Section 306 IPC for abetting suicide by his wife, this Court after a complete review of evidence on record and the law applicable held:

"15. Though, *Gurucharan* (supra) was a case based on dowry harassment, the last four lines mentioned in bold letters are still relevant and they require specific incident, and not general allegations, having provocative capability to drive the deceased to such distressed state, mental and physical that she could elect to end her life. Routine behaviour, remark or quarrel by husband in matrimonial life in a drunken

state cannot be taken to be sufficient to the extent to constitute abetment unless something extra-ordinary, more than normal wear and tear of married life, is shown on or just before the date of incident. In this instant case where admittedly the deceased was suffering from mental illness or disease, the burden of proving close link, in proximity of time between abetment and suicide, heavily lies on prosecution and the prosecution has utterly failed in discharging this burden.

16. This is no principle of law that wherever wife commits suicide, the husband will bear the responsibility and will be held liable. No doubt that in such cases, if the prosecution has discharged its initial burden of proof of guilt and has proved the relationship between abetment by husband and suicide by wife, the accused may be required in view of section 106 of the Evidence Act to explain the circumstances in which the wife committed suicide. But when mental illness of the wife is admitted much before in time from the date of death and the husband is habitual drunkard since marriage and in the habit of causing harassment in drunken state and both have passed more than 15 years of marriage as such giving birth to four children, general allegation of harassment cannot be sufficient to hold him guilty for the offence of abetment of suicide, particularly when the presence of husband in the house around the incident is not established."

22. This Court must still again remark that cases where the charge is about abetment to commit suicide, there are very subtle features of evidence that may show the necessary *mens rea* and the relevant persistent conduct of the accused in driving the deceased to commit suicide. There could be cases where on the material collected during investigation, there is hardly anything to show that the accused or one of them *ex facie* committed an act proximate in point of time that could drive the deceased to take his life. Again, there could be cases where the role of one of the accused is overt and proximate in point of time, by the standard of a man similarly circumstanced and a sensible man at that, that could lead him to commit suicide. The proximate and immediate conduct of one of the accused rendering the deceased option-less to commit suicide, may not be an impromptu action, provoked by the action of the accused on occasion. It could be the precipitating event behind which stand a long trail of instigation or aid, driven by persistent conduct of one or more of the accused acting together. This is in particular true of a matrimonial relationship, which comes as it does, with abiding social obligations and much legal consequences. A spouse at the receiving end of matrimonial cruelty - mental and physical or both, cannot be compared to a person placed in a different situation of harassment, like an employee perceiving or being actually harassed by his employer, or a student by his teacher. It is for this reason that special laws have been made for women where they commit suicide, within seven years of marriage in the matrimonial home.

23. No doubt, social realities have not yet arisen in the perception of law makers and others as well in similar terms for the other partner in marriage, but the reality remains that in the nature of relationship in matrimony, social and legal obligation arise, which when inter-laid with persistent cruel conduct by the wife, may lead a man to find himself optionless. Of course, it

depends on the circumstances of a man, his financial and social status and his general outlook towards life. But, what cannot be ignored is the fact that in the matrimonial relationship both spouses, in sometime, become aware of the others general outlook and the threshold of toleration beyond which the other may not be driven, and if persistently harassed, may adopt fatal options.

24. There is yet another angle to the matter, which holds stronger in case of a matrimonial alliance. The person actually involved in doing an act proximate in point of time to the deceased taking his life, may have others participating with him/her leading to the 'build-up', where the fatal event occurs. These could be those persons who have conspired with the instigator or the one who actively aids the deceased through a proximate act. The role of such persons in the shadows who have conspired would in no measure be less culpable and certainly relevant under Section 107 IPC. No doubt, the evidence about their role would have to be more carefully sifted at the trial, than the person who has acted as the agent provocateur, proximate in point of time.

25. In the present case, this Court finds that whatever evidence has been collected is not one simply about a hair trigger fatal response from an over sensitive man. The parties were together for some four years and had a son. The suicide note, which comprises two parts, the one physically scripted and the other sent by WhatsApp messages, shows definitive allegations against wife and the in-laws. The scripted suicide note shows that the wife, who was staying back at her parents' place at Muzaffarnagar, was carrying on there and forcing the deceased to stay in a house close to her place. The note also says that the wife abuses him and snatches away food from him (मुझे गाली देती है, खाना तक छीन लेती है). He has blamed his wife and named the other in-laws, who along with her threatened and harassed him. The scripted suicide note goes to the extent of showing that the son is not begotten of him.

26. It must be remarked that though a child born during the subsistence of a valid marriage is presumed to be legitimate and begotten of the husband, subject to fulfillment of the conditions specified under Section 112 of the Evidence Act, 1872 disowning a child born during marriage is frowned upon by the law, but the words carried in the suicide note are those of a man who was on the brink of ending his own life. These are entitled justly to be differently received and assessed. No doubt, in the scripted suicide note, there is conspicuous absence of the applicant's name though all other in-laws have been specifically nominated as part of concerted design and effort to harass the deceased driving him over the brink, but the WhatsApp message, a copy of which is annexed at page 17 to the counter affidavit and is part of the case diary, clearly nominates the applicant also with imputations that have been extracted hereinbefore.

27. The statements of the informant and the two sisters-in-law of the deceased show that the family made efforts to persuade the deceased's wife away from the course of harassment and oppression, but to no avail. The deceased's wife, and if the material collected during investigation, were to withstand scrutiny at the trial, shows that the in-laws of the deceased, including the applicant, sometimes directly and at others through the deceased's wife

put the deceased to extreme oppression and threat. The deceased was exposed to insult and humiliation. The material gathered during investigation shows that the immediate and proximate cause for the deceased to take the extreme step was a public humiliation by his wife, co-accused Menaka, who outside the matrimonial home and in full public view, misbehaved with him and on his protest beat him up. Public humiliation of a spouse, particularly, an act of assault by the husband or the wife, may, in the circumstances of long and persistent misbehaviour and harassment, drive a person to take the extreme step of taking his/ her life.

28. In the entirety of the circumstances, in the considered opinion of this Court, suicide committed by the deceased cannot be regarded as an oversensitive or freak reaction of a person, who circumstanced like the deceased, would not ordinarily be expected to exhibit. Much reliance was placed during the hearing by Mr. Zaidi, learned Senior Advocate for the applicant on a recent decision of the Supreme Court in **Arnab Manoranjan Goswami** *(supra)* on the question what would constitute an offence of abetment to suicide, punishable under Section 306 IPC. It reads, thus:

"49. Before we evaluate the contents of the FIR, a reference to Section 306 IPC is necessary. Section 306 stipulates that if a person commits suicide "whoever abets the commission of such suicide" shall be punished with imprisonment extending up to 10 years [***"306. Abetment of suicide.***--If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."] . Section 107 is comprised within Chapter V IPC, which is titled "Of Abetment". Section 107 provides:

(Quoted portion omitted)

50. The first segment of Section 107 defines abetment as the instigation of a person to do a particular thing. The second segment defines it with reference to engaging in a conspiracy with one or more other persons for the doing of a thing, and an act or illegal omission in pursuance of the conspiracy. Under the third segment, abetment is founded on intentionally aiding the doing of a thing either by an act or omission. These provisions have been construed specifically in the context of Section 306 to which a reference is necessary in order to furnish the legal foundation for assessing the contents of the FIR. These provisions have been construed in the earlier judgments of this Court in *State of W.B. v. Orilal Jaiswal* [State of W.B. v. Orilal Jaiswal, (1994) 1 SCC 73 : 1994 SCC (Cri) 107] , *Randhir Singh v. State of Punjab* [*Randhir Singh v. State of Punjab*, (2004) 13 SCC 129 : 2005 SCC (Cri) 56] , *Kishori Lal v. State of M.P.* [*Kishori Lal v. State of M.P.*, (2007) 10 SCC 797 : (2007) 3 SCC (Cri) 701] (*"Kishori Lal"*) and *Kishangiri Mangalgiri Goswami v. State of Gujarat* [*Kishangiri Mangalgiri Goswami v. State of Gujarat*, (2009) 4 SCC 52 : (2009) 2 SCC (Cri) 62] . In Amalendu Pal v. State of W.B. [Amalendu Pal v. State of W.B., (2010) 1 SCC 707 : (2010) 1 SCC (Cri) 896] , Mukundakam Sharma, J., speaking for a two-Judge Bench of this Court and having adverted to the earlier decisions, observed : (SCC p. 712, para 12)

"12. ... It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable."

51. The Court noted that before a person may be said to have abetted the commission of suicide, they "must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide". Instigation, as this Court held in *Kishori Lal* [*Kishori Lal v. State of M.P.*, (2007) 10 SCC 797 : (2007) 3 SCC (Cri) 701] , "literally means to provoke, incite, urge on or bring about by persuasion to do anything". In *S.S. Chheena v. Vijay Kumar Mahajan* [*S.S. Chheena v. Vijay Kumar Mahajan*, (2010) 12 SCC 190 : (2011) 2 SCC (Cri) 465] , a two-Judge Bench of this Court, speaking through Dalveer Bhandari, J., observed : (SCC p. 197, para 25)

"25. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide."

52.*Madan Mohan Singh v. State of Gujarat* [*Madan Mohan Singh v. State of Gujarat*, (2010) 8 SCC 628 : (2010) 3 SCC (Cri) 1048 : (2010) 2 SCC (L&S) 682] was specifically a case which arose in the context of a petition under Section 482 CrPC where the High Court had dismissed [*Madan Mohan Singh v. State of Gujarat*, 2008 SCC OnLine Guj 568] the petition for quashing an FIR registered for offences under Sections 306 and 294(b) IPC. In that case, the FIR was registered on a complaint of the spouse of the deceased who was working as a driver with the accused. The driver had been rebuked by the employer and was later found to be dead on having committed suicide. A suicide note was relied upon in the FIR, the contents of which indicated that the driver had not been given a fixed vehicle unlike other drivers besides which he had other complaints including the deduction of 15 days' wages from his salary. The suicide note named the appellant-accused. In the decision of a two-Judge Bench of this Court, delivered by V.S. Sirpurkar, J., the test laid down in *Bhajan Lal* [*State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] was applied and the Court held : (*Madan Mohan Singh case* [*Madan Mohan Singh v. State of Gujarat*, (2010) 8 SCC 628 : (2010) 3 SCC (Cri) 1048 : (2010) 2 SCC (L&S) 682] , SCC p. 631, paras 10-11)

"10. We are convinced that there is absolutely nothing in this suicide note or the FIR which would even distantly be viewed as an offence much less under Section 306 IPC. We could not find anything in the FIR or in the so-called suicide note which could be suggested as abetment to commit suicide. In such matters there must be an allegation that the accused had instigated the deceased to commit suicide or secondly, had engaged with some other person in a conspiracy and lastly, that the accused had in any way

aided any act or illegal omission to bring about the suicide.

11. In spite of our best efforts and microscopic examination of the suicide note and the FIR, all that we find is that the suicide note is a rhetoric document in the nature of a departmental complaint. It also suggests some mental imbalance on the part of the deceased which he himself describes as depression. In the so-called suicide note, it cannot be said that the accused ever intended that the driver under him should commit suicide or should end his life and did anything in that behalf. Even if it is accepted that the accused changed the duty of the driver or that the accused asked him not to take the keys of the car and to keep the keys of the car in the office itself, it does not mean that the accused intended or knew that the driver should commit suicide because of this."

53. Dealing with the provisions of Section 306 IPC and the meaning of abetment within the meaning of Section 107, the Court observed : (*Madan Mohan Singh case* [*Madan Mohan Singh v. State of Gujarat*, (2010) 8 SCC 628 : (2010) 3 SCC (Cri) 1048 : (2010) 2 SCC (L&S) 682] , SCC pp. 631-32, para 12)

"12. In order to bring out an offence under Section 306 IPC specific abetment as contemplated by Section 107 IPC on the part of the accused with an intention to bring about the suicide of the person concerned as a result of that abetment is required. The intention of the accused to aid or to instigate or to abet the deceased to commit suicide is a must for this particular offence under Section 306 IPC. We are of the clear opinion that there is no question of there being any material for offence under Section 306 IPC either in the FIR or in the so-called suicide note."

The Court noted that the suicide note expressed a state of anguish of the deceased and "cannot be depicted as expressing anything intentional on the part of the accused that the deceased might commit suicide". Reversing the judgment [*Madan Mohan Singh v. State of Gujarat*, 2008 SCC OnLine Guj 568] of the High Court, the petition under Section 482 was allowed and the FIR was quashed.

54. In a concurring judgment delivered by one of us (Dhananjaya Y. Chandrachud, J.) in the decision of the Constitution Bench in *Common Cause* [*Common Cause v. Union of India*, (2018) 5 SCC 1] , the provisions of Section 107 were explained with the following observations : (SCC p. 244, para 458)

"458. For abetting an offence, the person abetting must have intentionally aided the commission of the crime. Abetment requires an instigation to commit or intentionally aiding the commission of a crime. It presupposes a course of conduct or action which (in the context of the present discussion) facilitates another to end life. Hence abetment of suicide is an offence expressly punishable under Sections 305 and 306 IPC."

55. More recently in *M. Arjunan v. State* [*M. Arjunan v. State*, (2019) 3 SCC 315 : (2019) 2 SCC (Cri) 219] , a two-Judge Bench of this Court, speaking through R. Banumathi, J., elucidated the essential ingredients of the offence under Section 306 IPC in the following observations : (SCC p. 317, para 7)

"7. The essential ingredients of the offence under Section 306 IPC are : (i) the abetment; (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide. The act of the accused, however, insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of

instigation/abetment to commit suicide are satisfied the accused cannot be convicted under Section 306 IPC."

56. Similarly, in another recent judgment of this Court in *Ude Singh v. State of Haryana* [*Ude Singh v. State of Haryana*, (2019) 17 SCC 301 : (2020) 3 SCC (Cri) 306] , a two-Judge Bench of this Court, speaking through Dinesh Maheshwari, J., expounded on the ingredients of Section 306 IPC, and the factors to be considered in determining whether a case falls within the ken of the aforesaid provision, in the following terms : (SCC pp. 321-22, para 16)

"16. In cases of alleged abetment of suicide, there must be a proof of direct or indirect act(s) of incitement to the commission of suicide. It could hardly be disputed that the question of cause of a suicide, particularly in the context of an offence of abetment of suicide, remains a vexed one, involving multifaceted and complex attributes of human behaviour and responses/reactions. In the case of accusation for abetment of suicide, the court would be looking for cogent and convincing proof of the act(s) of incitement to the commission of suicide. In the case of suicide, mere allegation of harassment of the deceased by another person would not suffice unless there be such action on the part of the accused which compels the person to commit suicide; and such an offending action ought to be proximate to the time of occurrence. Whether a person has abetted in the commission of suicide by another or not, could only be gathered from the facts and circumstances of each case.

16.1. For the purpose of finding out if a person has abetted commission of suicide by another, the consideration would be if the accused is guilty of the act of instigation of the act of suicide. As explained and reiterated by this Court in the decisions abovereferred, instigation means to goad, urge forward, provoke, incite or encourage to do an act. If the persons who committed suicide had been hypersensitive and the action of accused is otherwise not ordinarily expected to induce a similarly circumstanced person to commit suicide, it may not be safe to hold the accused guilty of abetment of suicide. But, on the other hand, if the accused by his acts and by his continuous course of conduct creates a situation which leads the deceased perceiving no other option except to commit suicide, the case may fall within the four-corners of Section 306 IPC. If the accused plays an active role in tarnishing the self-esteem and self-respect of the victim, which eventually draws the victim to commit suicide, the accused may be held guilty of abetment of suicide. The question of mens rea on the part of the accused in such cases would be examined with reference to the actual acts and deeds of the accused and if the acts and deeds are only of such nature where the accused intended nothing more than harassment or snap show of anger, a particular case may fall short of the offence of abetment of suicide. However, if the accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide. Such being the matter of delicate analysis of human behaviour, each case is required to be examined on its own facts, while taking note of all the surrounding factors having bearing on the actions and psyche of the accused and the deceased."

57. Similarly, in *Rajesh v. State of Haryana* [*Rajesh v. State of Haryana*, (2020) 15 SCC 359] , a two-Judge Bench of this Court, speaking through L. Nageswara Rao, J., held as follows : (SCC para 9)

"9. Conviction under Section 306 IPC is not sustainable on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused, which led or compelled the person to commit suicide. In order to bring a case within the purview of Section 306 IPC, there must be a case of suicide and in the commission of the said offence, 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. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC."

58. In a recent decision of this Court in *Gurcharan Singh v. State of Punjab* [*Gurcharan Singh v. State of Punjab*, (2020) 10 SCC 200 : (2021) 1 SCC (Cri) 417] , a three-Judge Bench of this Court, speaking through Hrishikesh Roy, J., held thus : (SCC pp. 206-07, para 15)

"15. As in all crimes, mens rea has to be established. To prove the offence of abetment, as specified under Section 107 IPC, the state of mind to commit a particular crime must be visible, to determine the culpability. In order to prove mens rea, there has to be something on record to establish or show that the appellant herein had a guilty mind and in furtherance of that state of mind, abetted the suicide of the deceased."

59. In *Vaijnath Kondiba Khandke v. State of Maharashtra* [*Vaijnath Kondiba Khandke v. State of Maharashtra*, (2018) 7 SCC 781 : (2018) 3 SCC (Cri) 362] , a two-Judge Bench of this Court, speaking through U.U. Lalit, J., dealt with an appeal against the rejection of an application under Section 482 CrPC, for quashing an FIR registered under Sections 306 and 506 read with Section 34 IPC. A person serving in the office of the Deputy Director of Education, Aurangabad had committed suicide on 8-8-2017. His wife made a complaint to the police that her husband was suffering from mental torture as his superiors were getting heavy work done from her husband. This resulted in him having to work from 10 a.m. to 10 p.m. and even at odd hours and on holidays. The specific allegation against the appellant was that he had stopped the deceased's salary for one month and was threatening the deceased that his increment would be stopped. This Court noted that there was no suicide note, and the only material on record was in the form of assertions made by the deceased's wife in her report to the police. The Court went on to hold that the facts on record were inadequate and insufficient to bring home the charge of abetment of suicide under Section 306 IPC. The mere factum of work being assigned by the appellant to the deceased, or the stoppage of salary for a month, was not enough to prove criminal intent or guilty mind. Consequently, proceedings against the appellant were quashed.

60. On the other hand, we must also notice the decision in *Praveen Pradhan* [*Praveen Pradhan v. State of Uttaranchal*, (2012) 9 SCC 734 : (2013) 1 SCC (Cri) 146] where a two-Judge Bench of this Court, speaking through B.S. Chauhan, J., dismissed an appeal against the rejection [*Praveen Pradhan v. State of Uttaranchal*, 2012 SCC OnLine Utt 51] of an application under Section 482 CrPC by the High Court for quashing a criminal proceeding, implicating an offence under Section 306 IPC. The suicide note which was left behind by the deceased showed, as

this Court observed, that "the appellant perpetually humiliated, exploited and demoralised the deceased, who was compelled to indulge in wrongful practices at the workplace, which hurt his self-respect tremendously." The Court noted that the appellant always scolded the deceased and tried to always force the deceased to resign. Resultantly, the Court observed : (SCC p. 741, para 19)

"19. Thus, the case is required to be considered in the light of the aforesaid settled legal propositions. In the instant case, alleged harassment had not been a casual feature, rather remained a matter of persistent harassment. It is not a case of a driver; or a man having an illicit relationship with a married woman, knowing that she also had another paramour; and therefore, cannot be compared to the situation of the deceased in the instant case, who was a qualified graduate engineer and still suffered persistent harassment and humiliation and additionally, also had to endure continuous illegal demands made by the appellant, upon nonfulfilment of which, he would be mercilessly harassed by the appellant for a prolonged period of time. He had also been forced to work continuously for long durations in the factory, vis-à-vis other employees which often even entered to 16-17 hours at a stretch. Such harassment, coupled with the utterance of words to the effect, that, "had there been any other person in his place, he would have certainly committed suicide" is what makes the present case distinct from the aforementioned cases. Considering the facts and circumstances of the present case, we do not think it is a case which requires any interference by this Court as regards the impugned judgment and order [*Praveen Pradhan v. State of Uttaranchal*, 2012 SCC OnLine Utt 51] of the High Court. The appeal is, therefore, dismissed accordingly."

The contents of the FIR, therefore, indicated that the deceased had been subjected to harassment persistently and continuously and this was coupled by words used by the accused which led to the commission of suicide.

61. In *Narayan Malhari Thorat v. Vinayak Deorao Bhagat* [*Narayan Malhari Thorat v. Vinayak Deorao Bhagat*, (2019) 13 SCC 598 : (2019) 4 SCC (Cri) 636] , this Court, speaking through U.U. Lalit, J., reversed the judgment [*Vinayak Deorao Bhagat v. State of Maharashtra*, 2016 SCC OnLine Bom 15933] of a Division Bench of the High Court which had quashed criminal proceedings in exercise of the jurisdiction under Section 482. This was a case where the FIR was registered pursuant to the information received from the appellant. The FIR stated that the son and daughter-in-law of the appellant were teachers in Zila Parishad School. The respondent used to call the daughter-in-law of the appellant on the phone and used to harass her. Moreover, despite the efforts of the son of the appellant, the respondent did not desist from doing so. This Court noted : (SCC p. 603, para 12)

"12. We now consider the facts of the present case. There are definite allegations that the first respondent would keep on calling the wife of the victim on her mobile and keep harassing her which allegations are supported by the statements of the mother and the wife of the victim recorded during investigation. The record shows that 3-4 days prior to the suicide there was an altercation between the victim and the first respondent. In the light of these facts, coupled with the fact that the suicide note made definite allegation against first respondent, the High Court was not justified in entering into question

whether the first respondent had the requisite intention to aid or instigate or abet the commission of suicide. At this juncture when the investigation was yet to be completed and charge-sheet, if any, was yet to be filed, the High Court ought not to have gone into the aspect whether there was requisite mental element or intention on part of the respondent."

The above observations of the Court clearly indicated that there was a specific allegation in the FIR bearing on the imputation that the respondent had actively facilitated the commission of suicide by continuously harassing the spouse of the victim and in failing to rectify his conduct despite the efforts of the victim."

29. The authorities of the Supreme Court referred to in **Goswami** *(supra)*, it is true, lay down that mere harassment of an individual by another or oppressive behaviour cannot be held to be in itself constitutive of the offence of abetment to commit suicide, but persistent acts of harassment by the accused or a continuous course of conduct, that creates a situation, "which leads the deceased perceiving no other option except to commit suicide" to borrow the words of their Lordships in **Ude Singh vs. State of Haryana**9 has been regarded sufficient to qualify for the requirement envisaged under Section 306 IPC. Likewise, in **Ude Singh** it has been recognized that where the accused played an active role in tarnishing the self-esteem and self-respect of the victim, that eventually draws him to commit suicide, may be regarded as abetment. Here, as said in some detail in the earlier part of this judgment, the wife allegedly brought matters to the precipitating event by humiliating the husband in public outside their matrimonial home, where she is said to have assaulted him; and again, if this were an isolated action, it might have been discounted for a hypersensitive reaction of a person, where a person similarly circumstanced would not have acted to take his own life. But, as the materials collected during investigation suggest, the fateful event came at the end of a 'build-up', where the wife and in-laws had subjected the deceased to persistent harassment and humiliation. And if the departed soul were to be believed for his word in the scripted suicide note, he was subjected to the humiliation of the wife carrying on with another man and bearing the other's child. In this entire long course of the claimed harassment that the deceased suffered, the in-laws, including the applicant, are alleged to have been active participants. They are said to have connived with the wife and acted alongside her in harassing the deceased.

30. One may legitimately think as to what would possibly be the shade of the *mens rea* that the victim's wife or his in-laws would harbour to covet death for him. In the opinion of this Court, if a person, particularly one in a relationship of great trust like man and wife, were to betray that trust persistently and indulge in harassment of the other in a manner that the victim-spouse, could reasonably be expected in the circumstances to be driven to take the extreme step, the precise kind of *mens rea* that would be involved, may not be very relevant. The necessary *mens rea* of whatever shade and fuelled by whatever motivation, would be inferable from the persistent conduct of the accused.

31. This Court, however, may clarify that whatever is said in this judgment is purely tentative and limited to the purpose

of judging the worth of the prayer to quash proceedings. It is and ought not be regarded by the Trial Court as any kind of a comment or evaluation about evidence, which is yet to surface during trial. The truth of the prosecution case has to be established beyond doubt at the trial in accordance with law. However, this Court is of opinion that this is not a case, where the prosecution ought to be scuttled at the threshold in the exercise of powers under Section 482 of the Code.

32. In the result, this Application fails and is **dismissed**.

(2021)07ILR A802
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.07.2021

BEFORE

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

Application U/S 482 Cr.P.C. No. 6193 of 2021

Virendra Kumar Yadav ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Mohammad Fahad, Sri Devesh Mishra, Sri Vijay Gautam

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

Code of Criminal Procedure, 1973 - Section 41-A- Indian Penal Code, 1860 - Sections 332, 323, 504 & 506 I.P.C All these are within the perview of Section 41A of Cr.P.C.- The accused shall not be arrested without following the procedure as envisaged in Section 41A of Cr.P.C.
Where the punishment for the offences are less than seven years, the legal requirement is that when the accused presents himself before the police officer in terms of the notice u/s 41 of the Code, he shall not be arrested unless reasons for the arrest are recorded in writing.

Code of Criminal Procedure, 1973- Section 482, 89 & 320- The applicant is constable and the allegations against him are all triable by a Judicial Magistrate. It appears that the prosecution is going on and the oscillation of deleting of Section 332 I.P.C. and adding Section 332 I.P.C. has caused lots of problem. The learned Judicial Magistrate would also see that Section 89 of Cr.P.C.. namely alternative redressal mechanism as well as provisions of Section 320 Cr.P.C.. may also be invoked looking to the factual data, this indulgence to the applicant who is a police constable and the dispute arose due to his duty is shown. Looking into the factual scenario which has been canvassed even in discharge application and it appears that application that the complainant himself was at fault who was the superior officer of the petitioner.

In cases where the offences are triable by the Magistrate, inviting punishment of less than seven years and the matter being prima facie not serious or grave, the Magistrate can decide the same by compounding the offences and through the process of alternative redressal mechanism. (Para 5,6)

Criminal Application partly allowed. (E-2)

Case law/ Judgements relied upon-

1. Criminal Misc. Writ Petition No. 17732 of 2020 (Vimal Kumar & 3 ors. Vs St. Of U.P. & 3 ors.) decided on 28.01.2021

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

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

2. The present application under Section 482 Cr.P.C. has been filed by the

applicant with the prayer to quash the impugned Summoning Order dated 08.10.2020 passed by the Chief Judicial Magistrate Gautambudh Nagar, in Criminal Case No. 24176 of 2018, Case Crime No.1105 of 2018, under Sections 332, 323, 504 and 506 I.P.C., Police Station- Sector-20, Noida, District- Gautambudh Nagar.

3. The applicant is constable. He had filed his discharge application pursuant to order passed by this Court 05.02.2019 which has been dismissed.

4. Order dated 05.02.2019 reads as under:-

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

This application under Section 482 of the Code of Criminal Procedure (for short 'Code') has been filed on behalf of the applicant with a prayer to quash the charge sheet No. 1 dated 18.09.2018 and entire criminal proceeding against the applicant before Chief Judicial Magistrate, Gautam Budh Nagar in Case Crime No. 1105 of 2018, under Sections 332, 323, 504, 506 I.P.C., Police Station-Noida Sector 20, District-Gautam Budh Nagar (State vs. Virendra Singh Yadav) as well as cognizance order dated 22.10.2018.

Learned counsel for the applicant contended that first information report has been lodged with false allegation only to harass the applicant.

Per contra, learned A.G.A. opposed the prayer made and contentions thereof raised by learned counsel for the applicant.

All the submissions made at the bar relate to the disputed questions of fact, which cannot be adjudicated upon by this Court in exercise of its extraordinary jurisdiction under Section 482 of Code.

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 applicant.

In view of the above, the prayer for quashing the impugned charge-sheet, the impugned cognizance order as well as the entire proceedings in the aforesaid case is hereby refused.

However, if applicant claims for discharge at appropriate stage, the same shall be decided by trial court by speaking order.

With the aforesaid observations /directions, the instant application stands disposed of."

5. The applicant is a constable and it is submitted that if he would be arrested in criminal matter for which he is facing trial and prosecution, he may suffer immense loss. As per Section 332 I.P.C. is concerned, it is punishable for three years As far as Section 323 I.P.C. is concerned, it is punishable with one year and fine and all the both. As far as Sections 504 I.P.C. and 506 I.P.C. is concerned, it is punishable for two years or with fine. As far as Section 506 I.P.C. is concern, it is punishable for two years or the fine, Part-II of 506 I.P.C. is punishable up to seven years and or fine. All these are within the perview of Section 41A of Cr.P.C. and as per the Division Bench of this Court in **Criminal Misc. Writ Petition No. 17732 of 2020 (Vimal Kumar And 3 Others Vs. State Of U.P. And 3 Others)** decided on 28.01.2021 has considered the provisions of Section 41A of the Cr.P.C. and held that the accused shall not be arrested without following the procedure as envisaged in Section 41A of

Cr.P.C., Wherein the Division Bench has observed as follows:-

Moreover, reliance on the judgements dated 04.09.2018 passed by Apex Court in the case of ***Social Action Forum for Manav Adhikar Vs. Union of India, Ministry of Law and Justice and others in Writ Petition (Civil) No. 73 of 2015 with Criminal Appeal No. 1265 of 2017 Writ Petition (Criminal) No. 156 of 2017.***

In which Hon'ble Supreme Court has also issued directions:

"20. We, therefore, direct the Magistrates/ Police authorities that when accused alleged with offence punishable up to 7 years imprisonment are produced before them remands may be granted to accused only after the Magistrate satisfies himself that the application for remand by the police officer has been made in a bona fide manner and the reasons for seeking remand mentioned in the case diary are in accordance with the requirements of Section 41(I) (b) and 41 A Cr.P.C., and there is concrete material in existence to substantiate the ground mentioned for seeking remand. Even where the accused himself surrenders or where investigation has been completed and the Magistrate needs to take the accused in judicial custody as provided under Section 170(I) and Section 41(I)(b)(ii)(e) Cr.P.C. prolonged imprisonment at this initial stage, where the accused has not been adjudged guilty may not be called for, and the Magistrate and Sessions Courts are to consider the bails expeditiously and not to mechanically refuse the same, especially in short sentence cases punishable with upto 7 years imprisonment unless the allegations are grave and there is any legal impediment in allowing the bail, as laid down in ***Lal Kamlendra Prap Singh Vs. State of U.P. (2009) 4 SCC 437, and Sheoraj Singh @ Chuttan Vs. State of U.P. and others, 2009(65) ACC 781.*** *The facility of releasing the accused on interim bail pending consideration of their regular bails may also be accorded by the Magistrates and Sessions Judges to appropriate cases.*

21.The Magistrate may also furnish information to the Registrar of the High Court through the District Judge, in case he is satisfied that a particular police officer has been persistently arresting accused in cases punishable with upto 7 year terms, in a mechanical or mala fide and dishonest manner, in contravention of the requirements of sections 41(1)(b) and 41 A, and thereafter the matter may be placed by the Registrar in this case, so that appropriate directions may be issued to the DGP to take action against such errant police officer for his persistent default or this Court may initiate contempt proceedings against the defaulting police officer.

22.The Sessions District Judges should also be directed to impress upon the remand Magistrates not to routinely grant remand of accused to police officers seeking remand for accused if the pre-conditions for granting the remands mentioned in sections 41(1)(b) and 41 A Cr.P.C. are not disclosed in cases punishable with 7 year terms, or where the police officer appears to be seeking remand for an accused in a mala fide manner in the absence of concrete material. The issue of compliance with sections 41(1)(b) and 41 A Cr.P.C and the directions of this Court in this regard may also be discussed in the monthly meetings of the District Judges with the administration and the superior police officials.

23.We are also of the view that the Registrar General may issue a circular

within a period of one month with directions to the Sessions Courts and Magistrates to monitor and oversee the applications for remand sought by the arresting police officers and to comply with the other directions mentioned herein above.

25. As already indicated above we are of the view that by routinely mentioning in the case diary that a particular condition referred to in sections 41(1)(b) or 41 A Cr.P.C. has been met for seeking police remand, would not provide adequate reason for effecting the arrest. The DGP is also directed to circulate the present order to all subordinate police officers.

We have been pained to note that regularly petitions are filed where the offence committed would be for a lesser period then seven years or maximum punishment would be seven years and they routinely bring by way of writ petition scrap of being arrested. The provision of Section 41-A were incorporated of this purpose only that concerned who is not charged with heinous crime does not require and whose custody is not required may not face arrest. But we are pained that this provision has not met his avoid purpose.

27.Let a copy of this order be sent to the DGP, U.P., Member Secretary, U.P. SLSA and District Judges in all districts of U.P. for compliance and communication to all the concerned judicial magistrates before whom the accused are produced for remand by the police officers within ten days.

In order to ensure what we have observed above, we give the following directions:

11.1. The State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41-A of Cr.P.C. 1973.

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

While parting we appreciated the efforts made by learned counsel for the petitioners namely Sri Ajay Vikram Yadav who has seriously urged to us that as scribe are not facing what said to case under the dowry prohibition Act as there is still no marriage, but apprehend to arrest. That the police authorities would convey our guidelines not only in this matter but in all the investigations which are to be taken.

A copy be circulated by learned Registrar General to the Law Secretary who shall impress upon all the police stations officers about the same.

We would like to draw the attention of the police authorities of the

State to our order dated 18.01.2021 and the provisions of section 41-A of the Cr.P.C. Despite there being warning from the Apex Court in the matter reported in ***Writ Petition (Civil) No. 73 of 2015 Social Action Forum for Manav Adhikar and another Vs. Union of India, Ministry of law and Justice and others (Supra) and in the matter of Anand Tiwari Vs. State of U.P. and others passed in Crl. Misc. Writ Petition No. 17641 of 2020 and Arnesh Kumar Vs. State of Bihar, (2014) 8 SCC 273*** *has directed the police authorities to try the balance between individual liberty and social order. "*

6. The fact that the applicant is constable and the allegations against him are all triable by a Judicial Magistrate. It appears that the prosecution is going on and the oscillation of deleting of Section 332 I.P.C. and adding Section 332 I.P.C. has caused lots of problem. The learned Judicial Magistrate would also see that Section 89 of Cr.P.C.. namely alternative redressal mechanism as well as provisions of Section 320 Cr.P.C.. may also be invoked looking to the factual data, this indulgence to the applicant who is a police constable and the dispute arose due to his duty is shown. Looking into the factual scenario which has been canvassed even in discharge application and it appears that application that the complainant himself was at fault who was the superior officer of the petitioner.

7. This petition is partly **allowed**. The petitioner shall not be coercively dealt with as per the aforesaid observations.

(2021)07ILR A806
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.02.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 8632 of 2010
connected with others cases

Rajveer Sharma ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
B.K. Singh, Brijesh Kumar Singh

Counsel for the Respondent:
C.S.C.

A. Service Law – Pension - U.P. Cooperative Federal Authority (Business) Regulations, 1976 - Subordinate Cooperative Service Rules, 1979 - Rule 4(d), 4(p) - The definition of Rules 4(d) and 4(p) clearly indicates the intendment of the legislature. Definition of "Cooperative Supervisor" in Rule 4(d) is the clear intendment of the legislature that the Co-operative Supervisor shall be under the employment of the co-operative institutions; whereas in Rule 4(p), "village-level workers" have been brought under the employment of the Community Development Department in the State of Uttar Pradesh. Therefore, wherever the legislature intended to do so, they have done it expressly. Therefore, this Court is of the opinion that **the post of Co-operative Supervisor was completely kept out of the purview of the Government department.** (Para 71)

B. In the Co-operative Regulations there is no provision for pensionary benefits. The intention of the legislature is clear that Cooperative Supervisors can come to government service only through the procedure established by the Rules and Regulations, as government servants. They are recruited according to the procedure provided in (a) and (b) of Part III of the Rules.

It has been noticed that Co-operative Supervisors were under the control of the Co-operative Federation Authority and in Co-operative Regulations there is no provision for

pensionary benefits. In the opinion of this Court, the period served as Co-operative Supervisor is not liable to be added for reckoning the pensionary benefit of retired Co-operative Inspectors, Grade-II. (Para 72, 73, 80)

C. 'Delay defeats equity' - It is now well-settled that who claims equity must enforce his claim within a reasonable time. (Para 78)

It is admitted case of the petitioners that the petitioners have approached this Court after the retirement from service claiming benefit of grant of notional promotion with effect from the date their juniors have been provided benefit for reckoning the qualifying service for the grant of pension. (Para 74)

The claim set up in the writ petitions reflects that the juniors to the petitioners have been granted promotion on the post of Co-operative Supervisor Grade-II/Assistant Development Officer Co-operative. The petitioners were not vigilant to approach this Court claiming the benefits granted to their juniors. The petitioners, who have approached this Court after a long delay, are not entitled to get relief in exercise of discretionary jurisdiction u/Art. 226 of the Constitution of India. (Para 81)

Writ petitions dismissed. (E-3)

Precedent followed:

1. St. of U.P. & ors. Vs Roshan Singh & ors., Civil Appeal No. 7340-7341 (Para 47)

2. Ghulam Rasool Lone Vs St. of J. & K. & anr. JT 2009 (13) SC 422 (Para 61)

Precedent cited:

1. St. of U.P. Vs Hari Singh Gupta, decided on 26.10.2009 (Para 40)

2. St. of U.P. Vs Durga Prasad & ors., decided on 06.12.1990 (Para 40)

3. Raj Singh Yadav Vs St. of U.P., Writ Petition No. 237 (SB) of 2001 (Para 40)

4. St. Vs Hari Singh Gahlaut (Para 43)

5. St. of U.P. Vs Rajan Singh (Para 44)

6. Bengali Prasad Vs St. of U.P. & ors., Writ Petition No. 13240 (SS) of 1980 (Para 77)

7. Roshan Singh Vs St. of U.P. & ors., Writ Petition No. 3947 (SS) of 1997 (Para 77)

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

1. Heard Sri B.K. Singh, learned counsel for the petitioner, learned Additional Chief Standing Counsel and Sri Kuldip Mani Tripathi, learned Additional Advocate General, assisted by Sri Vinod Kumar, learned counsel for the respondent-State.

2. In the abovementioned writ petitions in question, as common question of law has been engaging the attention of this Court, the writ petitions are being decided collectively and Writ Petition No.8632 (SS) of 2010 is being treated to be leading case.

3. The present writ petition has been filed before this Court for issuance of a writ in the nature of Mandamus commanding the respondents to grant notional promotion on the post of Cooperative Supervisor Grade-II/ Assistant Development Officer Cooperative with effect from the date juniors to the petitioner have been promoted with all consequential benefits.

4. Facts of Writ Petition No.8632 of 2010 (Rajveer Sharma v. State of U.P. and others) are that the petitioner was granted appointment on the post of Cooperative Supervisor on 25.3.1977 and was confirmed on the said post on 1.1.1988 and in the gradation list, his name finds place at

45/77. It is case of the petitioner that the persons junior to the petitioner from serial no.48 onwards have been granted promotion on the post of Cooperative Supervisor Grade-II/ Assistant Development Officer, Cooperative. The petitioner was placed in the seniority list at serial no.57 vide seniority list dated 30.09.2003 and accordingly he was granted promotion on the post of Assistant Development Officer, Cooperative on 30.9.2003 and retired from services on attaining the age of superannuation on 31.3.2010. On the basis of certain judgments relied upon, he is claiming notional promotion on the post of A.D.O., Cooperative with effect from the date juniors have been granted promotion for the purpose of accounting qualifying service for the payment of pension. Under the Rules, it is provided that for the payment of pension to a government servant, required qualifying service is 10 years. The petitioner admittedly was granted promotion on the post of A.D.O., Cooperative on 30.9.2003 and retired on 31.3.2010, therefore, he does not have 10 years of qualifying service required under Regulation 361.

5. Facts of Writ Petition No.6378 (SS) of 2011 (Ram Gopal Verma v. The State of U.P. and others) are that the petitioner was absorbed under Managing Director, U.P. Provincial Cooperative Union Limited, Vidhan Sabha Marg, Lucknow on the post of Cooperative Supervisor whose date of initial appointment was 13.9.1970 and his service were made confirmed on the post of Cooperative Supervisor subsequently. Order was passed by Additional Registrar (Administration), Cooperative Societies, U.P., Lucknow granting promotion to petitioner to the post of Assistant Development Officer (Cooperative)/ Cooperative Inspector Group-II. In pursuance thereof, he joined on the promoted post and was allowed to continue as such. Judgment and order was passed by this Hon'ble Court in Writ Petition No.4527 (SS) of 2009 for grant of notional promotion to the similarly situated and even junior person to the petitioner namely Sri Shyam Manohal Lal Srivastava to the post of Cooperative Inspector Group-II/ Assistant Development Offficer (Cooperative) with effect from the date of promotion of junior person with the direction to fix his pension w.e.f. 18.04.1990. Additional Registrar (Administration), Cooperative Societies, U.P., Lucknow issued order complying the abovementioned judgment 31.7.2009. The petitioner made representation before Additional Registrar (Administration), Cooperative Societies, U.P., Lucknow thereby making request to the effect that the petitioner may also be granted notional promotion to the post of Cooperative Group-II/ Assistant Development Officer (Cooperative) with effect from 18.04.1990 as it has been given to above named Sri Shyam Manohar Lal Srivastava keeping in view the fact that the prsons who were granted promotion on 18.04.1990 are junior to the petitioner also and the petitioner was also superseded in the matter of grant of promotion without any reason or justification but the same could not come within the know of the petitioner and it was only in the month of March, 2010 when order dated 11.03.2010 was passed in compliance of order dated 31.07.2009 passed by this Court in Writ Petition No.4527 (SS) of 2009, the petitioner has got knowledge about the promotion granted to the junior prsons. The petitioner retired from service on attaining the age of superannuation on 31.7.2010 while

working on the post of Cooperative Group-II/ Assistant Development Officer (Cooperative) and respondents have fixed the pension of petitioner w.e.f. 4.3.1995 thereby reckoning the length of petitioner's services on the post of Cooperative Officer (Cooperative) as 15 years 4 months and 28 days only. When no order has been passed on the representation, he filed the present writ petition.

6. Facts of Writ Petition No.2695 of 2014 (Briddhi Chandra Yadav v. State of U.P. and others) are that the petitioner was appointed on the post of Cooperative Supervisor. He was placed under suspension in relation to the charge of alleged financial irregularities and embezzlement. In this regard, an FIR was also lodged against him under Sections 409/467/471/477 in which criminal case no.82/83 was registered against him. The petitioner was served with a charge-sheet and in furtherence of the same he was dismissed from service vide order dated 29.11.1985 against which he filed departmental appeal but the same was also rejected vide order dated 30.07.1987 and as such the petitioner filed Writ Petiton No.6212 of 1987 before this Court. The aforesaid writ petition was partly allowed vide judgment and order dated 31.3.1993 whereby order dated 29.11.1985 dismissing the petitioner from service as well as order dated 30.07.1987 rejecting the appeal of petitioner filed against the dismissal order were quashed and petitioner was directed to be deemed continuing in service with liberty to respondents to hold further proceedings on the basis of charge sheet in accordance with law within the stipulated period as per direction of this Court, but department filed S.L.P. No.14002/1993 against the judgment and order dated 31.03.1993 before the Hon'ble Supreme Court which was dismissed.

The petitioner was reinstated in service in compliance of judgment and order dated 31.03.1993 and he was treated to be in continuous service and he was paid entire arrears of salary excluding the amount of subsistence allowance already paid to him. Moreover the respondents did not proceed further with the departmental proceeding after reinstatement of petitioner. Additional Commissioner/ Additional Registrar (Administration). Cooperative, U.P., Lucknow issued order dated 22.5.1995 thereby granting promotion to the post of Cooperative Officer (Cooperative) to 101 persons including the persons juniors to the petitioner on temporary and ad hoc basis but the petitioner was not granted promotion and as such petitioner filed Writ Petition No.397 (SS) of 1998 which was disposed of vide judgment and order dated 6.2.1998 giving liberty to petitioner to make a representation to the authority concerned with a direction to the concerned authority to decide the said representation within a period of three months in accordance with law by a speaking order.

In pursuance to the said order, the petitioner made representation to Additional Commissioner/ Additional Registrar (Administration). Cooperative, U.P., Lucknow. Additional Commissioner/ Additional Registrar (Administration). Cooperative, U.P., Lucknow issued order on 20.7.1999 granting promotion to petitioner to the post in question on ad hoc basis thereby directing the petitioner to submit his joining report within a period of one month and also issued another letter no.1434 dated 20.07.1999 on the same day disposing of petitioner's representation. The

petitioner submitted his joining report on 30.7.1999 in pursuance of said promotion order dated 20.7.1999 and since then, he was allowed to work on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative). Additional Commissioner/ Additional Registrar (Administration). Cooperative, U.P., Lucknow issued an order on 30.9.2003 regularizing the promotion of petitioner as well as junior persons.

The petitioner on attaining the age of superannuation retired from service on 31.01.2012 while working on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative). Additional Commissioner/ Additional Registrar (Administration). Cooperative, U.P., Lucknow issued an order on 21.1.2013 thereby allotting the year of vacancies to the concerned Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) who were granted promotion on previous occasions from the year 1989 to 2001 and the regularization order dated 30.09.2003 was deemed to be amended accordingly but by means of the order dated 21.01.2013 the petitioner has been regularized against the vacancy of the year 1997-98 whereas the junior persons have been regularized against the vacancies of previous years i.e. 1992-93 onward.

Feeling aggrieved, the petitioner made representation to Additional Commissioner/ Additional Registrar (Administration). Cooperative, U.P., Lucknow for issuing order of notional promotion on the post in question against the vacancy of the year 1992-93 w.e.f. 1.7.1992 for being granted regular promotion against the vacancy of the year 1992-93 since when a person junior to him has been firstly regularized keeping in view the criteria for promotion to the post in question i.e. seniority subject to rejection of unfit under the relevant Service Rules, 1979 and as such the petitioner is entitled to be promoted on the post in question prior to a date of promotion of a person junior to him and in continuation of the same the petitioner has vehementaly represented his case through various representations. When no order has been passed on it, the petitioner has filed the present writ petition.

7. Facts of Writ Petition No.3037 (SS) of 2011 (Naresh Chandra Sharma v. The State of U.P. and others) are that the petitioner was initially appointed on the post of Cooperative Supervisor on 8.1.1958 and his services were confirmed on 30.4.1972. The Additional Registrar (Administration), Cooperative Societies, U.P., Lucknow issued order on 9.5.1985 whereby petitioner was granted promotion to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative). On 27.5.1985, the petitioner submitted his joining report on the post of Cooperative Inspector Group-II and he was allowed to work on the promoted post. He retired while working on the post of Cooperative Inspector Group-II after attaining the age of superannuation on 31.5.1994. However, the petitioner has not been paid pensionary benefits under Government Order dated 1.7.1989 on the ground that the length of petitioner's service on the said post is only 9 years and 4 months which is below ten years.

This Court vide order dated 3.5.1995 was pleased to pass judgment and order in Writ Petition No.13240 of 1989 directing respondents to treat the writ petitioners who are similarly situated persons than the present petitioner as having been notional promoted on the post of Cooperative

Inspector Group-II from the date of promotion of junior person i.e. 7.4.1978 for the purposes of pensionary benefits keeping in view the fact that vide orders dated7.4.1978 and 22.7.1978 promotion was granted to several Cooperative Supervisors to the post of Cooperative Inspector Group-II thereby superseding the Senior Cooperative Supervisors depriving them from promotion though they were eligible for grant of promotion on the date of issuance of promotion orders. Respondent no.3 issued an order on 21.5.1996 in compliance of the abovementioned judgment and order dated 3.5.1995 whereby persons namely Bengali Prasad Sharma and others were granted pensionary benefits by giving notional promotion when juniors were promoted.

The judgment and order was passed by this Court in Writ Petition on 4419 (SS) of 1996 filed by other similar situated retired Cooperative Inspectors Group-II whereby a writ of mandamus was also issued to respondents to give notional promotion with effect from 7.4.1978 when juniors were promoted and the respondents were directed to fix their pension w.e.f. 7.4.1978 with the condition that the writ petitioners will not be entitled for any arrears of salary. Respondent no.3 issued order on 11.11.1999 in compliance of the abovementioned judgment and order dated 11.5.1999 and granted benefit of notional promotion to petitioners of Writ Petition No.4419 (SS) of 1996 to the post of Cooperative Inspector Grade-II w.e.f. 7.4.1978 and accordingly they were granted pensionary benefits. The State Government has also issued a Government Order giving directions for considering the claim of similarly situated persons.

Another Government Order was issued on 14.2.2002 in super-session of the above mentioned Government Order dated 8.6.2000 for consideration of the similar cases on merit and the benefit of judgment and order dated 3.5.1995 passed in W.P. No.13240 of 1990 and order dated 11.5.1999 passed in W.P. No.4419 (SS) of 1996 has been made available to several retired Cooperative Inspectors thereby granting notional promotion for the purposes of pensionary benefits with effect from the date of promotion of person junior to them w.e.f. 7.4.1978.

This Court vide order dated 27.4.2007 was pleased to pass judgment and order for making available the benefit of judgment and orders dated 3.5.1995 passed in W.P. No.13240 of 1995 and order dated 11.5.1999 passed in W.P. No.4419 (SS) of 1996 to another similarly situated retired Cooperative Inspector namely Sri Somesh Chandra Pandey in W.P. No.1771(SS) of 1996 thereby granting benefits w.e.f. the date of promotion of person junior i.e. 7.4.1978. This Court vide another order dated 9.10.2009, was pleased to pass another judgment and order in W.P. No.275 (SB) of 2007 namely Siddhi Nath Shukla v. State of U.P. and others for giving benefit of notional promotion with effect from the date of junior person for the purposes of pensionary benefits to a retired similarly situated Cooperative Inspector Group-II. Respondent no.3 passed an order on 25.1.2010 in compliance of the aforesaid judgment and order dated 9.10.2009 granting similar benefits to above-named Sri Siddhi Nath Shukla. The petitioner being similarly situated person made representation before respondent no.3 for giving benefit of the aforesaid judgments and orders. When no order has been passed, the petitioner has filed the present writ petition.

8. Facts of Writ Petition No.2923 (SS) of 2015 (Amar Singh v. State of U.P.

and others) are that the petitioner joined on the post of Cooperative Supervisor on 1.3.1978. He was granted promotion to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) on 1.10.1993 initially for the period of 89 days. The term was extended from time to time and petitioner was allowed to continue upto 31.3.1998 with on day artificial break i.e. 3.1.1994.

On 1.4.1998 the petitioner was reverted to the post of Co-operative Supervisor due to the reason of non-extension of his term of promotion. Respondent no.3 issued an order on 16.11.2012 granting promotion to the petitioner to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) in pursuance of which he joined on 17.11.2012 and was allowed to continue.

The petitioner made representation on 20.11.2012 to respondent no.3 claiming notional promotion to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) w.e.f. 1.3.1989 i.e. the date since when a person junior to the petitioner was granted promotion which was not decided. The petitioner on attaining the age of superannuation retired from service on 31.12.2012 while working on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative), but he has not been granted pensionary benefits till the date. In this regard, he made another representation dated 3.2.2015 which is still pending consideration. When no order has been passed, he has filed the present writ petition.

9. Facts of Writ Petition No.1780 (SS) of 2015 (Purshottam Sharma v. State of U.P. and others) are that the petitioner joined service on the post of Cooperative Supervisor on 22.2.1978. He was granted promotion to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) on 28.12.1988 initially for a period of 90 days. The term was extended from time to time and he was allowed to continue upto 19.08.1988 with one day artificial break created after every interval of one year, three months or 80 days as the case may be depending upon the term of promotion indicated in each promotion orders. The petitioner was reverted to the post of Cooperative Supervisor on 20.8.1998.

Feeling aggrieved, he filed Civil Misc. Writ Petition No.31478 of 1998 in which although the respondents were directed to file counter afffidavit, yet no interim order was granted in favour of the petitioner and the petitioner worked on the post of Cooperative Supervisor w.e.f. 20.8.1998. Respondent no.3 issued an order 16.11.2012 granting promotion to petitioner to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative)during the pendency of the writ petition and in pursuance thereof, he joined w.e.f. 18.11.2012 and was allowed to continue. The petitioner made representation on 19.11.2002 to respondent no.3 claiming for notional promotion. Civil Misc. Writ Petition No.31478 of 1998 was dismissed as infructuous vide judgment and order dated 7.4.20014. The petitioner on attaining the age of superannuation retired from service while working on the post Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) on 30.6.2014, but he has not been granted pensionary benefits till date.

In this regard, the petitioner made representation before respondent no.3 on 19.8.2014 but till date no order

whatsoever has been filed. When no order has been passed, the petitioner has filed the present writ petition.

10. Facts of Writ Petition No.1242 (SS) of 2012 (Shiv Shankar Singh v. State of U.P. and others) are that the petitioner was absorbed on 1.1.1977 under respondent no.6 on the post of Cooperative Supervisor whose date of initial appointment was 20.04.1971 and his services were made confirmed on the said post subsequently. Respondent no.4 passed an order on 3.7.1993 granting promotion to the petitioner on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) for a period of 89 days in pursuance of which he joined the said post. Respondent no.4 passed another order on 30.9.1993 granting promotion to the petitioner for next 89 days. The term was further extended for 89 days. Thereafter, he was converted to the post of Cooperative Supervisor.

Feeling aggrieved, the petitioner filed writ petition which was number as Writ Petition No.1604 (SS) of1994 wherein this Court vide order dated 7.4.1994 was pleased to pass an interim order for allowing the petitioner to continue on the post in question. In pursuance thereof, he was allowed to continue. Thereafter, respondent no.3 passed an order on 15.2.1995 granting promotion to 149 persons including the petitioner to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative)for a period of one year. In pursuance thereof, he joined on 1.3.1995. Vide order dated 30.9.2003, the services of the petitioner were regularized. The petitioner retired from service on attaining the age of superannuation while working on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) on 30.6.2007 and opposite parties fixed the pension of the petitioner w.e.f. 17.7.1993 thereby reckoning the length of petitioner's services on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) are 13 years 11 months and 14 days only.

Thereafter, this Court vide judgment and order dated 31.7.2009 passed in Writ Petition No.4527(SS) of 2009 for the grant of notional promotion to the similarly situated and even junior persons to the petitioner namely Sri Shyam Manohar Lal Srivastava to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) with effect from the date of promotion of junior person with the direction to fix his pension w.e.f. 18.4.1990. In pursuance thereof, respondent no.3 issued an order on 11.3.2010 complying the judgment and order dated 31.7.2009. Thereafter, the petitioner made representation on 6.4.2010 claiming benefits of aforesaid judgment and order dated 31.7.2009. When no order has been passed, the petitioner has filed the present writ petition.

11. Facts of Writ Petition No.1490 (SS) of 2012 (Ram Sundar Lal Maurya v. State of U.P. and others) are that the petitioner was initially appointed as Cooperative Supervisor on 20.6.1978 and his services were made confirmed subsequently. The petitioner was granted selection grade on 20.06.1988 on completion of ten years service and after completion of 14 years service he was granted first promotional pay-scale and thereafter, on completion of 24 years service of petitioner was granted second

promotional pay-scale. He was granted promotion on to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) vide order dated 17.5.2010. On 25.5.2010, the order dated 17.5.2010 was amended to the extent changing the place of posting after promotion from Faizabad to Sultanpur. The petitioner was allowed to work on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative)on 7.6.2010.

Thereafter, respondent no.3 issued an order on 9.8.2010 granting pensionary benefits to a similarly situated person namely Sadho Ram Gangwar by way of grant of notional promotion to him to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) with effect from the date of promotion of junior persons i.e. 18.4.1990 in compliance of judgment and order dated 15.3.2010 passed by this Court in W.P. No.1409(SS) of 2010. Thereafter, several persons junior to the petitioner were granted notional promotion. The petitioner made representation on 31.8.2010 claiming notional promotion. The petitioner on attaining the age of superannuation retired while working on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) on 30.6.2011.

Thereafter, the petitioner made another representation on 20.7.2011 before respondent no.3 for extension of benefit of judgment and order dated 15.3.2010 and when no order has been passed, the present writ petition has been filed.

12. Facts of Writ Petition No.4311 (SS) of 2014 (Jai Prakash Vimal v. State of U.P. and others) are that the petitioner was appointed on the post of Cooperative Supervisor on 24.6.1978, joined the services and his services were confirmed subsequently. Juniors/ similarly situated persons to petitioner were promoted on the next promotion post i.e. Cooperative Inspector Group-II. After that, petitioner made several application; and personal contact to respondents but they are sitting tight over the matter. The petitioner was promoted on the next higher post i.e. Cooperative Inspector Group-II after expiry of 20 years of promotion of junior persons. The petitioner was retired on attaining the age of superannuation on 31.5.2014. He will not get the pension due to not completion of service at lest 10 years on government post while juniors to the petitioner are getting. In an identical case this Court passed a judgment and order dated 10.7.20014 in Writ Petition No.6359(SS) of 2010 (SB Sharma v. State of U.P. and others) granted promotion w.e.f. 18.4.1990. When no action has been taken, the petitioner has filed the present writ petition.

13. Facts of Writ Petition No.3198 (SS) of 2014 are that the petitioner was initially appointed on the post of Cooperative Supervisor in Central Cooperative Bank, Biswan, District Sitapur on 12.5.1973. The services of the petitioner were absorbed under respondent no.6 and he belonged to Group of Vikalp Patra-B Cooperative Supervisors. Respondent no.3 issued an order 15.2.1995 granting promotion to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) on temporary and ad hoc basis in pursuance of which he joined on 2.3.1995 and was posted at District Lakhimpur Kheri. The U.P. Public Service Commission Allahabad gave recommendation for regularization of promotion of petitioner as well as other

persons in pursuance of which respondent no.3 issued an order dated 30.9.2013 regularizing ad hoc promotions of 305 persons including the petitioner on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative). Thereafter, respondent no.3 also issued an order on 2.1.2008 confirming services of 131 persons including the petitioner on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) wherein service of petitioner were confirmed w.e.f. 1.10.2005. The petitioner on attaining the age of superannuation retired from service while working on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) on 31.12.2011. Respondent no.4 sent pension papers of petitioner to respondent no.5 for release of government pension and gratuity to petitioner. The office of respondent no.5 raised objection to the effect that petitioner was not entitled for grant of pension on the ground that 10 years' qualifying sergice for pension in case of the petitioner, if continued from the date of his regularization i.e. 30.9.2003 was not complete and as such the petitioner filed Writ Petition No.1050 (SS) of 2013.

Respondent no.3 issued another order on 21.1.2013 allotting the year of vacancies to the concerned Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) including the petitioner who were granted promotions during the year 1989 to 2001 whereby the petitioner has been regularized against the vacancy of the year 1995-96 and on that basis objections ere removed and vide letter dated 8.3.2013 papers in respect of the finalization of pension of the petitioner were forwarded to the respondent no.5 and in pursuance of the same petitioner's pension has been fixed w.e.f. 2.3.1995 whereas promotion of several junior persons were regularized against the vacancies of previous years on the one hand as mentioned above and on the other pension of several junior persons were fixed w.e.f. 18.4.1990 as a result of grant of notional promotion to the post in question for the purpose of pensionary benefits w.e.f. 18.04.1990 to them. The petitioner made representation to respondent no.3 claiming notional promotion and when no order has been passed, he filed the present writ petition.

14. Facts of Writ Petition No.6550 (SS) of 2014 (Sheodan Singh v. State of U.P. and others) are that the petitioner was initially appointed on the post of Cooperative Supervisor on 23.4.1978. The meeting of department promotion committee was held on 31.1.1994. Respondent no.3 issued an order granting promotion to the person junior to the petitioner as the petitioner was superseded in the matter of promotion due to the pendency of the disciplinary proceeding as well as proceedings of Surchage. The petitioner was absolved from all the charges levelled in the said disciplinary proceedings as well as proceeding of surcharge by means of order dated 18.11.1996.

The meeting of DPC was held on 15.7.199 in which petitioner's case for promotion was considered. On 3.12.1999, respondent no.3 passed an order granting promotion to the petitioner with effect from the date of joining and he was directed to submit his joining report with a period of one month failing which the promotion granted to him was to be cancelled

automatically. He submitted his joining report on 21.12.1999 and was allowed to work on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative). The meeting of DPC was held on 29.7.2003 in which the case of petitioner's promotion was reconsidered. on 22.8.2003, respondent no.3 passed an order granting notional promotion to petitioner with effect from the date of promotion of junior persons i.e. 10.5.1994 and the petitioner was granted benefits of annual increments but he was not granted any arrears of difference of salary on the one hand asnd on the other he was also not granted the benefits of selection grade payable to him on the completion of 8 years' service i.e. 10.5.2002 and promotional pay-scale payable to him on the completion of 14 years' service i.e. 10.5.2008 at the time of fixation of his salary and as such the petitioner made representation.

Respondent no.3 sent a letter to respondent no.1 on 11.11.2008 making recommendation in favour of petitioner for granting the said benefits, however, the matter of petitioner remained pending for final disposal. The petitioner was granted further promotion to the Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) on 11.2.2010 and while working on the said post, he retired on attaining the age of superannuation. On 23.2.2012, respondent no.4 issued an order refusing to grant benefits of time scales to petitioner. Respondent no.3 also issued an order on 30.7.2012 issuing directing to counting the period of service of petitioner from the date of notional promotion i.e. 10.5.1994 for the purpose of grant of pensionary benefits only. The petitioner made another representation to respondents for considering the case in the light of the judgment and orders dated 29.7.2008 and 23.7.2009 and order dated 11.2.2010 on which respondent no.3 issued an order dated 21.1.2013 refusing to grant the benefits of time scales to petitioner. On 6.2.2013, respondent no.4 issued an order communicating copy of the order dated 21.1.2013 to petitioner. Respondent no.1 also issued order dated 21.1.2013 refusing to grant the same. Respondent no.4 also issued order dated 2.6.2014 refusing to grant the benefits of time scale. Feeling aggrieved, the petitioner has filed the present writ petition.

15. Facts of the Writ Petition No.670 (SS) of 2008 (Rakesh Kumar Shukla v. State of U.P. and others) are that the petitioner was appointed on 17.3.1992 on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative). The D.P.C. was held on 15.1.2007 for considering promotion of employees. The first adverse entry has been incorporated in character roll of the petitioner in the year 2000-01 against which petitioner moved representation on 4.6.2000 before appropriate authority. The second adverse entry has been given to petitioner in the year 2003-04, but the said adverse entry was not communicated to the petitioner. The third adverse entry has been given in the year 2004-05 which was communicated to the petitioner after lapse of three months. D.P.C. rejected the consideration of petitioner's promotion on 1.2.2007. On 2.3.2007, the petitioner moved a representation stating therein that one Naveen Kumar Srivastava who is junior to petitioner has been promoted and therefore the petitioner be granted promotion. When no order was passed, the petitioner filed Writ Petition No.2870 (SS) of 2007 which was disposed of vide order dated 18.5.2007 with a direction to

competent authority to decide representation of the petitioner within a period of four weeks and in pursuance thereof, Additional Registration (Administration) decided the representation and rejected candidature of petitioner for consideration of promotion by D.P.C. Against his rejection for promotion, he made severals representations through proper channel as well as through U.P.C. recent of which is dated 17.10.2006. In the DPC held on July 2007, the name of petitioner was sent for consideration for promotion and no consideration has been made in third meeting, forth meeting and fifth meeting of DPC, the petitioner filed the present writ petition.

16. Facts of the Writ Petition No.1613 (SS) of 2008 (Veg Raj Singh v. State of U.P. and others) are that the petitioner was appointed on the post of Cooperative Supervisor on 1.1.1958. The petitioner has been promoted to the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) on 19.10.1978and on 10.11.1978 he joined the said post. The petitioner was sent on deputation on 1.4.1979 and 31.1.1980. An adverse entry has been awarded against the petitioner in the year 1979-1980. Thereafter, the petitioner has been punished vide order dated 21.3.1986. Vide orders dated 15.10.1988, 16.1.1989 and 27.4.1992, Mr. Satya Vir Singh, Mr. Hari Nath Singh Kushwaha and others juniors to the petitioners have been promoted on the post of Cooperative Inspector Group-I. The petitioner made representation claiming promotion which has been rejected. Vide order dated 30.9.2003, the petitioner has been regularized on the post of Cooperative Inspector Group-II. Against punishment, the petitioner filed appeal which was rejected. Feeling aggrieved, he filed revision before State Government and when revision filed by the petitioner was not decided, he filed Writ Petition No.6095(SS) of 2006 wherein this Court was pleased to direct respondent no.3 to send record to the State Government and the State Government may decide the matter within a period of three months thereafter. The revision has been decided vide order dated 21.2.2017 in pursuance of the order of this Court exonerating the petitioner from the charges levelled against him. When no order was passed in regard to notional promotion, the petitioner has moved the present writ petition.

17. Facts of Writ Petition No.7660 (SS) of 2014 (Ram Veer Singh v. State of U.P. and others) are that the petitioner has been appointed on the post of Supervisor on 20.6.1978 and he was confirmed on the said post on 29.6.1979. On 22.5.1995 several juniors to petitioner were promoted on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) and in the list of confirmation dated 22.5.1995, they are placed at serial nos.48 onward. On 17.5.2010, the petitioner has been promoted on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative). Although the juniors to petitioner were promoted on 22.5.1995, but the petitioner has been promoted only on 17.5.2010. On 31.12.2013 the petitioner retired from the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) but he has not been paid pension for the reason that the petitioner has not completed ten years of service. When no order has been passed, the petitioner has filed the present writ petition.

18. Facts of Writ Petition No.7660 (SS) of 2014 (Ram Veer Singh v. State of U.P. and others) are that petitioner has been appointed on the post of Supervisor on 20.6.1978. He was sent on training and subsequently he was confirmed on the post of Supervisor on 29.6.1979. Vide order dated 7.4.1983, a Divison Bench of this Court has been pleased to pass one judgment in the case of R.N. Dixit v. State of U.P. and anr. Wherein this Court has made it clear that once the legal position is delcared by the Court regarding principles and it is obligatory on the part of the State Government to give effect to same and not to deny the benefit of the decision to similarly situated persons who did not file writ petitions challenging the Government Orders. In Writ Petition No.13240 (SS) of 1989 (Bengali Prasad and others v. State of U.P. and others), this Hon'ble Court has been pelased to grant notional promotion to the petitioner. Juniors to the petitioners who are placed at serial no.48 onwards were given promotion vide order dated 22.5.1995. The State Government has issued a Government Order receiving the same controversy in which it is mentioned that if the juniors to the petitioner/s have been promoted, then the matter may be disposed of by the Registrar, Cooperative for granting notional promotion. The petitioner has relied upon various judgment in this regard. The petitioner has been given promotion vide order dated 17.5.2010. The petitioner retired from the post of Cooperative Supervisor Grade-II/ Assistant Development Officer, Cooperative on 31.12.2013.

19. Facts of Writ Petition No.7626 (SS) of 2014 (Keshav Singh v. State of U.P. and others) are that the petitioner has been appointed on the post of Supervisor and he was confirmed on the said post on 29.6.1979. On 17.5.2010, the petitioner has been promoted on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative). Although the juniors to petitioner were promoted on 22.5.1995, but the petitioner has been promoted only on 17.5.2010. On 31.12.2013 the petitioner retired from the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) but he has not been paid pension for the reason that the petitioner has not completed ten years of service. When no order has been passed, the petitioner has filed the present writ petition.

20. Facts of Writ Petition No.4918 (SS) of 2012 (Kashi Ram Shukla v. The State of U.P. and others) are that the petitioner was appointed on the post of Cooperative Supervisor and while working on the said post, his services were confirmed. On 22.5.1995, respondent no.3 issued an order granting promotion to 101 persons including petitioner on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) and in pursuance thereof, he joined on the said post on 6.6.1995. The U.P. Public Service Commission, Allahabad vide its letter dated 4.7.2003 has given recommendations for regularization of petitioner's promotion on the post of Cooperative Inspector Group-II/ Assistant Development Officer (Cooperative) along with others similarly situated person. Respondent no.3 regularizing 301 persons including the petitioner on 30.9.2003 and the petitioner was regularized against the vacancy of the year 1996-97. On 2.1.2008, respondent no.3 issued an order confirming services of 131 persons including the petitioner on the said post. The petitioner while working on the said post retired on attaining the age of superannuation on 31.10.2011 and as such,

pension papers of petitioner were processed and were sent to respondent no.6 for release of government pension and gratuity to petitioner. Respondent no.7 on 26.12.2011 issued a letter to respondent no.5 raising certain objections to which respondent no.2 sent a letter on 22.2.2012 giving explanation to the objections. The matter was referred to respondent no.3 on 25.6.2012. The petitioner made representation before respondent no.4 on 14.8.2012 and 2.7.2012 and 17.8.2012 and when no order was passed, the petitioner has filed the present writ petition.

21. Facts of Writ Petition No.1021 (SS) of 2007 (Dev Narian Shukla v. Sultanpur District Cooperative Bank Limited, Sultanpur and others) are that the petitioner was appointed on the post of Cooperative Supervisor. An FIR was lodged against the petitioner under Section 409/468 IPC. On 23.9.1970, the petitioner was placed under suspension. In the criminal case, the petitioner was not found guilty of any offence and final report was submitted in his favour exonerating him from the allegations levelled against him in FIR. Thereafter, the petitioner filed writ petition which was numbered as Writ Petition No.8533 (SS) of 1989 challenging suspension order dated 23.9.1970 with further prayer to reinstate in service with all consequential benefits wherein this Court was pleased to pass an interim order to the effect that suspension order shall remain suspended. In compliance of the order, the petitioner was allowed to resume the duties. Thereafter, this Court was further pleased to pass an interim order directing to respondents that from the date of the reinstatement the petitioner shall be paid salary admissible to him under Rules. On 30.6.1998 the petitioner retired from services on attaining the age of superannuation. The writ petition was disposed of finally with a direction to respondent no.1 to take a decision regarding payment of arrears of petitioner within three months from the date of production of a certified copy of this order and the same be communicated to him. Thereafter, the petitioner made representation on 10.2.2014 communicating copy of the aforesaid judgment and order and in continuation of the same the petitioner made several representations for compliance of the judgment. Under compelling circumstances, the petitioner filed Criminal Misc. Case No.1230(C) of 2004 and during pendency of the contempt case, all the retiral dues were paid to him. Thereafter, the petitioner demanded interest on the retiral dues withheld by the respondents. This Court was pleased to dismiss the contempt petition giving liberty to the petitioner to seek appropriate remedy before appropriate Forum. Hence this writ petition.

22. Facts of Writ Petition No.3753 (SS) of 2007 (Dev Narain Shukla v. State of U.P. and others) are that the petitioner was appointed on the post of Cooperative Supervisor. An FIR was levelled against the petitioner under Sections 409/468 IPC. The petitioner was placed under suspension however no departmental enquiry was conducted. The petitioner was exonerated from the charges/ allegations levelled against him. The petitioner filed Writ Petition No.8533 (SS) of 1989 challenging suspension order claiming reinstatement wherein an interim was passed suspending the suspension order. In pursuance thereof, the he was allowed to resume the duties but was not paid salary. This Court vide order

dated 10.12.1990 was pleased to pass further interim order for making payment of salary to the petitioner admissible to him. However, the said interim order was not complied with, the petitioner filed Criminal Misc. Case No.1916 (C) of 1993. During pendency of the petition, the petitioner retired from services on attaining the age of superannuation on 30.6.1998. The writ petition was finally disposed of with a direction for taking deciding regarding payment of arrears of petitioner keeping in view of fact that the petitioner has already retired during the pendency of the case. When order was not complied with, the petitioner filed Criminal Misc. Case No.1230 (C) of 2004 and during pendency of the contempt petition, all retiral dues of the petitioner was paid to the petitioner. Accordingly, contempt petition was dismissed with liberty to seek appropriate remedy before appropriate Forum with the observation that if the petitioner is not satisfied with the determination of the amount admissible to the petitioner, he may seek his remedy in appropriate Forum. Thereafter, the petitioner filed Writ Petition No.1021 (SS) of 2007 challenging order dated 5.4.2005 so far as it has rejected the claim of petitioner remaining dues wherein this Court was pleased to grant time to respondents to file counter affidavit and the same is pending. The petitioner made representations before respondent no.2 claiming notional promotion on 14.2.2007 and 19.3.2007 and when no order was passed the petitioner has filed the present writ petition.

23. Facts of Writ Petition No.7769 (SS) of 2013 (Brahma Swaroop Saraswat v. State of U.P. and others) are that the petitioner has been appointed on the post of Cooperative Supervisor and services of the petitioner has been confirmed on 30.11.1987. On 17.5.2010, the petitioner has been promoted on the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative). Although juniors to petitioner were promoted on 22.5.1995 but the petitioner has been promoted only on 17.5.2010. On 26.6.1995 and 10.8.2013 the petitioner has sent representation to respondents requesting them to promote the petitioner w.e.f. 22.5.1995 i.e. when his juniors have been given promotion and pay all consequential benefits but the same is of no avail. On 30.09.2013 the petitioner has retired from the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative) but petitioner will not get pension for the reason that the petitioner has not completed ten years' service. When no order has been passed on the representations, he has filed the present writ petition.

24. Facts of Writ Petition No.5553 (SS) of 2012 (Chandra Prakash Pal v. State of U.P. and others) are that the petitioner has been appointed on the post of Cooperative Supervisor on 12.4.1977 and services of the petitioner has been confirmed. On 22.5.1995 several juniors to petitioner were promoted on the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative). On 30.9.2003 the petitioner has been promoted on the post Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative). Although juniors to petitioners were promoted on 22.5.1995, but the petitioner has been promoted only on 30.9.2003. On 30.4.2008 the petitioner retired while working on the said post on attaining the age of superannuation. When no order has been for notional promotion and pension, the petitioner has filed the present writ petition.

25. Facts of Writ Petition No.2257 (SS) of 2010 (Rajendra Singh v. State of U.P. and others) are that the petitioner has been appointed on the post of Supervisor, Faizabad on 16.11.1977 and services of the petitioner have been confirmed on 17.2.1987. On 22.5.1995 several juniors to petitioner were promoted on the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative). On 30.9.2003 the petitioner has been promoted on the post Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative). Although juniors to petitioners were promoted on 22.5.1995, but the petitioner has been promoted only on 30.9.2003. On 31.3.2010 the petitioner retired while working on the said post on attaining the age of superannuation. When no order has been for notional promotion and pension, the petitioner has filed the present writ petition.

26. Facts of Writ Petition No.8633 (SS) of 2010 (Ram Kishor Lal Srivastava v. State of U.P. and others) are that the petitioner was appointed on the post of Cooperative Supervisor on 4.4.1957. Thereafter, the petitioner was confirmed on the said post. On 7.4.1978, 22.7.1978 and 17.9.1978 large number of juniors to petitioner were promoted, but the petitioner was not promoted and ultimately, he was promoted on the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative) vide promotion order dated May 8, 1985. Although juniors to petitioners were promoted in the year 1978, but the petitioner has been promoted only in the year 1985 due to this reason, he has not been granted pension. On 31.1.1990 the petitioner retired while working on the said post on attaining the age of superannuation. When no order has been for notional promotion and pension, the petitioner has filed the present writ petition.

27. Facts of Writ Petition No.7208 (SS) of 2013 (Shiv Ram Verma v. State of U.P. and others) are that the petitioner was appointed in February, 1958 as Cooperative Supervisor and while working on the said post he was initially posted as Seed Store Incharge, Kotra in District Lakhimpur Kheri. The petitioner was transferred from District Lakhimpur Kheri to District lucknow in the year 1966. While working on the post of Cooperative Supervisor, services of the petitioner were confirmed on 30.4.1972. He was transferred to District Hardoi where he worked as Seed Store Incharge Thamarwa upto 23.2.1981. The petitioner was granted promotion to the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative) on officiating/ temporary basis on 7.4.1981. He joined his service on the said post on 24.2.1981. Vide order dated 20.6.1984 passed by respondent no.3, petitioner was reverting to the post of Cooperative Supervisor against which petitioner filed Writ Petition No.3592 of 1984 which was dismissed vide judgment and order dated 10.8.1984. The petitioner filed Special Leave Petition before Hon'ble the Supreme Court against the judgment and order dated 10.8.1984 which was registered and numbered as Special Leave Petition (Civil) No.10777 of 1984.

Respondent no.3 issued an order on 9.5.1985 granting promotion to 278 persons ignoring petitioner's case for promotion due to pendency of S.L.P. filed before Hon'ble Apex Court. The petitioner withdrew SLP in order to pursue his case before respondent no.3. The petitioner made representations to respondent no.3 for

the grant of promotion on 15.10.1985 and 12.11.1984. On 18.4.1988, a complaint was made against the petitioner in respect of non-submission of certain charge of the Seed Store Thamarwa where the petitioner was posted from 17.8.1976 to 3.2.1981. Show cause notice dated 25.5.1988 was issued to petitioner for submitting explanation.

Thereafter, the petitioner was placed under suspension vide order dated 26.2.1990 and a disciplinary proceeding was initiated against him vide charge sheet dated 8.1.1991. Feeling aggrieved, the petitioner filed Writ Petition No.4542 of 1990 which was disposed of by means of judgment and order dated 17.9.1991 with direction to conclude the departmental inquiry within the stipulated time. On 31.7.1991 the petitioner on attaining the age of superannuation retired from service. Respondent no.4 passed an order awarding punishment to petitioner in relation to the departmental inquiry whereby the salary for the period of suspension was withheld and an order of recovery from the petitioner of amounting to Rs.21858.69 along with the interest was also passed. Feeling aggrieved, departmental appeal was filed which was rejected on 8.8.1994. Feeling aggrieved, the petitioner Writ Petition No.5665 (SS) of 1994 challenging orders dated 11.2.1994 and 8.8.1994, which was allowed by means of judgment and order dated 23.4.2013 whereby punishment order and appellate Order were quashed with observation that the petitioner is held entitled to all consequential benefits.

The petitioner communicated the said judgment and order to respondents vide application dated 13.5.2013 whereupon respondent no.6 issued order dated 27.5.2013 issuing direction for disposal of the dues of petitioner in compliance of the aforesaid judgment and order dated 27.5.2013. The petitioner made representations dated 5.6.2013 claiming notional pr3omotion to the post in question w.e.f. 7.4.1978 as well as pensionary benefits as par with the junior and similarly situated persons which has been rejected vide order dated 27.6.2013. Feeling aggrieved, the petitioner has filed the present writ petition.

28. Facts of Writ Petition No.2771 (SS) of 2013 (Mahendra Pal v. State of U.P. and others) are that the petitioner initially joined services as Kamdar in September, 1981. The petitioner was appointed on the post of Cooperative Supervisor on 7.8.1996. On 17.5.2010, respondent no.3 issued order granting promotion to the petitioner to the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative) and in pursuance thereof, he submitted joining report and was allowed to work on the said post. On 31.10.2012, the petitioner on attaining the age of superannuation was retired from service while working on the said post. However, the services rendered by the petitioner on the post of Cooperative Supervisor has not been counted in addition to the services rendered by him on the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative) as the services rendered by him on the post of Cooperative Supervisor are being treated as non-government services in view of regulation 2(17) of the Regulations, 1976 as well as rule 3(d) of the Service Rules, 1979 as a result of which the petitioner has not been treated to be qualified for government pension in as much as after exclusion of the services rendered by the petitioner on the post of Cooperative Supervisor, the total length of

the petitioner's service comes less than 10 years. Challenging the said validity of the provisions of Regulations, the present writ petition has been filed.

29. Facts of Writ Petition No.6913 (SS) of 2004 (UdaiRaj Dewedi v. State of U.P. and others) are that the petitioner joined on the post of Cooperative Supervisor. The petitioner was granted promoition on the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative). The petitioner on attaining the age of superannuation retired from service while working on the said post on 31.5.1997. When the petitioner has not been granted notional promotion and pensionary benefits, he has filed present writ petition.

30. Facts of Writ Petition No.7232 (SS) of 2010 (Aditya Kumar Tripathi v. State of U.P. and others) are that the petitioner was initially appointed on the post of Cooperative Supervisor on 11.5.1972 and thereafter services of the petitioner was confirmed. Respondent no.3 passed an order on 30.9.2003 whereby similarly situated and juniors to petitioner was promoted on the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative). Thereafter, respondent no.3 passed an order on 29.7.2008 in compliance of the judgment and order dated 3.3.2008 in Writ Petition No.1149 (SS) of 2008 granting promotion of juniors to the petitioner on the post of Cooperative Inspector Grade-II and their services on the post in question were reckoned w.e.f. 18.4.1990 and on that score his services became more than ten years and as such they were granted pensionary benefits. Similar benefit was allowed to similarly situated persons and junior to the petitioners. In this regard, the petitioner made representation for the grant of similar relief on 27.10.2009 and when no order has been passed, the petitioner has filed the present writ petition.

31. Facts of Writ Petition No.2949 (SS) of 2010 (Gyanendra Dutt Shukla v. State of U.P. and others) are that the petitioner was initially appointed on the post of Cooperative Supervisor on 15.11.1972. He was absorbed under respondent no.5 on 1.1.1977. Respondent no.2 issued an order on 30.9.2003 granting promotion to the petitioner to the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative). On 8.10.2003 the petitioner was allowed to join on the said post. On 30.11.2008, the petitioner was retired on attaining the age of superannuation while working on the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative). Thereafter, the petitioner filed Writ Petition No.2125 (SS) of 2009 wherein the Court has passed an order on 10.4.2009 directing the respondents for grant of the benefit of notional promotion w.e.f. the date of promotion of junior person i.e. 18.4.1990 to the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative) and to fix his pension w.e.f. 18.4.1990.

Respondent no.2 passed an order on 13.7.2009 in compliance of the aforesaid judgement and order dated 10.4.2009 granting notional promotion to the petitioner w.e.f. 18.4.1990 and his pension was fixed accordingly as per direction of this Court. Feeling Aggrieve Special Appeal No.746 of 2009 was filed wherein the Division Bench of this Court decided the special appeal refusing to grant

any interim relief vide order dated 30.10.2009. The petitioner was paid the amount payable to him in lieu of pension and gratuity admissible for the post of Cooperative Inspector Grade-II i.e. 2,72,000/- and thereafter he is receiving pension month to month without any interruption. However, the amount payable to the petitioner has not been paid to him despite the fact that the same has been sanctioned by the competent authority. Respondent no.3 issued a letter dated 5.4.2010 to respondent no.5 giving information to the effect that the salary bill relating to the period of 16 months when the petitioner was posted as Cooperative Supervisor under respondent no.6 amounting to Rs.89299/- has been prepared and sanctioned in accordance with circular of respondent no.5 being letter no.19 C. Pradhi. Vyo dated 21.5.2009 but due to non-availablity of fund in the salary contribution account no.1186 of the district and as such by means of the aforesaid letter the required action was requested to be taken further. When no action has been taken, the petitioner has filed the present writ petition.

32. Facts of Writ Petition No.3174 (SS) of 2011 (Raghuraj Singh v. State of U.P. and others) are that the petitioner was initially appointed on the post of Cooperative Supervisor on 27.6.1978. He was granted promotion to the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative) vide order dated 17.5.2010 and in pursuance thereof, he submitted his joining report on 28.5.2010 and was allowed to work on the promoted post. On 31.7.2010, the petitioner retired from service on attaining the age of superannuation while working on the post of Cooperative Inspector Grade-II/Assistant Development Officer (Cooperative). However, since the respondents are not counting the services rendered by the petitioner on the post of Cooperative Supervisor in his total length of service, the petitioner has been said to be disqualified for pensionary benefits under Government Order dated 1.7.1989 inasmuch as on the post of Cooperative Supervisor, the length of petitioner's services on the post of Cooperative Inspector Grade-II are below ten years. Respondent no.3 issued an order on 9.8.2010 granting notional promotion to the similarly situated persons namely Sri Sadho Ram Gangwar to the post in question w.e.f. the date of promotion of junior person i.e. 18.4.1990 in compliance of the judgment and order dated 15.3.2010 passed by this Court in Writ Petition No.1409 (SS) of 2010 and on that basis Sri Sadho Ram Gangwar was granted pensionary benefits. He made representation on 6.9.2010 claiming benefits granted to similarly situated person and when no order has been passed the petitioner has filed the present writ petition.

33. Facts of Writ Petition No.6549 (SS) of 2011 (Mathura Prasad Verma v. State of U.P. and others) are that the petitioner joined on the post of Cooperative Supervisor on 1.12.1954. On 18.12.1967, the petitioner was promoted on the post of Cooperative Inspector Grade-I and he joined on the said post. The petitioner was reverted to the post of Cooperative Supervisor. On 1.10.1969 the petitioner again promoted to the post of Cooperative Inspector, Grade-II and as such, he took over the charge of the same post. The respondents illegally not treated the periods of petitioner's services of the post of Cooperative Supervisor from 1.12.1954 to 17.12.1961 and from 1.1.1968 to 30.9.1969 for pensionary purpose. Vide order dated 12.8.2002, similarly situated person namely

Sri Hardeo Prasad Yadav was given notional promotion on the post of Cooperative Inspector, Grade-II only to make his period of services of the post of Cooperative Supervisor entitled for pensionary benefits. The petitioner submitted representations/ reminders but no order has been passed on it. When no action has been taken, the petitioner has filed the present writ petition.

34. Facts of Writ Petition No.4397 (SS) of 2011 (Sanktha Prasad Awasthi v. State of U.P. and others) are that the petitioner was initially appointed on the post of Cooperative Supervisor. On 30.9.2003, respondent no.2 issued order granting promotion to the post of Cooperative Inspector Grade-II to the petitioner and in pursuance thereof, he submitted his joining report on the post and was allowed to work. On 31.7.2006, the petitioner while working on the post of Cooperative Inspector Grade-II on attaining the age of superannuation retired. Respondent no.2 issued order on 30.11.2006 making pay fixation of petitioner in furtherance of promotion order dated 30.9.2003 thereby fixing the petitioner's salary on 9.10.2003 in the pay scale of Rs.4500-7000 with the direction for recovery of the excess amount already paid to the petitioner inasmuch as the petitioner was paid salary in higher scale i.e. Rs.5000-8000 on the basis of LPC dated 1.10.2003 keeping in view that the petitioner while working on the post of Cooperative Education Instructor on ad hoc basis was drawing the same prior to the date of his promotion. Respondent no. 2 passed an order on 28.12.2007 granting notional promotion to the post of Cooperative Inspector Grade-II to the petitioner w.e.f. the date of promotion of junior persons i.e. 15.2.1995 with the condition that the petitioner would not be paid any arrears of salary as a result of notional promotion. Respondent no.2 issued a corrigendum letter on 6.6.2008 making amendment in the order dated 28.12.2007 to the effect that the part of the order which states that the petitioner would not be paid any arrears of salary as a result of notional promotion is amended to the extent that the petitioner would not be paid arrears of any salary/ allowances etc. for the period between the date of notional promotion i.e. 15.2.1995 to the date of actual promotion i.e. 9.10.2003. However, the petitioner's salary arising out of the grant of notional promotion vide order dated 28.12.2007 was not fixed consequently withholding the payment of pension and gratuity payable to the petitioner despite the repeated representations made by him and as such the petitioner filed Writ Petition No.7919 (SS) of 2010 which was disposed of with as direction for disposal of the petitioner's representation dated 29.9.2008. Respondent no.2 issued an order on 3.2.2011 disposing of petitioner's representation in compliance of judgment and order dated 20.11.2000 after making fixation of the petitioner's salary by means of order dated 25.1.2011.

Respondent no.3 issued a letter on 31.5.2011 to respondent no.4 for passing order of recovery of alleged excess amount already paid to the petitioner i.e. Rs.17845.00 under the head of salary and Rs.86284.00 under the head of the dearness allowance total Rs.98129.00 against the petitioner in compliance of pay fixation orders dated 30.11.2006 and 25.1.2011. Respondent no.4 issued letter on 24.6.2011 forwarding the matter of release of pensionary benefits of the petitioner to

respondent no.5 with the direction for recovery of the amount in q.uestion from the petitioner. Hence this writ petition.

35. Facts of Writ Petition No.3106 (SS) of 2011 (Prem Shankar Trivedi v. State of U.P. and others) are that the petitioner was absorbed under respondent no.4 on the post of Cooperative Supervisor whose date of initial appointment was 23.12.1970 and his services were made confirmed on the said post. Respondent no.3 passed an order on 15.2.1995 granting promotion to petitioner to the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative) and in pursuance thereof, he joined the said post and was allowed to continue as such. On 31.10.2005, petitioner on attaining the age of superannuation while working on the said post retired, but opposite parties have not fixed the pension of petitioner w.e.f. 2.3.1995 thereby reckoning the length of petitioner's services on the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative) are 10 years 7 months and 29 days only. Similarly situated person namely Sri Shyam Manohar Lal Srivastava filed a writ petition which was number as Writ Petition No.4527 (SS) of 2009 and the same was disposed of with direction to grant notional promotion to the post of Cooperative Inspector Grade-II/ Assistant Development Officer (Cooperative) with effect from the date of promotion of junior person with the direction to fix his pension w.e.f. 18.4.1990 which was complied with vide order dated 11.3.2010 passed by respondent no.3. The petitioner made representation before respondents claiming the benefits granted to the similarly situated person namely Sri Shyam Manohar Lal Srivastava and when no order has been passed, the petitioner has filed the present writ petition.

36. Facts of Writ Petition No.3013 (SS) of 2015 (Ramesh Chandra Srivastava & Another v. State of U.P. and others) are that the petitioners had been appointed on the post of Cooperative Supervisor through selection from U.P. Cooperative Institutional Service Board constitued under Section 122 of the U.P. Cooperative Societies Act, 1965. They had been appointed under the supervision of Provincial Cooperative Union (PCU), Lucknow. They joined on the post of Cooperative Supervisor in the office of District Assistant Registrar Cooperative, District Sitapur. In the year 1978, the Provincial Cooperative Union (PCU), Lucknow issued a seniority/merit/ gradation list of Cooperative Supervisors appointed through U.P. Cooperative Institutional Service Board. Persual of the aforesaid seniority/merit/gradation list shows that the name of the petitioner no.1 finds place at serial no.361 having gradation no.349/842 and the name of the petitioner no.2 finds place at serial no.415 having gradation no.433/842. The State Government has issued a Government Order has issued a Government Order on 8.6.2000 issuing directions for considering the claim of notional promotion of similarly situated persons that of Sri Shyam Bihari Lal Srivastava and others. Subsequently, another Government Order was issued on 14.2.2002 directing the respondents to consider the similar cases of notional promotion on the basis of merit of the case. On 3.3.2010, again a new seniority/ gradation list of Cooperative Supervisors have been issued in which the name of petitioner no.1 finds place at serial no.87 having new gradation number 87 and the name of petitioner no.2 finds place at serial no.118 having new gradation number as 118. Next promotional post from the post of Cooperative Supervisor is the post

of Cooperative Supervisor is the post of Cooperative Inspector, Group-II/ Assistant Development Officer (Cooperative) under the Subordinate Cooperative ServiceRules, 1979 and the criteria for promotion to the said post is seniority subject to the rejection of unfit in accordance with seniority list of Cooperative Supervisors on State-wise basis. On 16.11.2012, petitioners were promoted to the post of Cooperative Inspector, Group-II/ Assistant Development Officer (Cooperative) under the 'Service Rules of 1979'. Perusal of the aforesaid promotion order dated 16.11.2012 reveals that the name of the petitioner no.1 finds plae at serial no.2 and the name of petitioner no.2 finds place at serial no.5. In pursuance to the aforesaid order, petitioners joined on the post Cooperative Inspector, Group-II/ Assistant Development Officer (Cooperative) on 17.11.2012.

On attaining the age of supperannuation petitioner no.1 retired on 30.11.2014 while being posted at District-Rampur from the post of Cooperative Inspector, Group-II/ Assistant Development Officer (Cooperative) and petitioner no.2 retired on 31.7.2014 from the post of Cooperative Inspector, Group-II/ Assistant Development Officer (Cooperative). The respondents are not counting the services rendered by the petitioners on the post of Cooperative Supervisors w.e.f. 17.7.1978 for the purpose of pensionary benefits and since the length of petitioners' services on the post of Cooperative Inspector, Group-II/ Assistant Development Officer (Cooperative) are below ten years and therefore the petitioners are not being treated to be eligible for getting pension.

Four persons who have been appointed on the post of Cooperative Supervisors in the year 1978 along with the petitioners through the same recruitment process and junior to petitioners have been promoted on the post of Cooperative Inspector, Group-II/ Assistant Development Officer (Cooperative) in the year 1989, 1994 etc. The said junior persons have worked for more than 20 years on the promoted post of Cooperative Inspector, Group-II/ Assistant Development Officer (Cooperative). Similarly various writ petitions have been filed before this Court for grant of notional promotion in the matter of Cooperative Supervisors and this Court has granted notional promotion to writ petitioners where persons junior to them have been promoted before the promotion of writ petitioners. In this regard, the petitoners representated before respodent no.3 vide representations dated 15.3.2015 and 16.3.2015 respectively for the grant of notional promotion with effect the date of persons junior to the petitoners have been promoted. By means of the impugned orders the respondent no.3 have rejected representations of petitioners on the ground that the juniors who are alleged by the petitioners to be promoted before the promotion of the petitioners, had been promoted by the respondents only for ad hoc period of 90 days on the basis of regional arrangement and the case of petitioners cannot be equated with them.

37. Facts of Writ Petition No.7561 (SS) of 2014 are that the petitioner was initially appointed on the post of Co-operative Supervisor by a duly selected committee on 24.7.1978. The State Government issued government order to appoint the Supervisors working in Cooperative Department on the post of A.D.O. (Co-operative) and accordingly, the

petitioner was granted promotion on the post of A.D.O. (Co-operative) vide order dated 10.9.1989. He joined the said post on 15.9.1989. By means of an order passed on 25.8.1992, the petitioner was reverted from the post of A.D.O. (Co-operative). Feeling aggieved, he filed Writ-A NO.33432 of 1992, wherein interim order was granted staying the order of reversion passed against the petitioner. In pursuance thereto, he continued to discharge his duties and subsequently, the writ petition was dismissed vide order dated 20.11.2001. The respondents passed an order of regularization on 25.9.2009, regularizing the service of the petitioner w.e.f. 1.8.2006. On attaining the age of superannuation, the petitioner retired from service on 30.10.2012. He filed Writ Petition No.30121 of 2014for the grant of certain retiral benefits, which was finally disposed of with the direction to file a representation and to decide the same. In compliance of the order of this Court, the impugned order was passed on 28.9.2014, whereby recording reason that the petitioner does not have requisite qualifying service for the payment of pension, fixation of pension has been recalled.

38. Submission of learned counsel for the petitioners is that in case juniors to the petitioner have been granted promotion on the post of A.D.O., Cooperative then since the year 1995 onwards the petitioner is also entitled for the grant of notional promotion with effect from date the juniors to the petitioner have been granted promotion. He next submits that the similar controversy like the present one came into consideration before this Court in Writ Petition No.1771 (SS) of 1996 (Somesh Chandra Pandey v. State of U.P. and others) decided vide judgment and order dated 27.4.2007 wherein the claim for the grant of notional promotion was considered and it was directed that the case of the petitioner of that petition be considered with effect from the date juniors have been granted promotion.

39. Next submission is that taking into consideration the judgment passed by this Court, the State Government proceeded to grant notional promotion for calculation of qualifying service for the payment of pension and accordingly, pension was accorded to the petitioner as well as similarly situated employees of the cooperative society who were subsequently appointed in the government service. He further submits that the case of State of U.P. and others v. Rosan Singh and other, State of U.P. v. Rookmangal Rathore were taken into consideration by the learned Single Judge and by distinguishing the issue involved, learned Single Judge allowed the petition and directed for consideration of claim of the petitioner for the grant of notional promotion. He next submits that the judgment of the learned Single Judge was not subject matter of challenge in the Special Appeal as well as before Hon'ble Supreme Court, therefore, the same has attained finality in the eye of law.

40. In support of his submission, learned counsel for the petitioners placed reliance upon judgment and order rendered in the case of State of U.P. and Hari Singh Gupta decided on 26.10.2009, State of U.P. and others v. Durga Prasad and others decided on 6.12.1990 inasmuch as judgment rendered in Writ Petition No. 237(SB) of 2001 (Raj Singh Yadav v. State of U.P.) decided on 20.12.200 and on the said basis, his submission is that taking into consideration the judgments passed by this Court on the issue that whether

Cooperative Supervisors are entitled for the notional promotion, this Court issued direction that in case juniors have been granted promotion, the claim of the petitioner may also be taken care and necessary order shall be passed in this regard.

41. His next submission is that most of the petitions, the employees are very old and in case this Court takes sympathetic view in issuing direction for consideration of their claim for the grant of notional promotion, they may get pension for survival of themselves and their families in the interest of justice.

42. He next submits that the delay occasioned in claiming the notional promotion is for the reason that the orders which were passed in respect of the case of the juniors were not available to the petitioner. When the writ petition has been filed before this Court, then somehow they get the order, therefore, the claim set up before this Court for the grant of notional promotion be granted to the petitioner with effect from the date juniors have been granted promotion.He next submits that in the case of Rosan Singh (supra), there was no claim setup for the grant of notional promotion. By relying on the judgment passed by the learned Single Judge, he submits that the case for consideration was distinguishable and the judgment was passed by separating the issue. For that, on a query made to learned Additional Advocate General on the point, he submitted that the argument advanced by the learned counsel for the petitioner is misplaced. In fact in the writ petition, prayer was made for the grant of notional promotion.

43. He next submits that on the basis of decision of this Court, the State Government resolved to issue government order for consideration of claim of similarly situated other employees of the Cooperative Department seeking claim for the grant of notional promotion and as per the government order, most of the employees were granted notional promotion with effect from the date juniors were granted promotion. In the light of the said government order, his submission is that in case the Court proceeds to consider the claim of the petitioners, this aspect may also be taken into consideration that there are few numbers of petitioners who have been deprived in getting the benefit of notional promotion on the point of delay. In support of his submission on the point of delay, he placed reliance upon the judgment rendered in the case of State v. Hari Singh Gahlaut and submitted that the petitioner has claimed notional promotion after lapse of almost several years, therefore in the light the said judgment they are entitled for the relief claimed in the writ petition.

44. On the other hand, Sri Kuldeep Pati Tripathi, learned Additional Advocate General and learned Additional Chief Standing Counsel submit that submissions advanced by Sri B.K. Singh, learned counsel for the petitioner were considered by the Hon'ble Supreme Court in the case of State of U.P. v. Rajan Singh and others and Hon'ble Supreme Court while dealing with the issue, recorded that unequal cannot be treated equally therefore, the respondents were not holding the post of Cooperative Inspector Grade-II which is a government post. When they retired from service, the High Court was not justified in allowing the writ petition and granting pensionary benefits with effect from 7.4.1978 as has been done in the case of Bengali Prasad (supra). Next submission is

that the issue of delay was also considered by the Hon'ble Supreme Court and it has been held that inordinate delay in claiming the notional promotion cannot be granted at belated stage.

45. Next submission of learned counsel for the respondents is that the judgment of the Hon'ble Supreme Court was considered by the Division Bench of this Court in Special Appeal No.244 of 2002 decided vide judgment and order dated 11.3.2019 wherein ratio of judgment of the Hon'ble Supreme Court was taken into consideration and in the light of the said, special appeal was decided. On the said basis, their submission is that the claim setup by the petitioner is wholly misconceived and in the light of the said judgment, the benefit claimed cannot be granted.

46. Learned counsel for the respondents next submit that there is highly belated claim of notional promotion, hence the same is liable to be rejected on the ground of latches. They lastly submit that the petitioners were granted promotion on the post of A.D.O. Cooperative in the year 2003 and retired from the post on 31.3.2010 and some of the petitioners on different dates, therefore they are not having required qualifying service for the payment of pension, thus he is not entitled for the same.

47. Learned counsel for the respondents next submit that at the very out-set it is relevant to bring into the notice of this Hon'ble Court of the judgment and order dated 22.01.2002 passed in Writ Petition No.491(SS) of 2002. Challenging the judgment and order dated 22.01.2002 a special appeal bearing Special Appeal No.244/ 2002 was filed before this Court and the said special appeal was finally heard on 11.3.2019 and on the said date, the special appeal has been allowed after considering the judgment rendered by Hon'ble Apex Court in Civil Appeal No.7340-7341 of 2003 "State of U.P. & others v. Roshan Singh & others" and the judgment and order dated 22.01.2002 whereby a mandamus was issued by learned Single Judge directing the opposite parties to give notional promotion to the petitioner w.e.f. 7.4.1978 when juniors to petitioner were promoted, has been set aside and the writ petition has been dismissed.

48. Learned counsel for the respondents next submit that the issue involved in the instant bunch of writ petitions is exactly the same like the issue involved in Writ Petition No.491 (SS) of 2002 and in the instant bunch of writ petitions the petitioners are also claiming notional promotion w.e.f. the date of promotion of alleged juniors who were promoted on ad hoc basis under the local stop gap arrangement and as such, the instant bunch of writ petition are liable to be decided in terms of judgment and order dated 11.3.2019 passed in Special Appeal No.244/2002.

49. Learned counsel for the respondents next submit that the petitioners were initially appointed as Cooperative Supervisor which is a non-government post. The persons with whom the parity is being claimed by the petitioners were promoted on ad hoc basis for a period of 89 days under the Government Order dated 10.04.1980 whereunder the Deputy Registrar was given an authority to make ad hoc promotions at the local/ region level from amongst the Cooperative Supervisors posted in the concerned reason. The said

arrangement made under the Government Order dated 10.04.1980 was time/ stop gap arrnagement.

50. Learned counsel for the respondents next submit that the power to make ad hoc promotion by the Deputy Registrar at the division level was taken away by the State Government vide notification dated 08.12.1999. The regular process of promotion to the post of Cooperative Inspector, Grade-II/ ADO (Cooperative) is provided in Subordinate Cooperative Rules, 1979 and the source of recruitment is by direct recruitment through Public Service Commission or by promotion through Commission. Rule 17 of the Rules of 1979 provides that recruitment by promotion shall be made on the basis of seniority subject to rejection of unfit in accordance with the procedure laid down in part-iv of the U.P. Selection in consultation with the public service Commission (procedure Rules 1970).

51. Learned counsel for the respondents next submit that the seniority of Cooperative Supervisors is maintained at the state level and the said seniority is maintained by the Provincial Cooperative Union Limited, Lucknow (PCU).

52. Learned counsel for the respondents next submit that the petitioners in the entire writ petitions have nowhere claimed that they have been superseded in the matter of promotion when the cases were considered for promotion under the provisions of Subordinate Cooperative Service Rules, 1979 rather as soon as the petitioners came within the criteria of promotion as per the seniority list, he has been given promotion on the post of Cooperative Inspector/ ADO (Cooperative).

53. Learned counsel for the respondents next submit that the petitioners were not posted in the division in which the persons with whom the parity is being claimed by the petitioners for notional promotion were posted and the arrangement provided in the notification dated 10.04.1980 was a local stop gap arrangement and under the said notification the Deputy Registrar was authorized to make ad hoc promotion of 89 days only from amongst the Coopertive Supervisors posted in his division only.

54. Learned counsel for the respondents next submit that so far as case of Shyam Manohar Lal Srivastava and the order passed in Writ Petition No.4527 (SS) of 2009 filed by the said Sri Shyam Lal Srivastava is concerned, in that regard it is clarified that in Writ Petition No.4527(SS) of 2009, the claim of Sri Srivastava was with regard to grant of notional promotion w.e.f. 18.04.1990 and in the said writ petition a judgment and order dated 31.07.2009 was passed by this Court and though the judgment and order dated 31.07.2009 was challenged by filing Special Appeal No.26 of 2010 yet since the authorities of the department were under the threat of contempt which was filed by Srivastava, the compliance of the judgment and order dated 31.07.2009 was made subject to the final outcome of the special appeal.

55. Learned counsel for the respondents next submit that so far as the case of Rameshwar Dayal Gangwar is concerned it is clarified that said Sri Gangwar was initially appointed as Cooperative Supervisor in a non-government body and he was given ad hoc promotion for 89 days under the local

arrangement provided under the Government Order dated 10.04.1980 vide order of the Deputy Registrar, Cooperative, Bareilly Division dated 31.01.1989 and thereafter, he was reverted back to his original post of Cooperative Supervisor vide order dated 9.9.1993. Feeling aggrieved, Mr. Gangwar filed a Writ Petition No.39319 of 1993 in which an interim order dated 12.10.1993 was passed staying the order dated 9.9.1993.

Subsequent thereto on coming in the zone of consideration for promotion as per his seniority position under the Rules of 1979, the case of said Sri Gangwar was palced before the D.P.C. held on 31.01.1994 but since the service records of Mr. Gangwar were not complete, his case was not considered and thereafter, in the year 2003, the next D.P.C. was held in which the case of Mr. Gangwar was recommended and accordingly he was promoted w.e.f. 30.09.2003 and thereafter, Mr. Gangwar retired on 31.12.2008. The pending writ petition of Mr. Gangwar bearing no.39319/1993 was allowed by this Hon'ble Court setting aside the order impugned in the writ petition and respondents were further directed to regularize the service of the petitioner w.e.f. the date the juniors have been regularized and to release the emoluments etc. including pensionary benefits and in compliance of the said judgment and order dated 16.02.2012, said Sri Gangwar was given ad hoc promotion w.e.f. 22.5.1995 and regularized w.e.f. 01.07.1996 against the vacancies of year 1996-97.

It is relevant to point out that a writ petition bearing No.53217/2013 was again filed by Mr. Gangwar for providing pensionary benefits counting his services on adhoc basis under the divisional level arrangement w.e.f. the year 1989 but he said that writ petition has been dismissed by this Court vide judgment and order dated 26.11.2018.

56. Learned counsel for the respondents next submit that so far as the parity claimed by the petitioner with Sri Rajendra Prasad Bharti, Radhey Shyam, Banke Lal Mittar, Vinod Kumar Sharma, Iqbal Ali and Uddal Singh is concerned, in that regard it is clarified that the petitioner is not entitled to claim parity with them for the reason that all those persons were given adhoc promotion under the government order dated 10.04.1980 by the Deputy Registrar, Cooperative, Agra Division, Agra and the petitioner was not posted in Agra Division at the relevant point of time.

57. Learned counsel for the respondents next submit that in an identical matter bearing Writ Petition No.68386 of 2015 (Suresh Chandra Upadhya v. State of U.P. and others) it was claimed by the petitioners that he may be given notional promotion with effect from the date persons junior to him were given adhoc promotion under the Government Order dated 10.04.1980 for 89 days by the Deputy Registrar of the Allahabad Division. The learned Single Judge was pleased to allow the writ petition vide judgment and order dated 18.05.2016. The said judgment and order dated 18.05.2016 was challenged by the State Government by filing the Special Appeal No.424 of 2017 and in the said special appeal, the judgment and order passed in writ petition has been set aside the writ petition has been restored to its original matter with further observation that the writ Court shall decide the matter afresh in the light of the Hon'ble Supreme Court in the case of Gulam Rasool Lone v. State of Jammu & Kashmir in which it has been

held that there cannot be any negative equality and no mandamus can be issued by a writ Court asking the State Authority to perpetuate the illegality.

58. Learned counsel for the respondents next submit that in another identical case filed by one Sri Lav Prasad Dwivedi through Writ-A No.33208/ 1990 which was filed by him against the order of reversion to his original post of Cooperative Supervisor from the post of Cooperative Inspector Grade-II on which the adhoc promotion under the local stop gap arrangement was given to him under the Government Order dated 17.12.1990 was passed and in compliance thereof, Sri Dwivedi continued as Cooperative Inspector and ultimately the said writ petition has been dismissed by this Court at Allahabad vide its judgment and order dated 07.02.2012. Against the judgment and order dated 07.02.2012 a special appeal bearing Special Appeal No.401/ 2012 was filed by Mr. Dwivedi which was allowed setting aside the order dated 7.2.2012 remanding the matter back to the learned Single Judge to decide the writ petition afresh and thereafter, the said writ petition was allowed by learned Single Judge vide judgment and order dated 27.04.2015. The judgment and order dated 27.04.2015 was challenged by the State Government by filing of the Special Appeal No.713/2015 and the said special appeal has been allowed by this Court vide judgment and order dated 28.10.2015 and the matter was again remitted back to the learned Single Judge for disposal of the writ petition afresh.

59. Learned counsel for the respondents next submit that it is relevant to put on record that in pursuance of the judgment and order dated 28.10.2015 passed in Special Appeal No.713/2015, the writ petition has again been allowed by the learned Single Judge vide judgment and order dated 10.04.2020 and challenging the said judgment and order dated 10.04.2020, a special appeal bearing Special Appeal No.1021/2020 has been filed by the State Government in which the Hon'ble Appellate Court has been pleased to stay the directions given under the order impugned in the special appeal dated 10.04.2020 and accordingly, the claim of the petitioner for notional promotion is liable to be rejected at the threshold.

60. Learned counsel for the respondents next submit that in view of the provisions contained in Article 361 of the Civil Service Regulations, the Government Order dated 01.07.1989, the letter of the State Government dated 29.09.2014 and the orders passed by this Court on 26.11.2018, 22.08.2017 and 20.08.2019 as mentioned hereinabove, the services rendered in the adhoc capacity under the local stop gap arrnagement are not liable to be counted for pensionary purposes and accordingly the pension of the petitioner cannot be revised counting those services as claimed by him in the instant writ petition. In this regard, the recently issued ordinance of the State Government dated 21.10.2020 is also to be considered by this Court.

61. Learned counsel for the respondents next submit that there cannot be any negative parity and as per the settled proposition of law as observed by this Court in its judgment and order dated 22.08.2017 passed in Special Appeal No.424/ 2017 relying on the judgment of the Hon'ble Apex Court in the case of Gulam Rasool Lone v. State of Jammu &

Kashmir reported in JT 2009 (13) SC 422 no mandamus can be issued by a writ Court asking the State Authorities to perpetuate the illegality.

62. Learned counsel for the respondents next submit that the petitioner has filed this writ petition claiming notional promotion on the basis of adhoc promotion of his alleged juniors after the retirement and no writ petition was filed by the petitioner during his service period and as such the instant writ petition is highly barred by laches as the notional promotion as being claimed w.e.f. 18.4.1990 and the petition has been filed in the year 2011 and there is no averment in the writ petition that the petitioner was not aware of the promotion of his alleged juniors. The petitioner has been a fence sitter for a period of more than 20 years and accordingly he is not entitled to any relief from this Court in view of catena of decisions of the Hon'ble Apex Court that the persons who are not vigilent about their rights are not entitled to a benefit which has been given to a person who was vigilant towards his rights and accordingly the writ petition is liable to be rejected on the ground of delay and latches itself.

63. Learned counsel for the respondents next submit that as per the case of the petitioner himself he was given promotion w.e.f. 01.07.1995 vide order dated 30.09.2003 and accordingly, the petitioner came to know that he has been given promotion w.e.f. 1.7.1995 itself though by an order dated 30.09.2003 and in case the petitioner had a grievance regarding the promotion with the retrospective date he should have approached this Court in the year 2003 itself or within two or three years thereafter, but the petitioner has approached this Court an inordinate delay of about 8 years that too without any plausible explaination regarding the delay in filing the writ petition.

64. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

65. To resolve the controversy in regard to claim set up by learned counsel for the petitioners in bunch of writ petitions, it will be necessary to have the benefit of relevant sets of Acts and rules governing the subject. In this connection, the U.P. Cooperative Federal Authority (Business) Regulations, 1976 (in short 'the Regulations') would be relevant. In the said Regulations, the post of Cooperative Supervisor has been brought under the Authority of Cooperative Federation. According to Regulation 17 the "members of the employees" mean such persons who are working as the Cooperative Supervisor or worker working under the control of the Authority, irrespective of the fact that he draws wages from the Authority or any other source whose appointing authority will be the Administrative Committee will be deemed to be the employees of the authority.

66. Regulation 72 in Chapter 5 of the Regulations deals with the prvident fund. Clauses 1,2 and 3 of Regulation 72 red as under:

"72(1) The Authority in respect of the members of the employees will establish a contributory provident fund account in which all the necessary provisions of the Uttar Pradesh Cooperative Federation Contributory Provident Fund Regulations with necessary changes will be applicable in accordance with the

provisions of Rules 201 to 204 of the Regulations in which in place of direction of any Cooperative Committee the cross reference of the Authority will be kept.

(2) The member of the employees will maske his contribution in accordance with the provisions of Rule 202 of the Regulations in the above fund.

(3) The Authority will invest the amount of the said fund in accordance with Rule 204 of the Regulations and will get the interest accrued thereon under the provision of Rule 302 of the Regulations."

67. Regulation 73 deals with gratuity. Regulation 74 deals with surety and Regulation 75 deals with honorarium, commission and reward. There is no provision in the Regulations providing pension or pensionary benefits to its employee.

68. Subordinate Cooperative Service Rules, 1979 (in short 'the Rules') regulating recritment and conditions of service of persons appointed to cooperative service were framed in exercise of powers conferred by the proviso to Article 309 of the Constitution of India.

69 . As per Rule 4(d) of the Rules "Cooperative Supervisor" means the Supervisor under the employment of Cooperative Institutions.

70. As per Rule 4(p) "village-level workers" means the Group III workers under the employment of the Community Development Department in the State of Uttar Pradesh.

71. Contention of learned counsel for the petitioners is that once the Subordinate Cooperative Service Rules, 1979 have been framed by the Governor in exercise of the power under proviso to Article 309 of the Constitution, the Cooperative Supervisor shall be deemed to be a government servant. The definition of Rules 4(d) and 4(p) clearly indicates the intendment of the legislature. Definition in Rule 4(d) is the clear intendment of the legislature that the Cooperative Supervisor shall be under the employment of the cooperative institutions; whereas in Rule 4(p) village-level workers have been brought under the employment of the Community Development Department in the State of Uttar Pradesh. Therefore, wherever the legislature intended to do so, they have done it expressly. In the case of Cooperative Supervisor the legislature intended that the Supervisor is under the employment of the cooperative institutions and the intendment of the legislature is clearly expressed in Rule 4(d) of the Rules. Therefore, this Court is of the opinion that the post of Cooperative Supervisor was completely kept out of the purview of the government department, thus the submission of learned counsel for the petitioners has no substance.

72. Part III of the Rules deals that the recruitment to the post of Group II is from two source s; by direct recruitment through the Commission and by promotion through the Commission. It reads as under:

"Inspector Group II

(a) by direct recruitment through the Commission;

(b) by promotion through the Commission from amongst permanent Inspectors. Group III and such permanent Cooperative Supervisors and village-level workers who have passed Intermediate Examination of the Board of High School and Intermediate Education or an examination declared by the Governor as equivalent thereto or who are covered by GO No.3084/XXXV-A-129-NES-58 dated 14-6-1961/ 15-6-1961.

The above provisions also clarified the intendment of the legislature that they can come to the government service only through the procedure established by the Rules and Regulations, as government servants. In other words, they are recruited according to the procedure provided in (a) and (b) of Part III of the Rules. We have already noticed that in the Cooperative Regulations there is no provision for pensionary benefits. It has also been noticed that Cooperative Supervisors were under the control of the Cooperative Federation Authority.

73. In the opinion of this Court, the period served as Cooperative Supervisor is not liable to be added for reckoning the pensionary benefit of retired Cooperative Inspectors, Grade-II.

74. It is admitted case of the petitioners that the petitioners have approached this Court after the retirement from service claiming benefit of grant of notional promotion with effect from the date their juniors have been provided benefit for reckoning the qualifying service for the grant of pension.

75. The controversy involved in the present bunch of writ petitions was duly considered by the Hon'ble Supreme Court in **Civil Appeal No.7340-7341 of 2003, State of U.P. and others v. Roshan Singh and others**, wherein the Hon'ble Supreme Court passed the following order:

"All these appeals, arise out of the similar facts, are being disposed of by this common order. For the sake of brevity, we take facts from C.A. Nos.7340-7341/2003. Briefly stated the facts are as follows:

The respondents Roshan Singh and three others were working as Co-operative Supervisors under the Co-operative Department. According to the relevant Rules the post of Co-operative Supervisor is a non-Governmental post. They retired from service on 31.5.1996, 31.1.1996, 31.1.1997 and 31.1.1996 respectively. They filed Writ Petition No.3947 (SS) of 1997 seeking promotion to the post of Co-operative Inspector, Group-II (Governmental post) with effect from 7.4.1978 on the ground that on the same date the persons who were juniors to them had been promoted. Learned Single Judge allowed the writ petition by an order dated 24.8.2000 following the decision rendered in Bengali Prasad Sharma's case decided on 3.5.1995 in Writ Petition No.13240 (SS) of 1990. In Bengali Prasad's case he had filed Writ Petition No.13240 (SS) of 1990 while he was in service. It is also not disputed fact that Bengali Prasad was holding the post of Co-operative Inspector, Group-II which is a Governmental post while he filed the writ petition. In that view of the matter the High Court by its order dated 3.5.1995 allowed the writ petition filed by Bengali Prasad directing that he should be given notional promotion with effect from 7.4.1978 and he would be entitled pensionary benefits from 7.4.1978. Learned single Judge has committed a

grave error in law by equating the case of the respondents Roshan Singh and three others with the case of Bengali Prasad. It is now well settled principle of law that unequal cannot be treated equally. As already stated, the respondents Roshan Singh and three others were not holding the post of Co-operative Inspector, Group-II which is a Governmental post when they retired from services, therefore, the High Court was not justified in allowing writ petition and granting the pensionary benefits with effect from 7.4.1978 as has been done in Bengali Prasad's case.

Secondly, the respondents filed the writ petition in July, 1997 after they had retired from services. Even from this Count they could not have been granted any relief sought for in the writ petition. The Division Bench of the High Court also committed a grave error of law and facts by confirming the judgment of the learned single Judge, without assigning any reason. Civil Appeal Nos.7340-7341 and 7315-7316 of 2003. In the result these appeals deserve to be allowed and are accordingly allowed and the orders of the learned Single Judge and the Division Bench of the High Court are quashed and set aside.

These appeals are allowed and the writ petition filed by the respondents stands dismissed. However, the parties are asked to bear their own costs. Civil Appeal Nos.7317 and 7319 of 2003. Consequently, these appeals filed by the respondents are dismissed with no order as to costs."

76. The Division Bench of this Court also considered the issue in regard to grant of notional promotion to the Cooperative Supervisor from the date their juniors were granted notional promotion by quoting the relevant portion of the judgment, has recorded as under:

"In the light of the judgment referred above, the instant appeal is allowed. The judgment dated 22nd January, 2002 passed by learned Single Bench is set aside. The writ petition is also dismissed."

77. Although the petitioners have retired from the post of Cooperative Inspector, Grade-II, but they have approached this Court for granting the benefits of judgments rendered in Writ Petition No.13240 (SS) of 1980 titled 'Bungali Prasad v. State of U.P. and others' and Writ Petition No.3947 (SS) of 1997 titled 'Roshan Singh v. State of U.P. and others' after the great delay.

78. The Hon'ble Apex Court while examinaing the matter in the case **of Ghulam Rasool Lone v. State of Jammu and Kashmir and another reported in (2009) 15 Supreme Court Cases 321,** has dealt with several judgments of Hon'ble Supreme Court on the point of laches in approaching the Court seeking certain reliefs and in this regard, consideration has been made in paragraphs 12, 13, 14, 15 and 16 of the judgment which reads as under:

"12. There cannot furthermore be any doubt that Article 14 is a positive concept. The Constitution does not envisage enforcement of the equality clause where a person has got an undue benefit by reason of an illegal act. In Panchi Devi v. State of Rajasthan, this Court held as under:

"9..... Article 14 of the Constitution of India has a positive

concept. Equality, it is trite, cannot be claimed in illegality. Even otherwise the writ peition as also the review petition have rightly not been entertained on the ground of delay and laches on the part of the appellant."

13. The Court in a given case may be inclined to pass similar order as has been done in the earlier case on the basis of equality or otherwise. The discretionary jurisdiction under Article 226 of the Constitution may, however, be denied on the ground of delay and laches.

14. It is now well settled that who claims equity must enforce his claim within a reasonable time. For the said proposition, amongst others, we may notice a decision of a three-Judge Bench of this Court in Govt. Of W.B. v. Taurn K. Roy, wherein it has been opined as under:

"34. The respondents furthermore are not even entitled to any relief on the ground of gross delay and laches on their part in filing the writ petition. The first two writ petitions were filed in the year 1976 wherein the respondents herein approached the High Court in 1992. In between 1976 and 1992 not only two writ petitions had been decided, but one way or the other, even the matter had been considered by this Court in Debdas Kumar. The plea of delay, which Mr. Krishnamani states, should be a ground for denying the relief to the other persons similarly situated would operate against the respondents. Furthermore, the other employees not being before this Court although they are ventilating their grievances before appropriate courts of law, no order should be passed which would prejudice their cause. In such a situation, we are not prepared to make any observation only for the purpose of grant of some relief to the respondents to the respondents to which they are not legally entitled to so as to deprive others therefrom who may be found to be entitled thereto by a court of law."

(emphasis supplied)

15. The question yet again came up for consideration before this Court in NDMC v. Pan Singh wherein it has been observed as under:

"16. There is another aspect of the matter which cannot be lost sight of. The respondents herein filed a writ petition after 17 years. They did not agitate their grievances for a long time. They, as noticed herein, did not claim parity with the 17 workmen at the earliest possible opportunity. They did not implead themseleves as parties even in the reference made by the State before the Industrial Tribunal. It is not their case that after 1982, those employees who were employed or who were recruited after the cut-off date have been granted the said scale of pay. After such a long time, therefore, the writ petitions could not have been enterained even if they are similarly situated. It is trite that the discretionary jurisdiction may not be exercised in favour of those who approach the court after a long time. Delay and laches are relevant factors for exercise of equitable jurisdiction."

16. The said princple was reiterated in S.S. Balu v. State of Kerala in the following terms:

"17. It is also well-settled principle of law that ''delay defates equity'. The Government Order was issued on 15.1.2002. The appellants did not file any writ application questioning the legality and validity thereof. Only after the writ

petitions filed by others were allowed and the State of Kerala preferred an appeal thereagainst, they impleaded themselves as party-respondents. It is now a trite law that where the writ petitioner approaches the High Court after a long delay, reliefs prayed for may be denied to them on the ground of delay and laches irrespective of the fact that they are similarly situated to the other candidates who obtain the benefit of the juddgment. It is, thus, not possible for us to issue any direction to the State of Kerala or the Commission to appoint the appellants at this stage."

79. The Hon'ble Supreme Court in Civil Appeal No.7340-7341 (State of U.P. and others v. Roshan Singh and others) occasioned to consider the similar controversy as have been involved in the present bunch of writ petitions and on overall consideration, it has been recorded that writ petitioners claimed benefits of notional promotion after they had retired from services, therefore, the orders passed by the learned Single Judge and in speical appeal were quashed and set aside. The parity of claim may be made within a reasonable time. The explanation furnished that due to non-availability of orders of notional promotion to the juniors, the petitioners could not be filed within a reasonable time, is not acceptable in the eyes of law.

80. This Court upon examination of provisions applicable to the case of petitioners, has also taken notice that the post of Cooperative Supervisor is not pensionable, therefore, the same cannot be added for recokening qualifying service for the grant of pension.

81. Writ Petition Nos.8632(SS) of 2010, 6378 (SS) of 2011, 2695 (SS) of 2014, 3037 (SS) of 2011, 2923 (SS) of 2015, 1780 (SS) of 2015, 1242 (SS) of 2012, 1490 (SS) of 2012, 4311 (SS) of 2014, 3198 (SS) of 2014, 7660 (SS) of 2014, 7626 (SS) of 2014, 4918 (SS) of 2012, 3753 (SS) of 2007, 7769 (SS) of 2013, 5553 (SS) of 2012, 2257 (SS) of 2010, 8633 (SS) of 2010, 7208 (SS) of 2013, 7232 (SS) of 2010, 3174 (SS) of 2011, 3106 (SS) of 2011 and 3013 (SS) of 2015 pertain in regard to claim set up before this Court for issuance of direction to grant notional promotion with effect from juniors to the petitioners have been granted promotion. In this regard, I have examined the claim set up in the writ petitions which reflects that the juniors to the petitioners have been granted promotion on the post of Co-operative Supervisor Grade-II/Assistant Development Officer Co-operative. The petitioners were not vigilent to approach this Court claiming the benefits granted to their juniors. The Hon'ble Apex Court while considering the same controversy in Civil Appeal No.7340-7341 (State of U.P. and others v. Roshan Singh and others) which was followed by the Division Bench of this Court, recorded that the petitioners who are not vigilent to their rights and approach this Court after a long spell of time, are not entitled to get relief in exercise of power under Article 226 of the Constitution of India. Accordingly, in terms of judgment referred above, the petitioners, who have approached this Court after a long delay, are not entitled to get relief in exercise of discretionary jurisdiction under Article 226 of the Constitution of India. Therefore, the writ petitions of the petitioners whose petitions have been referred above are **dismissed.**

82. In some of the writ petitions i.e. Writ Petition Nos.6550 (SS) of 2014, 670 (SS) of 2008, 1613 (SS) of 2008, 1021 (SS) of 2007, 2771 (SS) of 2013, 6913 (SS) of

2004, 2949 (SS) of 2010, 6549 (SS) of 2011, 4397 (SS) of 2011 and 7561 (SS) of 2014 the petitioners claim for the grant of certain benefits.

83. On examination of the material available on record, it is apparent that the petitioners have been provided certain benefits and are claiming scheme of Annual Carrer Progression and in this regard, they have approached the competent authority and the claim set up by them are lying pending consideration, therefore, this Court is of the opinion, no useful purpose will be served in keeping the writ petitions pending any further.

84. Accordingly, the writ petitions i.e. Writ Petition Nos.6550 (SS) of 2014, 670 (SS) of 2008, 1613 (SS) of 2008, 1021 (SS) of 2007, 2771 (SS) of 2013, 6913 (SS) of 2004, 2949 (SS) of 2010, 6549 (SS) of 2011, 4397 (SS) of 2011 and 7561 (SS) of 2014 are finally disposed of with the direction to the respondents to consider the claim of the petitioners and to pass appropriate, reasoned and speaking order after affording opportunity of hearing to the petitioners within a period of three months from the date of production of a certified copy of this order.

(2021)07ILR A840
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.06.2021

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ -A No. 13299 of 2020

Nand Vijay Singh & Ors. ...Petitioners
Versus
Union of India. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Jagnath Singh

Counsel for the Respondents:
Sri Vivek Kumar Rai, Sri Arun Kumar Gupta

A. Service Law – Annual increment to retiring employees - Fundamental Rules - Rule 9(21) - Civil Service Regulations: Articles 43, 151 to 153; Central Civil Services (Pension) Rules - Scheme should not be construed in a manner that it offends the spirit of reasonableness enshrined in Article 14 of the Constitution of India. (Para 24)

The statutory rules cannot be read in a manner such that substantive rights earned by a central Government employee under the Rules are denied to him. A Government servant retiring on 30th June would be entitled to benefit of increment falling due on 1st July on account of his good conduct for the requisite length of time i.e. one year, in a regime of progressive appointment. (Para 25)

The petitioners', therefore, would be entitled to the grant of increment payable on 1st July 2019, notwithstanding their superannuation on 30th June, 2019.

B. Annual increment though is attached to the post & becomes payable on the day following that on which it is earned but the day on which increment accrues or becomes payable is not conclusive or determinative. In the statutory scheme governing progressive appointment increment becomes due for the services rendered over a year by the Government servant subject to his good behavior. The entitlement to receive increment therefore crystallises when the Government servant completes requisite length of service with good conduct and becomes payable on the succeeding day. (Para 23)

Law is settled that where entitlement to receive a benefit crystallises in law its denial would be arbitrary unless it is for a valid reason. The only reason for denying benefit of increment, culled, out from the scheme is that the central Government servant

is not holding the post on the day when the increment becomes payable. This cannot be a valid ground for denying increment since the day following the date on which increment is earned only serves the purpose of ensuring completion of a year's service with good conduct and no other purpose can be culled out for it. The concept of day following which the increment is earned has otherwise no purpose to achieve. (Para 24)

C. Words and Phrases – "*Pay*" – Pay defined in F.R. 9(21) means the amount drawn monthly by a central government servant and includes the increment. (Para 20)

***"Progressive appointment"* – Article 43 of CSR** defines progressive appointment to mean an appointment wherein the pay is progressive, subject to good behaviour of an officer. It connotes that pay rises, by periodical increments from a minimum to a maximum.

Writ petition allowed. (E-3)

Precedent followed:

1. P. Ayyamperumal Vs Registrar, CAT, Writ Petition No. 15732 of 2017, decided on 15.09.2017 (Para 6)

2. Gopal Singh Vs U.O.I. & ors., Writ Petition (C) 10509 of 2019, decided on 23.01.2020 (Para 9)

3. P.P. Pandey Vs St. of U.P. & ors., 2021 (1) ADJ 646 (Para 10)

Precedent distinguished:

1. U.O.I. Vs G.C. Yadav, Writ Petition (C) 9062 of 2018, decided on 23.10.2018 (Para 11, 17)

2. S. Banerjee Vs U.O.I., 1989 Supplementary (2) SCC 486 (Para 17) & ors. connected petition, decided on 06.11.2020 (Para 11)

3. Principal Accountant General, Andhra Pradesh, Hyderabad & anr. Vs C. Subba Rao & ors., 2005 (4) ESC 2862 (Para 11, 12)

Precedent referred:

1. Kunhayammed & ors. Vs Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal, (2019) 4 SCC 376 (Para 16)

2. St. of Orissa & anr. Vs Dhirendra Sunder Das & ors., (2019) 6 SCC 270 (Para 16)

3. U.O.I. Vs M.V. Mohanan Nair, (2020) 5 SCC 421 (Para 16)

Present petition assails orders dated 24.02.2020, 27.01.2020 and 02.03.2020, passed by Senior Divisional Security Commissioner, Railway Protection Force, North Central Railway, Allahabad.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. All the four petitioners have superannuated from Railway Protection Force, on 30th June, 2019 from the post of Inspector/Sub Inspector/Assistant Sub Inspector and Head Constable, respectively. They claim to have worked for the entire year i.e. 1.7.2018 to 30.6.2019, with good conduct, and have thus raised a claim for grant of annual increment for the year 2018-19. Annual increment for the year 2018-19, however, fell due under the relevant rules only on 1.7.2019, by when the petitioners had superannuated. Their claim has consequently been rejected by the Senior Divisional Security Commissioner, Railway Protection Force, North Central Railway, Allahabad vide orders dated 24.2.2020, 27.1.2020 and 2.3.2020. These orders are challenged in the present writ petition.

2. A counter affidavit and later a supplementary-counter affidavit has been filed in the matter on behalf of the respondents, to which a rejoinder affidavit has been filed by the writ petitioners. With

the consent of learned counsel for the parties this petition is taken up for final disposal, at the admission stage itself. I have heard Sri J.N. Singh, learned counsel for the petitioners and Sri Arun Kumar Gupta, learned counsel for the respondents and perused the materials on record.

3 . Petitioner no. 1 was initially appointed as Constable in the respondent Railway Protection Force on 29.7.1978 and was promoted to the post of Assistant Sub Inspector in the year 1989. He was further promoted to the post of Sub Inspector in the year 2001 and then promoted as Inspector in the year 2010. He has superannuated on 30.6.2019. Similarly, petitioner No. 2 was appointed as Constable on 1.8.1978 and has been promoted to higher posts from time to time. He has superannuated on 30.6.2019 from the post of Sub Inspector. Petitioner No. 3 was appointed as Constable in the same Force on 15.10.1979 and has ultimately superannuated on 30.6.2019 from the post of Assistant Sub Inspector. Petitioner No. 4 was appointed as Constable on 4.11.1980 and has superannuated on 30.6.2019 from the post of Head Constable.

4. Pension and other retiral benefits have been sanctioned to all the petitioners vide orders dated 26.6.2019 and 27.6.2019, w.e.f. 1.7.2019. Annual increment payable for the completed satisfactory work during recruitment year 2018-19, however, has been denied to them. According to respondents annual increment for the satisfactory working in the recruitment year fell due only on 1.7.2019 by when petitioners were not in employment, as such, the annual increment for the year 2018-19 is not due to them.

5 . Issue as to whether annual increment payable under the Service Rules on 1st of July, upon satisfactory working for the previous year 1st July to 30th June could be paid to the employees retiring on 30th June has been examined by different High Courts and there appears to be lack of uniformity in the views so expressed. Learned counsel for the parties have relied upon judgments which supports their respective claim. It would, therefore, be appropriate to proceed with deliberations on the issue after noticing the judgments available on the subject, that are cited before me.

6. Learned counsel for the petitioners have relied upon a Division Bench Judgment of the Madras High Court in P. Ayyamperumal Vs. Registrar, CAT, in Writ Petition No. 15732 of 2017, decided on 15.9.2017, wherein the Court has allowed payment of annual increment to a government servant, in similar circumstances, wherein also he retired on 30th of June and under the Rules payment of annual increment fell due on the 1st of July, next. The reasoning is assigned in paragraphs 6 & 7 of the judgment, which is reproduced hereinafter:-

"6. In the case on hand, the petitioner got retired on 30.06.2013. As per the Central Civil Services (Revised Pay) Rules, 2008, the increment has to be given only on 01.07.2013, but he had been superannuated on 30.06.2013 itself. The judgment referred to by the petitioner in State of Tamil Nadu, rep.by its Secretary to Government, Finance Department and others v. M.Balasubramaniam, reported in CDJ 2012 MHC 6525, was passed under similar circumstances on 20.09.2012, wherein this Court confirmed the order passed in W.P.No.8440 of 2011 allowing the writ petition filed by the employee, by observing that the employee had completed one full year of service from 01.04.2002 to

31.03.2003, which entitled him to the benefit of increment which accrued to him during that period.

7. The petitioner herein had completed one full year service as on 30.06.2013, but the increment fell due on 01.07.2013, on which date he was not in service. In view of the above judgment of this Court, naturally he has to be treated as having completed one full year of service, though the date of increment falls on the next day of his retirement. Applying the said judgment to the present case, the writ petition is allowed and the impugned order passed by the first respondent-Tribunal dated 21.03.2017 is quashed. The petitioner shall be given one notional increment for the period from 01.07.2012 to 30.06.2013, as he has completed one full year of service, though his increment fell on 01.07.2013, for the purpose of pensionary benefits and not for any other purpose. No costs."

7. A special leave petition (civil) preferred against the aforesaid judgment was dismissed *in limine* by the Supreme Court on 23.7.2018 vide following order:-

"Delay condoned.

On the facts, we are not inclined to interfere with the impugned judgment and order passed by the High Court of Judicature at Madras.

The special leave petition is dismissed."

8. A review petition filed in the matter also got dismissed on 8.8.2019.

9 . The Judgment of Madras High Court has been followed by a Division Bench of Delhi High Court in Gopal Singh Vs. Union of India and others in Writ Petition (C) 10509 of 2019, decided on 23.1.2020.

10. In P. Ayyamperumal (supra) the Court placed reliance upon an earlier order of the same High Court to hold that once the employee had completed one full year of service as on 30.6.2013, the benefit of increment earned on the basis of such completed service of one year cannot be denied only because such increment fell due on 1.7.2013, by when the government servant had retired. Petitioners submit that the ratio laid down in the case of P. Ayyamperumal (supra) as followed by the Delhi High Court in the case of Gopal Singh (supra) is squarely applicable in the facts of the present case and, therefore, the petitioners are entitled to the benefit of increment which fell due on 1.7.2019. Reliance is also placed upon a judgment of Lucknow Bench of this Court in P.P. Pandey Vs. State of U.P. and others, 2021(1)ADJ 646 wherein also the Court has taken a similar view.

11. Learned counsel for the respondent, on the other hand, places reliance upon a Delhi High Court Judgment, dated 23.10.2018, in the case of Union of India Vs. G.C. Yadav, Writ Petition (C) 9062 of 2018, decided on 23.10.2018. Learned counsel also places reliance Upon a Division Bench Judgment of Himachal Pradesh High Court in Hari Prakash Vs. State of Himachal Pradesh and others, CWP No. 2503 of 2016 and other connected petition, decided on 6.11.2020. The Himachal Pradesh High Court has, in turn, followed a Full Bench Judgment of Andhra Pradesh High Court in the case of Principal Accountant General, Andhra

Pradesh, Hyderabad and another Vs. C. Subba Rao and others reported in 2005(4) ESC 2862. The Court's have opined that as government servant retiring on last day of the preceding month is deemed to have become pensioner on the next date, as such, he ceases to be borne on the establishment w.e.f beginning of the first day of the succeeding month, and would not be entitled to payment of annual increment in pay.

12. The Full Bench of Andhra Pradesh High Court in the case of Principal Accountant General (Supra) has meticulously noticed all applicable provisions operating in the field. This Court has the benefit of erudite judgment of Hon'ble Mr. Justice V.V.S. Rao of Andhra Pradesh High Court on the issue and the statutory scheme noticed therein can safely be relied upon for adjudicating the question raised in this petition. Following two issues fell for consideration before the Andhra Pradesh High Court:

"I. Whether a Government servant who retires on the last working day of the preceding month and whose annual increment falls due on the first of the succeeding month is entitled for sanction of annual increment for the purpose of pension and gratuity?

II. Whether a retired Government servant is entitled for revised rate of D.A. which comes into force after such Government servant retires from service on attaining the age of superannuation?"

13. Paragraphs 12 to 17 of the Judgment refers to the statutory scheme on the first question formulated for consideration by the full bench and are reproduced hereinafter:-

"12. Keeping in view some of the relevant service law principles mentioned hereinabove, a reference has to necessarily be made to the relevant Rules, which fall for consideration. First set of Rules is Fundamental Rules applicable to all Central Government Servants. Second set of Rules is Central Civil Services (Pension) Rules, and thirdly Civil Services Regulations. We propose to examine the issue with reference to Fundamental Rules and Pension Rules separately and view the controversy in juxta position of all these Rules

Fundamental Rules

13. Fundamental Rules are core Rules governing all general conditions of service like pay, leave, deputation, retirement and dismissal, removal and suspension. All Central Government employees are governed by these Rules. If there are Special Rules governing a particular "service" and in event conflict with Fundamental Rules, Special Rules would prevail, for generalia specialibus non derogant.

14. F.R.9 contains definitions of the terms used in Fundamental Rules (FR 9(23), (24), (25) and (28) define the terms 'Personal Pay' 'Presumptive Pay', 'Special Pay' and 'Substantive Pay), F.R. 9(6), (21) and (31) define the terms 'duty', 'pay' and 'time-scale of pay', which read as under:

9(6) "Duty " - (a) Duty includes-

(i) service as a probationer or apprentice provided that such service is followed by confirmation; and

(ii) joining time.

(b) A Government servant may be treated as on duty-

(i) during a course of instruction or training in India, or

(ii) in the case of a student, stipendiary or otherwise, who is entitled to be appointed to the service of Government on passing through a course of training at a University, College or School in India, during the interval between the satisfactory completion of the course and his assumption of duties.

9(21) "Pay" (a) Pay means the amount drawn monthly by a Government servant as-

(i) the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and

(ii) overseas pay, special pay and personal pay; and

(iii) any other emoluments which may be specially classed as pay by the President

(b) Not printed.

(c) Not printed.

9(31) "Time-scale of pay"-

(a) Time-scale of pay means pay which, subject to any condition prescribed in these rules, rises by periodical increments from a minimum to a maximum. It includes the class of pay hitherto known as progressive.

(b) Time-scales are to be identical if the minimum, the maximum, the period of increment and the rate of increment of the time-scales are identical.

(c) A post is said to be on the same time-scale as another post on a time-scale if the two time-scales are identical and the posts fall within a cadre, or a class in a cadre, such cadre or class having been created in order to fill all posts involving duties of approximately the same character or degree of responsibility, in a service or establishment or group of establishments, so that the pay of the holder of any particular post is determined by his position in the cadre or class and not by the fact that he holds that post.

15. Chapter-Ill of the Fundamental Rules contains "General conditions of service". Chapter-IV deals with "Pay" whereas Chapter-IX deals with "Retirement". F.R. 17. and F.R.56 insofar as they are relevant read as under:

F.R.17. (1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence.

(2) The date from which a person recruited overseas shall commence to draw pay on first appointment shall be determined by the general or special orders of the authority by whom he is appointed.

F.R. 56. (a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Government servant whose date of birth is the first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years.

Provided further that a Government servant who has attained the age of fifty-eight years on or before the first day of May, 1998 and is on extension in service, shall retire from the service on expiry of his extended period of service, or on the expiry of any further extension in service granted by the Central Government in public interest, provided that no such extension in service shall be granted beyond the age of 60 years.

(b) A workman who is governed by these rules shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years.

16. As per F.R. 17, extracted hereinabove, a Government servant shall begin to draw the pay and allowances attached to his post with effect from the date when he assumes the duties of that post until he ceases to discharge those duties. "Pay" as defined in F.R.9(21)(a) means, the amount drawn monthly by a Government servant which also includes the increment given at an anterior date. Therefore, after retirement, a person will not be entitled to any pay including the increment that may be due from the posterior date. F.R.22 regulates the initial pay of a Government servant who is appointed to a post in time-scale and F.R.24 and F.R.26 regulate the sanction of increment to a Government servant, who is on duty. A reading of various Fundamental Rules extracted hereinabove would show that a person appointed as a Government servant is entitled to pay in time- scale of pay. He is also entitled to draw the increment as per time-scale of pay as a matter of course as long as such Government servant discharges duties of the post and such Government servant shall not be entitled to draw the pay and allowances attached to the post as soon as he ceases to discharge those duties. In other words, as per F.R. 17 read with F.Rs.24 and 26 annual increment is given to a Government servant to enable him to discharge duty and draw pay and allowances attached to the post. If such Government servant ceases to discharge duties by any reason say, by reason of attainment of age of superannuation, such Government servant will not be entitled to draw pay and allowances. As a necessary corollary, such employee would not be entitled to any increment if it falls due after the date of retirement, be it on the next day of retirement or sometime thereafter.

17. F.R.56(a) creates a legal fiction. Even if a person attains the age of 60 years on any day of the month, he shall be retired on the afternoon of the last day of the month. A Government servant, who attains the age of 60 years on any day in a month, is deemed to have not attained the superannuation till the last day of the month. In the case of a Government servant, whose date of birth is first of a month shall retire from service on the afternoon of the last day of the preceding month on attaining the age of 60 years. In this case, actually and factually, a Government servant would have completed the age of 60 years a day before the date on

which his date of birth falls. Therefore, there are two situations. In the first situation, a Government servant though he attains the age of 60 years on any day of the month, he is deemed to have not attained such age till the afternoon of the last day of that month. Assuming that such a situation is not contemplated - as in the case of persons holding constitutional offices like, Judges of Supreme Court, High Court, Members of Election Commission, Comptroller and Auditor General etc; if a Government servant is retired on a day before the actual date of birth on any day of the month and the increment of such Government servant falls on the first of the succeeding month, can he claim annual grade increment? The answer must be an emphatic "no". Because, by the date on which the increment falls due, such Government servant ceased to be a Government servant. It is therefore logical and reasonable to conclude that merely because for the purpose of F.R.56(a), a person is continued till the last date of the month in which he attains the age of superannuation, such an employee cannot claim increment which falls due on the first day of the succeeding month after retirement." (Emphasis supplied by me)

14. While referring to the second question formulated for consideration, the Full Bench noticed relevant provisions of Central Civil Service (Pension) Rules and also the methodology followed for calculating pension and the manner of calculating average emoluments. The Court traced the origin of the Fundamental Rules (hereinafter referred to as the "F.R.") and Civil Service Rules in paragraph 23 onwards and went on to hold on the basis of Articles 151 to 154 of Civil Service Regulations (hereinafter referred to as the "CSR") that increment accrues only following the date on which it is earned and as the employee is not in service on that date, as such, the benefit of increment cannot be extended. Paragraphs 23 to 26 of the judgment are also reproduced hereinafter:-

"23. Historically Government of India Act 1919 by Sections 96-B(2) empowered the Secretary of State for India to make Rules regarding conditions of service of Government servants. In exercise of these powers, Fundamental Rules and Civil Service (CCA) Rules were made sometime in 1922. As mentioned earlier, Fundamental Rules, especially in relation to general conditions of service, like, pay, leave, deputation, retirement, dismissal, removal and suspension apply to all Government servants whose pay is debitable to civil estimates. Before the promulgation of Fundamental Rules, Government of India made various Rules and Regulations in relation to salary, leave, pension and travelling allowance of Government servants. These Rules/ Regulations were published by authority compendiously as Civil Service Regulations. After inauguration of the Constitution of India, though President of India promulgated different kinds of Rules under the proviso to Article 309 of the Constitution of India as well as Special Rules governing All India Services and Railway Servants, Civil Service Regulations continued to be applied by various departments in respect of conditions of service, if they are not inconsistent with the Rules made under the proviso to Article 309 of the Constitution of India or relevant Statutes. It is not denied before this Court that in all the Central Government Departments and Wings, Civil

Service Regulations continued to be referred to and followed. There are as many as 1163 Articles or Regulations dealing with pay, allowance, leave and pension. Chapter-II contains definitions of terms like "Age" (Article 14), "Calendar Month" (Article 18), "Progressive Appointment" (Article 43) and the like.

24. As per Article 14, when an officer is required to retire on attaining a specified age, the day on which he attains that age is reckoned as non-working day and the officer must retire with effect from and including that day. Article 18 defines "Calendar Month" and also gives examples for reckoning the period of six months beginning on 28th February, 31st March, 1st April etc. The last day on which thirty days is completed is taken as the completion of the period of the Calendar Month. Regulation 43 defines "Progressive Appointment" to mean as an appointment the pay of which is progressive, that is, pay which, subject to the good behaviour of an officer, rises, by periodical increments, from a minimum to a maximum. Articles 151 to 154 deal with accrual of increment and it would be better to read Articles 151 to 153.

151. An increment accrues from the day following that on which it is earned.

Exception.-An officer appointed in England by the Secretary of State for service in India receives the increment in his pay in accordance with the terms of his engagement.

152. A periodical increment should not be granted to an officer serving on Progressive pay, as a matter of course, or unless his conduct has been good. When an increment is withheld, the period for which it is withheld is at the discretion of the authority having power to withhold, who will also decide whether the postponement is or is not to have the effect of similarly postponing future increments. The authority having powers to withhold is, in the case of ministerial and menial officers, the head of the office, and in the case of other officers, the Local Government, which may delegate the powers to heads of departments or other supervising officers.

153 (a). A proposal to grant an increment of Progressive pay in advance of the due date should always be scrutinized with special jealousy: it is contrary to the principle of Progressive pay to grant an increments before it is due, and such a grant should not be recommended or allowed, excepting under circumstances which would justify a personal allowance to an officer whose pay is fixed, - that is to say, seldom if ever.

(b) The powers of the Government of India, of Local Governments and of subordinate authorities to grant a premature increment to an officer are subject to the limits upto which each such authority can raise the officer's remuneration.

25. Thus a person who gets progressive appointment would be entitled to a periodical rise in the pay subject to good behaviour and such increment accrues from the day following that on which it is earned. That is to say, a Government servant would get and draw increment after completion of one year. If the day for payment of annual increment is first of January, a Government servant would be entitled for annual increment on 31st

December of that year, but the same would accrue only from First January of next year if such Government servant continues to be in progressive appointment. The words "Progressive Appointment" are crucial in understanding the question as to whether a person who retires would be entitled for payment of annual increment in Progressive Pay.

26. As held by us when conditions of service are governed by Rules promulgated under proviso to Rule 309, unless there is some unoccupied area, the Statutory Rules alone are applicable. As per the "Pension Rules" Government Servants Pension is regulated by these Rules and therefore we are not referring to Articles 348A to Articles 531 of the CS Regulations which deal with "pension". We have referred to relevant Articles in CS Regulations dealing with increment only."

15. The Himachal Pradesh High Court has substantially followed the reasoning given by Full Bench of Andhra Pradesh High Court to hold that as annual increment becomes payable on the date when the government servant was not in employment, therefore, the benefit of annual increment cannot be extended to him.

16. The Himachal Pradesh High Court has not accepted the reasoning assigned by the Madras High Court in P. Ayyamperumal (supra) and the summary dismissal of SLP by the Supreme Court against it has been held not to constitute any binding precedent under Article 141 of the Constitution of India. Reliance for such purposes is placed upon the Constitution Bench Judgment of the Supreme Court in the case of Kunhayammed and others Vs. State of Kerala and another, (2000) 6 SCC 359 followed in the case of Khoday Distilleries Limited and others Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Limited, Kollegal, (2019) 4 SCC 376; State of Orissa and another Vs. Dhirendra Sunder Das and others, (2019) 6 SCC 270 and Union of India Vs. M.V. Mohanan Nair, (2020) 5 SCC 421.

17. The other judgment relied upon by the respondents in support of their plea is of the Delhi High Court in the case of Union of India and others Vs. G.C. Yadav (supra). The issue before the Delhi High Court was distinct and not in respect of payment of increment. The issue therein was with regard to grant of revised pay scale as per recommendations of Seventh Central Pay Commission Report which became applicable w.e.f. 1.1.2016. The respondent before the Delhi High Court had already retired on 31.12.2015 and, therefore, the revised pay scale as per Seventh Central Pay Commission Report was not extended to him. The Central Administrative Tribunal, however, allowed original application of the employee and granted benefit of revised pay scale against which the Union of India had preferred writ petition. Reliance was placed before Delhi High Court of the Supreme Court Judgment in S. Banerjee Vs. Union of India, 1989 Supplementary (2) SCC 486. The Division Bench distinguished the judgment in S. Banerjee (supra) on facts. It was noticed that the employee in S. Banerjee (supra) was in employment on the date when revised pay scale became applicable unlike the facts in the case of G.C. Yadav (supra). Claim for payment of revised scale was accordingly rejected. The judgment of Madras High Court in P. Ayyamperumal (supra) was also distinguished on facts for similar reasons.

18. This Court in P.P. Pandey (supra) after noticing the full bench of Andhra Pradesh High Court has proceeded to follow the view taken by the Madras High Court in P. Ayyamperumal (supra).

19. It is in the above divergent views of the High Courts that the issue needs to be decided by this Court.

20. Payment of salary and increment to a central government servant is regulated by the provisions of F.R., CSR and Central Civil Services (Pension) Rules. Pay defined in F.R. 9(21) means the amount drawn monthly by a central government servant and includes the increment. A plain composite reading of applicable provisions leaves no ambiguity that annual increment is given to a government servant to enable him to discharge duties of the post and that pay and allowances are also attached to the post. Article 43 of the CSR defines progressive appointment to mean an appointment wherein the pay is progressive, subject to good behaviour of an officer. It connotes that pay rises, by periodical increments from a minimum to a maximum. The increment in case of progressive appointment is specified in Article 151 of the CSR to mean that increment accrues from the date following that on which it is earned. The scheme, taken cumulatively, clearly suggests that appointment of a central government servant is a progressive appointment and periodical increment in pay from a minimum to maximum is part of the pay structure. Article 151 of CSR contemplates that increment accrues from the day following which it is earned. This increment is not a matter of course but is dependent upon good conduct of the central government servant. It is, therefore, apparent that central government employee earns increment on the basis of his good conduct for specified period i.e. a year in case of annual increment. Increment in pay is thus an integral part of progressive appointment and accrues from the day following which it is earned.

21. There is a purpose for providing that increment earned accrues from the day following which it is earned. The grant of increment is not a matter of course and is dependent upon good conduct of the government servant for the entire year. It is, therefore but natural that good conduct must be observed for the entire year before the increment accrues. This is logical and in normal circumstances creates no difficulty for a central government servant.

22. Difficulty arises only when the central government servant also retires on the last day when he completes his yearly service required for grant of increment. Article 151 to 153 of the CSR explicitly provides that increment accrues from the day following that on which it is earned. Going by the plain reading of the applicable provisions the benefit of annual increment would not be available to a government servant if he superannuates on 30th June since the increment became payable only on the 1st of July. It is on the basis of above reasoning that full bench of Andhra Pradesh High Court & Himachal Pradesh High Court rejected the claim for payment of increment to the government servant who retires on 30th of June. With utmost respects to the views expressed by the two Court's, I find myself unable to subscribe to it, for the reasons enumerated hereinafter.

23. Annual increment though is attached to the post & becomes payable on a day following which it is earned but the

day on which increment accrues or becomes payable is not conclusive or determinative. In the statutory scheme governing progressive appointment increment becomes due for the services rendered over a year by the government servant subject to his good behaviour. The pay of a central government servant rises, by periodical increments, from a minimum to the maximum in the prescribed scale. The entitlement to receive increment therefore crystallises when the government servant completes requisite length of service with good conduct and becomes payable on the succeeding day.

24. Law is settled that where entitlement to receive a benefit crystallises in law its denial would be arbitrary unless it is for a valid reason. The only reason for denying benefit of increment, culled out from the scheme is that the central government servant is not holding the post on the day when the increment becomes payable. This cannot be a valid ground for denying increment since the day following the date on which increment is earned only serves the purpose of ensuring completion of a year's service with good conduct and no other purpose can be culled out for it. The concept of day following which the increment is earned has otherwise no purpose to achieve. In isolation of the purpose it serves the fixation of day succeeding the date of entitlement has no intelligible differentia nor any object is to be achieved by it. The central government servant retiring on 30th June has already completed a year of service and the increment has been earned provided his conduct was good. It would thus be wholly arbitrary if the increment earned by the central government employee on the basis of his good conduct for a year is denied only on the ground that he was not in employment on the succeeding day when increment became payable. In the case of a government servant retiring on 30th of June the next day on which increment falls due/becomes payable looses significance and must give way to the right of the government servant to receive increment due to satisfactory services of a year so that the scheme is not construed in a manner that if offends the spirit of reasonableness enshrined in Article 14 of the Constitution of India. The scheme for payment of increment would have to be read as whole and one part of Article 151 of CSR cannot be read in isolation so as to frustrate the other part particularly when the other part creates right in the central government servant to receive increment. This would ensure that scheme of progressive appointment remains intact and the rights earned by a government servant remains protected and are not denied due to a fortuitous circumstance.

25. In view of the above deliberations and discussions, I find myself in absolute agreement with the view expressed on the issue by Madras High Court in P. Ayyamperumal (supra) as also the Delhi High Court in the case of Gopal Singh (supra) and this Court in the case of P.P. Pandey (supra). The statutory rules cannot be read in a manner such that substantive rights earned by a central government employee under the Rules is denied to him. I, therefore, hold that a government servant retiring on 30th June would be entitled to benefit of increment falling due on 1st July on account of his good conduct for the requisite length of time i.e. one year, in a regime of progressive appointment. The petitioners', therefore, would be entitled to the grant of increment payable on 1st July

2019, notwithstanding their superannuation on 30th June, 2019. Orders impugned in this petition are consequently quashed. The respondents are directed to consider petitioners' case afresh in light of the above observations and directions within a period of two months from the date of services of the order. Writ petition, consequently succeeds and is allowed. Costs, however, are made easy.
